

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
WILLIAM KLEESS,	:	DECISION
OFFICER OF COMPETENT HOME PRODUCTS, INC.,	:	
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, 1980	:	
through August 31, 1982.	:	

Petitioner, William Kleess, officer of Competent Home Products, Inc., RD 2, Box 448A, Red Hook, New York 12571, 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, 1980 through August 31, 1982 (File No. 47568).

A formal hearing was held before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Office Campus, Albany, New York, on March 13, 1985 at 9:15 A.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Thomas Sacca, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined additional sales taxes due from Competent Home Products, Inc. on the basis of external indices.

FINDINGS OF FACT

1. On July 15, 1983, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Competent Home Products, Inc. for taxes due of \$3,702.34, plus penalty of \$633.66 and interest of \$581.54, for a total due of \$4,917.54 for the period June 1, 1980 through August 31, 1982.

On the same date, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against the petitioner, William Kleess, based on the fact that he was an officer of Competent Home Products, Inc.

2. On September 2, 1983, the petitioner filed a timely petition for a hearing to review the notice of determination.

3. During the period at issue, Competent Home Products, Inc. ("the corporation"), a New Jersey corporation, was engaged in the sale of small kitchen appliances at fairs and trade shows throughout the United States. Petitioner, William Kleess, and Mikel A. Kleess were the officers of the corporation. Since 1980, the corporation had maintained storage facilities in Red Hook, New York.

4. During the period at issue, the corporation was not registered with the Audit Division as a vendor for collecting sales tax. Additionally, the corporation did not file New York corporation franchise tax reports.

On audit, the only records made available to the auditor were copies of the corporation's Federal income tax returns for the fiscal years ended June 30, 1980 through June 30, 1982. The petitioner indicated that the corporation did not maintain individual sales records for any fair or show nor could he provide the auditor with the amount of sales tax or rent paid at any fair or show.

In order to determine New York State sales, the auditor, based on the Federal income tax returns, determined that rent paid at fairs and shows to be 14.06 percent of gross sales. The auditor next reviewed the Department's files on trade shows and fairs to determine those attended by the corporation. The operators of the attended fairs provided the auditor with the rent paid. For

the audit period, total New York State sales were determined to be \$86,978.00, with a tax due thereon of \$5,297.08. Since the corporation had paid sales tax at various shows in New York State of \$1,594.74, additional tax due was \$3,702.34.

5. Petitioner testified that there were shows where the prospect of making sales was so limited that he left early, notwithstanding that rent had been paid in advance. Petitioner could provide no specific details of the shows where he left early.

6. Petitioner offered no substantial evidence to refute the findings of the Audit Division. He did not challenge the determination that he was an officer responsible for the taxes of the corporation.

CONCLUSIONS OF LAW

A. That section 1135(a) of the Tax Law provides that every person required to collect tax shall keep records of every sale and of all amounts paid, charged or due thereon and of the tax payable thereon. Such records shall include a true copy of each sales slips, invoice, receipt or statement.

B. That section 1138(a)(1) of the Tax Law provides, in pertinent part, that the amount of tax due shall be determined from such information as may be available. If necessary, the tax may be estimated on the basis of external indices, such as rent paid.

C. That the books and records of Competent Home Products, Inc. were inadequate and incomplete for purposes of determining taxable sales or sales tax due. Therefore, the use of external indices is permissible (Matter of Korba v. N.Y.S. Tax Commission, 84 A.D.2d 655). Accordingly, the Audit Division's determination of additional tax due was proper pursuant to section 1138(a)(1) of the Tax Law. Exactness is not required where it is the taxpayer's own failure to maintain proper records which prevents exactness in the determination

of sales tax liability (Matter of Markowitz v. State Tax Commission, 54 A.D.2d 1023).

D. That petitioner was a person required to collect tax on behalf of the corporation within the meaning of section 1131(1) of the Tax Law and is personally liable for the tax.

E. That the petition of William Kleess, officer of Competent Home Products, Inc., is denied.

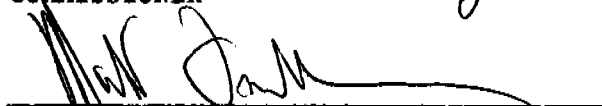
DATED: Albany, New York

STATE TAX COMMISSION

JUL 16 1985


PRESIDENT


COMMISSIONER


COMMISSIONER