

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
SOMERSET GROUP, INC. and JOHN L. SYMS	:	DETERMINATION
	:	
for Revision of Determinations or for Refunds of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 1974 through February 28, 1978.	:	

Petitioners, Somerset Group, Inc., Lewport Industrial Park, Balmer Road, Youngstown, New York 14174, and John L. Syms, 4818 East River Road, Grand Island, New York 14072, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1974 through February 28, 1978 (File Nos. 800083 and 800084).

A hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on May 21, 1987 at 1:15 P.M., with further evidence to be submitted by June 11, 1987. Petitioners appeared by Edward F. Messing, Esq. The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUE

Whether the Audit Division properly asserted sales and use tax liability on certain purchases made by petitioners, or whether petitioners have substantiated their claim that such purchases were not properly subject to tax.

FINDINGS OF FACT

1. On September 20, 1979, following an audit, the Audit Division issued to petitioner Somerset Group, Inc. a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period September 1, 1974 through February 28, 1978 asserting \$4,686.99 in tax due, plus penalty and interest. The Audit Division categorized the deficiency of petitioner Somerset

Group, Inc. as comprising a sales tax component of \$832.23 and a use tax component of \$3,854.76.

2. Also on September 20, 1979, following the same audit, the Audit Division issued to petitioner John L. Syms, as president of Somerset Group, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, also for the period September 1, 1974 through February 28, 1978 asserting \$832.23 in tax due, plus penalty and interest. Mr. Syms was found to be personally liable as an officer pursuant to the provisions of Tax Law §§ 1131(1) and 1133. The amount of the deficiency against Mr. Syms was based upon the sales tax component of the audit of petitioner Somerset Group, Inc.

3. Petitioner Somerset Group, Inc. was at all times relevant herein a real estate holding and management company. During the period at issue, it owned and operated Lewport Industrial Park in Youngstown, New York.

4. Petitioner John L. Syms was at all times relevant herein the president and sole shareholder of Somerset Group, Inc. He did not dispute that he was personally liable as an officer for the sales tax required to be collected by Somerset Group, Inc.

5. On audit, the Audit Division examined Somerset Group, Inc.'s ledger, disbursements journal and invoices. The Audit Division examined the purchase invoices provided to determine whether sales tax had been paid and asserted tax due on the expenditures for which the invoices provided did not indicate payment of sales tax. These purchases generally were related to building maintenance, repairs and improvements.

6. Petitioners failed to produce invoices in respect of many of the expenditures set forth in both the disbursements journal and ledger. The descriptions of these expenditures as set forth in the ledger or journal were broad, general descriptions such as "supplies", "auto expenses", "equipment" and "maintenance".

7. On audit, the Audit Division determined that, in the absence of invoices, such purchases were subject to sales tax. The Audit Division therefore asserted tax due on the total amount of such expenditures.

8. Included among the disbursements for which petitioner produced no invoices were regular and frequent cash disbursements described as "maintenance". The majority of the cash disbursements were in the amounts of \$25.00 and \$150.00. There were also several disbursements less than \$25.00 and several in varying amounts between \$25.00 and \$100.00.

9. With respect to the disbursements in amounts of \$25.00 or less, petitioner utilized these funds to purchase office supplies, coffee and dog food for guard dogs on the premises. These funds were also used, at times, for reimbursement of personal funds spent on such supplies. All of these small purchases were made at retail and sales tax was paid at the time of purchase.

10. Also included among the disbursements for which petitioner produced no invoices on audit were payments to oil companies; specifically, the Mobil, Shell, Sun, Atlantic Richfield and Amoco oil companies. These expenditures were credit card payments to the respective companies for retail purchases of gasoline.

11. The sales tax component of the deficiency was premised upon entries in the disbursements journal indicating receipts for "equipment", "paint", "topsoil" and "garbage". No further clarification of these receipts was provided and petitioners presented no evidence to refute the sales tax component of the audit.

SUMMARY OF PETITIONERS' POSITION

12. Petitioners took the position that some of the \$150.00 disbursements were expenditures for supplies similar to the purchases made with the small cash disbursements (Finding of Fact "9"). Petitioners further contended that such disbursements had been treated as salary paid by the corporation in connection with an Internal Revenue Service audit, and that therefore such disbursements should be treated as salary herein.

13. Petitioners also contended that sales tax was included in the amounts paid in making certain of the purchases upon which tax was asserted due. With respect to certain other purchases, specifically certain of those listed as "improvements" in the ledger, petitioners contended that such expenditures were not properly subject to tax.

CONCLUSIONS OF LAW

A. Section 1132(c) of the Tax Law creates a presumption of taxability under Articles 28 and 29 with respect to "all receipts for property or services of any type mentioned in subdivisions (a), (b), (c) and (d) of section [1105 of the Tax Law]." Said section further provides that the burden of proving that any such receipts are not subject to sales or use tax "shall be upon the person required to collect tax or the customer."

B. In light of Findings of Fact "9" and "10", petitioner Somerset Group, Inc. has sustained its burden of proving that no tax is due and owing on the disbursements made in respect of the gasoline credit cards and the cash disbursements in amounts of \$25.00 or less.

C. Petitioner Somerset Group, Inc. has failed to sustain its burden of proving that the remaining expenditures which comprised the use tax component of the deficiency herein were not subject to tax or that tax had previously been paid with respect to such purchases. It is noted that petitioner produced neither documentation nor testimony with any degree of specificity to show that tax had been paid on the remaining purchases upon which tax was asserted herein. It is further noted that, with respect to the \$150.00 disbursements which petitioner contended should be treated as salary, petitioner did not even allege that such disbursements were, in fact, salary.

D. In light of Finding of Fact "11", petitioner has failed to show that the sales tax component of the audit was improper.

E. The petition of Somerset Group, Inc. is granted to the extent indicated in Conclusion of Law "B"; the Audit Division is directed to adjust the Notice of Determination and Demand for Payment of Sales and Use Taxes Due in accordance therewith; and, except as so granted, the petition of Somerset Group, Inc. is in all other respects denied. The petition of John L. Syms, as president of Somerset Group, Inc., is in all respects denied and the Notice of Determination and

Demand for Payment of Sales and Use Taxes Due, dated September 20, 1979, and issued to John L. Syms, is sustained.

DATED: Albany, New York
January 28, 1988

ADMINISTRATIVE LAW JUDGE