

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter	of the Petition	:	
	of	:	
HAIR AND NAILS, INC.		:	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, 1979	:		
through August 31, 1982.	:		

Petitioner, Hair and Nails, Inc., 1655 East 14th Street, Brooklyn, New York 11229, 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, 1979 through August 31, 1982 (File No. 41777).

A hearing was held before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 26, 1985 at 9:50 A.M. Petitioner appeared by Harry Lewis, Esq. The Audit Division appeared by John P. Dugan, Esq. (Mark F. Volk, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined additional sales taxes due from Retlaw Novelties, Inc., a bulk sale seller.

II. If so, whether the Audit Division is required to take action against the aforesaid bulk sale seller prior to seeking to obtain sales taxes due from petitioner, the bulk sale purchaser.

FINDINGS OF FACT

1. On November 18, 1982, the Audit division issued to petitioner, Hair and Nails, Inc., a Notice of Determination and Demand for Payment of Sales and

Use Taxes for taxes of \$5,830.80, plus penalty of \$1,142.70 and interest of \$1,274.77, for a total amount due of \$8,248.27 for the period March 1, 1979 through August 31, 1982. The notice contained the following explanation:

"The following taxes are determined to be due from Retlaw Novelties, Inc. and represents your liability, as purchaser, in accordance with Section 1141(c) (sic) of the Sales Tax Law."

2. On January 18, 1983, the petitioner timely filed a petition for a hearing to review the notice of determination. It is the position of petitioner that the Audit Division incorrectly determined the additional taxes due from Retlaw Novelties, Inc. ("Retlaw") and, further, that the Audit Division is required to attempt to collect the taxes allegedly due from Retlaw, the bulk sale seller, before seeking to collect said taxes from the petitioner, the bulk sale purchaser.

3. It is the position of the Audit Division that the taxes due from Retlaw were based on the type and location of the business and are therefore correct and that they are not required to collect against a bulk sale seller prior to seeking to collect from a bulk sale purchaser.

4. Retlaw, a New York corporation, owned and operated a beauty salon known as "14 East Hair Designers" and "14 East Unisex" located at 1401 Kings Highway, Brooklyn, New York. On June 28, 1982, Retlaw and Martin Schaffer entered into an agreement with Larisa Tselnik for the sale of the business to Ms. Tselnik. Ms. Tselnik subsequently formed petitioner, Hair and Nails, Inc. and assigned her rights in the contract of sale to petitioner. On July 16, 1982, petitioner purchased the business for \$15,000.00 of which \$1,500.00 was allocable to furniture and fixtures.

5. On August 27, 1982, the petitioner sent a Notification of Sale, Transfer of Assignment in Bulk to the Audit Division. On August 30, 1982, the

Audit Division sent to the petitioner a Notice of Claim to Purchaser, and a Notice to Escrow Agent to Martin Schaffer.

6. On September 13, 1982, the Audit Division sent a Notice to the Seller wherein it requested Retlaw to submit specific information in order that the Audit Division could determine Retlaw's sales tax liability. When Retlaw failed to respond to the Audit Division's request for information, the Audit Division issued the notice of determination against the petitioner. The taxes due were subsequently reduced to \$5,631.84 as petitioner filed a sales tax return for the period July 16 through August 31, 1982 showing a tax due of \$198.96.

7. At the hearing, the Audit Division offered no evidence of the basis for issuing the notice of determination or the method used to compute the additional taxes determined to be due.

CONCLUSIONS OF LAW

A. That section 1138(a)(1) of the Tax Law provides, in pertinent part, as follows:

"(a)(1) If a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors."

B. That the record does not show a basis for issuing the notice of determination or explain the external index used in computing the tax due; therefore, the notice of determination is hereby cancelled.

C. That, in view of Conclusion of Law "B", Issue II is moot.

D. That the petition of Hair and Nails, Inc. is granted.

DATED: Albany, New York

STATE TAX COMMISSION

NOV 07 1985

Radu Chelaru
PRESIDENT

Francis P. Koenig
COMMISSIONER

Mark J. ...
COMMISSIONER