

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
DAVID E. ROBB : DECISION
for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period March 1, 1976 :
through August 31, 1980.

Petitioner, David E. Robb, 6715 Conner Road, East Amherst, New York 14051, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1976 through August 31, 1980 (File No. 32980).

A formal hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on August 18, 1983 at 1:15 P.M. with all briefs to be submitted by December 19, 1983. Petitioner appeared by Richard N. Kirchgraber, Esq., and Vincent J. Muffoletto, CPA. The Audit Division appeared by John P. Dugan, Esq. (Deborah Dwyer, Esq. of counsel).

ISSUE

Whether the Audit Division may properly subject petitioner to liability for sales tax on those receipts earned by petitioner as the result of supplying various rides at events sponsored by tax-exempt organizations.

FINDINGS OF FACT

1. On December 9, 1980, the Audit Division issued to petitioner, David E. Robb, two notices of determination and demand for payment of sales and use taxes due, numbered S801220423E and S801220424E, respectively. Notice number S801220423E assessed tax due in the amount of \$128,634.76 for the period ended

May 31, 1976 through the period ended August 31, 1979, while Notice number S801220424E assessed tax due in the amount of \$42,312.83 for the period ended November 20, 1979 through the period ended August 31, 1980. Full penalty and interest accrued to the date of issuance were also assessed against petitioner on each of these notices.

2. The aforementioned notices were estimated assessments by the Audit Division based upon available records and other information. Petitioner had previously executed various consents extending the period of limitation on assessment, the latest of which allowed assessment of sales and use taxes for the period March 1, 1976 through February 28, 1978 to be made at any time on or before December 20, 1980.

3. As the result of a pre-hearing conference and subsequent actual audit of petitioner's records, the estimated assessments were reduced to \$61,660.76 assessed as due for the entire audit period (the sales tax periods ended May 31, 1976 through August 31, 1980). This reduced assessment consists of \$3,957.03 assessed as due from petitioner on recurring purchases, with the balance of the assessment, \$57,703.73, due from petitioner on sales to various customers as described more particularly herein. At the hearing, petitioner, by his representative, indicated that the tax assessed on recurring purchases (\$3,957.03) was not at issue, but that the balance of the assessment remained at issue.

4. Petitioner, David E. Robb, operating as a sole proprietorship d/b/a Fun City Amusements, is a supplier of portable rides such as a ferris wheel, merry-go-round, "kiddie" rides and adult rides.

5. Petitioner is engaged in the business of supplying these rides at events commonly known as carnivals sponsored by various organizations, both

tax-exempt and non tax-exempt. The tax at issue herein is based solely upon petitioner's receipts earned from supplying rides at events sponsored by tax-exempt organizations such as churches, schools, volunteer fire departments, etc.

6. Each of the various sponsoring organizations with whom petitioner deals usually holds one event per year as a fund raiser, at which petitioner's rides as well as other attractions such as games, food, etc. are available. The organizations contact petitioner to find out which particular rides petitioner has available. The organizations normally determine and provide the site at which their event is held and the location thereat for petitioner's rides, although at times the event site and ride locations are mutually agreed upon by petitioner and the organization.

7. Members of the general public attending these events are allowed to ride on petitioner's rides after presenting ride tickets to petitioner's employees who operate the rides. These tickets are either printed by the organizations or provided to the organizations by petitioner prior to the date of the events. The organizations sell the ride tickets to the general public prior to and during the events, and collect all money on such sales. Petitioner does not sell any tickets to the public at any time nor does petitioner collect any money directly from the public. Persons are entitled to ride on petitioner's rides only upon the presentation of tickets, and may not buy a ride by paying cash to petitioner or to his employees who operate the rides. Signs are posted at each ride indicating that tickets only and no money will be accepted in return for rides.

8. Ticket sales revenues are deposited in the organizations' general funds, out of which funds petitioner's fee as well as other expenses of the

events are paid by the organizations. Petitioner's fee is calculated as a percentage of the gross ticket sales at each event (as determined from the number of tickets printed and sold, taken from the numbers on the ticket rolls). Petitioner does not set a minimum guaranteed payment amount which must be received. Petitioner is usually paid on the last day or evening of the event.

9. There was no charge nor any ticket needed to get onto the grounds or site of the event where the rides were located.

10. The organizations set the dates during which their events will run, dictate the days and times when petitioner's rides will be in operation and determine when, where, how and to whom the tickets will be sold. The organizations determine the number of tickets which must be presented in order to allow a person to ride on a given ride, and also frequently become involved in determining the actual duration (length of time) of the rides.

11. Petitioner owns the rides and employs a minimum of twenty persons who set up the rides, collect (and destroy) the tickets, operate the rides and disassemble the rides at the end of each event. Petitioner's employees determine the validity (proper identification) of the tickets tendered to them. Petitioner also reserves the right to determine the fitness of individuals to ride the rides. Petitioner pays his expenses, such as employee wages, maintenance and operating costs, etc. out of the fees he receives from the organizations.

12. The organizations did not collect sales tax on ticket sales nor was any sales tax included as part of petitioner's receipts from the organizations. Petitioner has no control over the organizations' ticket sales receipts. There is no evidence that the Audit Division has attempted to collect sales tax from the organizations sponsoring the events for which petitioner supplied rides.

13. Petitioner is a registered vendor and pays sales tax in New York State, conducts the majority of his business with tax-exempt organizations and is neither a tax-exempt organization nor the agent for a tax-exempt organization.

14. In accordance with section 307(1) of the New York State Administrative Procedure Act, petitioner submitted proposed findings of fact, numbered "1" through "11", each of which has been, in substance, adopted herein. Similarly, the Audit Division submitted proposed finding of fact, numbered "1" through "5", each of which has been, in substance, adopted herein.

CONCLUSIONS OF LAW

A. That the tax at issue herein was assessed based upon a characterization of petitioner's receipts as admission charges pursuant to section 1105(f)(1) of the Tax Law. The exemption from sales tax provided by section 1116(a)(4) of the Tax Law does not apply because the exempt organization is not the seller of record. It is involved in a joint venture with the petitioner where the exempt organization acts as an agent for the petitioner and both are equally liable for collecting sales tax on the receipts from the admission charges. The present case is distinguishable from the situation in which the ride owner is paid a flat rental fee by the exempt organization, which is not contingent on the number of tickets sold by the exempt organization. In that instance, the exempt organization is the seller of record and qualifies for the exemption from sales tax pursuant to section 1116(a)(4) of the Tax Law.

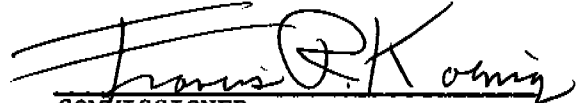
B. That the petition of David E. Robb is hereby denied and the notices of determination and demand dated December 9, 1980, are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

FEB 06 1985


PRESIDENT


COMMISSIONER


COMMISSIONER