

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
WARCHEM, 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 June 1, 1976	:	
through June 15, 1979.	:	

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Petitioner, Warchem, Inc., 5 East 8th Street, New York, New York 10003, 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 June 1, 1976 through June 15, 1979 (File No. 42419).

A formal 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 August 22, 1984 at 9:15 A.M. Petitioner appeared by Turetzky, Sternheim & Co. (Isaac Sternheim, C.P.A.). The Audit Division appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUES

I. Whether petitioner timely filed a petition for revision of a determination of tax due.

II. Whether the Audit Division properly determined additional sales tax due from petitioner for the period June 1, 1976 through June 15, 1979.

FINDINGS OF FACT

1. On July 3, 1979, the Audit Division received a Notification of Sale, Transfer or Assignment in Bulk which indicated the purchaser as QID Chemists, Inc. and the seller as Warchem, Inc., the petitioner herein. The date of sale

was June 15, 1979 and a bulk sales tax of \$400.00 was paid by the purchaser on fixed assets of \$5,000.00.

2. On September 6, 1979, the Audit Division, based on the findings of a field audit of petitioner's records through the period August 31, 1975, issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for tax due of \$36,923.07, plus penalty of \$5,963.98 and interest of \$5,121.52, for a total amount due of \$48,008.57 for the period June 1, 1976 through June 15, 1979.

3. The Audit Division, as a result of additional information, discovered during the field audit that petitioner had operated a luncheonette which was discontinued on October 14, 1977. As a result of this information, the liability of Warchem, Inc. was reduced for the period September 1, 1977 through June 15, 1979. Accordingly, on December 1, 1981, the Audit Division issued to petitioner a Notice of Assessment Review for adjusted tax due of \$20,189.23, plus penalty and interest of \$6,400.01, for a total amount due of \$26,589.24.

4. On January 6, 1981, petitioner's representative filed a petition in reference to the Notice of Assessment Review. Petitioner did not claim that it never received the notice dated September 6, 1979. Both notices and the petition indicated the same address for petitioner.

5. Petitioner's representative alleged that, at the time of the mailing of the notice dated September 9, 1979, a strike was in progress by the union employees of a restaurant located next to the premises of petitioner. They were purportedly not allowing anybody in or out of the building and the surrounding stores were closed due to the strike. Consequently, it was alleged that petitioner was not receiving any mail and did not receive the notice. The strike lasted approximately 30 days. The petitioner failed to present any

documentary or other substantial evidence to support these allegations. It was further alleged that the notice was probably returned to Albany. There is no evidence in the file to indicate that the notice was returned to Albany.

6. On July 29, 1980, petitioner resold the business to Chang's Chemist, Inc.

CONCLUSIONS OF LAW

A. That section 1138(a)(1) of the Tax Law provides, in part, that a notice of determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving notice of such determination, shall apply to the Tax Commission for a hearing.

B. That petitioner failed to comply with section 1138(a)(1) of the Tax Law. Therefore, the taxes due were finally and irrevocably fixed. However, based on the Notice of Assessment Review, the tax due has been adjusted to \$20,189.23.


C. That since a timely petition was not filed, the State Tax Commission does not have jurisdiction to render a decision with respect to Issue II.

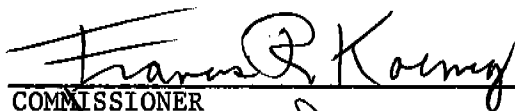
D. That the petition of Warchem, Inc. is denied and the adjusted tax due is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

FEB 06 1985

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER