

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
CONTINENTAL ARMS CORP.  
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, 1979  
through May 31, 1982.

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DECISION

Petitioner, Continental Arms Corp., 697 Fifth Avenue, New York, New York 10022, 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, 1979 through May 31, 1982 (File No. 45178).

A hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 23, 1985 at 1:15 P.M., with all briefs to be submitted by July 24, 1985. Petitioner appeared by Hess, Segall, Guterman, Pelz, Steiner & Barovick (Abraham S. Guterman, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUES

I. Whether certain merchandise sold by petitioner was delivered within New York State, thereby subjecting the receipts from said sales to New York sales tax.

II. Whether it was proper for the Audit Division to assess additional sales tax due on the basis of a test period.

FINDINGS OF FACT

1. On June 20, 1983, subsequent to the conduct of a field examination, the Audit Division issued to petitioner, Continental Arms Corp. (hereinafter "Continental"), a Notice of Determination and Demand for Payment of Sales and Use Taxes Due. Said Notice encompassed the period June 1, 1979 through May 31, 1982 and assessed additional sales and use taxes due of \$56,977.59, plus interest of \$15,502.71, for a total amount due of \$72,480.30. The periods ending August 31, 1979, November 30, 1979 and February 29, 1980 were held open for assessment by virtue of petitioner's execution of three consents extending the period of limitations for assessment.

2. The aforementioned Notice was primarily based on the Audit Division's disallowance of claimed nontaxable sales of \$705,234.31 (resulting in tax due of \$56,901.59). Said Notice also included tax due of \$76.00 for purchases of fixed assets. Petitioner conceded that \$76.00 of tax was due on purchases of fixed assets.

3. During the years at issue, petitioner was involved in the retail sale of firearms, including such items as handguns, rifles and ammunition. The disallowed nontaxable sales of \$705,234.31 represented sales of firearms made to nonresident aliens.

4. In order to purchase a firearm from Continental, a nonresident alien would first visit petitioner's showroom located in New York City and select the merchandise he or she desired. The nonresident alien could not take delivery of any firearms at the showroom since Federal law required that the firearms must either be shipped directly out of the country or delivered by the vendor to a common carrier for foreign delivery. On its sales invoice, petitioner would note the nonresident alien's name, foreign address, passport number, and

the manner in which the customer intended to depart the State (generally the airline, the flight number and the date and time of departure).

5. Prior to the period at issue, petitioner would deliver the nonresident alien's firearm directly to the aircraft departing for a foreign country and the captain or a crew member from said aircraft would issue Continental a receipt. Due to greatly increased security at airport terminals, the airlines would no longer permit Continental to board the aircraft and deliver firearms. To circumvent this problem, a new procedure was adopted wherein petitioner would contact the nonresident alien purchaser at the airport terminal and, in the presence of the baggage agent of the airline carrier, the purchaser's luggage was opened, the firearm placed therein, the luggage closed and then delivered to the baggage agent for forwarding to the aircraft. No receipt was issued by a representative of the airline. The new procedure was in effect throughout the entire period under audit.

6. Petitioner did not charge or collect sales tax on those sales made to nonresident aliens which were delivered pursuant to the new procedure described in Finding of Fact "5", supra. Continental maintains that it made delivery to a common carrier (the baggage agent for the airline carrier) via the only available procedure and that delivery took place outside New York. Petitioner argues that to impose a sales tax under these circumstances would violate the commerce clause, the import-export clause and the supremacy clause of the United States Constitution. It is the Audit Division's position that delivery took place at the airport in New York, thereby subjecting the receipt from said transaction to New York sales tax.

7. During the audit period in question, petitioner maintained complete and adequate books and records. As the audit began, petitioner's accountant

would not agree to the use of a test period and would not sign a "Test Period Agreement Form". However, the Audit Division initially used a test period, presumably to determine if a detailed audit was warranted. The Audit Division presented petitioner's accountant with the results of the test period audit, specifically its position that the aforementioned sales to nonresident aliens were taxable. Petitioner's accountant stated that he was of the opinion that the Audit Division's position was totally without merit. He subsequently denied the Audit Division further access to petitioner's books and records. At the hearing held herein, petitioner's president testified that in his conversations with the accountant no mention was made that the Audit Division was denied access to Continental's books and records. Petitioner's accountant did not appear at the hearing held herein to offer his testimony.

8. Petitioner also maintained that its sales to nonresident aliens were not of a regular and periodic nature and that to project the results of the test period over the entire audit period distorted the computation of tax due. No evidence was adduced at the hearing to support this allegation.

#### CONCLUSIONS OF LAW

A. That 20 NYCRR 525.2(a)(3) provides that "[t]he sales tax is a 'destination tax', that is, the point of delivery or point at which possession is transferred by the vendor to the purchaser or designee controls both the tax incident and the tax rate."

B. That, in the instant matter, actual physical possession of the merchandise was transferred by Continental to its customer while such customer was still in New York. The merchandise in question was not delivered by petitioner to a common carrier for delivery outside the State. Since the customer took possession within New York, these sales were properly held subject to sales tax

(Matter of Jacques Francais Rare Violins, Inc., State Tax Comm., October 5, 1984).

C. That section 1138(a) of the Tax Law provides, in part, that if a return required to be filed is incorrect or insufficient, the Tax Commission shall determine the amount of tax due on the basis of that information which may be available. Resort to the use of a test period to determine the amount of tax due must be based upon an insufficiency of record keeping which makes it virtually impossible to determine such liability and make a complete audit (Matter of Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44). Although Continental maintained complete books and records, said books and records must be made readily available to the Audit Division for examination. Since petitioner's accountant denied the Audit Division access to Continental's books and records, it was proper for the Audit Division to utilize a test period.

D. That petitioner has failed to show that its sales to nonresident aliens were not made on a regular and periodic basis. Accordingly, it was proper for the Audit Division to project the results of the test period over the entire audit period.

E. That the constitutionality of the laws of the State of New York are presumed at the administrative level.

F. That the petition of Continental Arms Corp. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated June 20, 1983 is sustained.

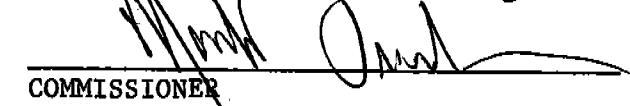
DATED: Albany, New York

JAN 17 1986

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER