

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
CORNWALL VARIETY STORE, 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, 1972	:	
through May 31, 1975.	:	

Petitioner Cornwall Variety Store, Inc., 282 Main Street, Cornwall, New York, 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, 1972 through May 31, 1975 (File No. 48584).

A hearing was held before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 15, 1986 at 1:30 P.M. Petitioner appeared by Coopers & Lybrand (Gerald Cohen, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Angelo A. Scoppellito, Esq., of counsel).

ISSUE

I. Whether petitioner, purchaser in a bulk sale transaction, is liable for sales taxes determined to be due from the seller in accordance with section 1141(c) of the Tax Law.

FINDINGS OF FACT

1. On June 15, 1983, the Department of Taxation and Finance ("the Department") received from petitioner, a purchaser in a bulk sale, a Notification of Sale, Transfer or Assignment in Bulk.

2. On June 16, 1983, the Department mailed to Stephen Duggan, Esq., identified by petitioner as the escrow agent for the sale, a notice of a possible claim for New York State and local sales and use taxes and instructed

the escrow agent not to distribute funds or property until one of the following conditions were met:

- "1. The State Tax Commission has determined the seller's liability if any.
2. Payment of such liability has been made to the State.
3. This office has authorized you to release the funds or property."

3. On the same date as above, the Department mailed to petitioner a Notice of Claim to Purchaser reiterating the instructions given to the escrow agent.

4. On September 19, 1983, the Department issued against petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period ended August 31, 1976, asserting a tax due of \$7,864.14 plus penalty of \$1,966.04 and interest of \$6,849.82 for a total amount due of \$16,680.00. The notice stated, in pertinent part:

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

5. The taxes determined to be due from Peter Pan Supermarkets, Inc. ("Peter Pan") resulted from an audit of its records which revealed additional taxable sales for the period June 1, 1972 through May 31, 1975. A Notice of Determination and Demand was issued against Peter Pan on February 3, 1976.

6. At a tax conference with petitioner, a review of the Audit Division's field audit report on Peter Pan revealed that purchases had been overstated due to a mathematical error. Furthermore, the Audit Division agreed to reduce the markup on cigarettes, to cancel the asserted penalty and to reduce interest on the tax assessment to the statutory minimum. These adjustments reduced the tax assessment to \$7,153.94 plus minimum interest.

7. Petitioner has paid the tax due in full; however, it has refused to pay the asserted interest based on its belief that the amount is exorbitant and that the accrual of interest over a nine year period is due to the Department's own negligence in failing to collect the tax due from the seller. Furthermore, petitioner now asks for a refund of taxes paid asserting that it never received timely notification of the sales tax due from Peter Pan.

8. Petitioner's assertion that it did not receive timely notification of taxes due is predicated upon the fact that the Department issued a Notice to the Seller to Peter Pan on July 6, 1983 which stated, in pertinent part: "Remit payment for the following open assessments:". A space was provided for the listing of assessments; however, the Department crossed out the words "the following" and asserted the word "all"; no assessments were listed.

9. By letters dated March 2, 1976 and April 27, 1976, Peter Pan protested the tax assessments issued against it. The Tax Compliance Bureau sent Peter Pan two postcards, each stating: "This acknowledges receipt of your letter of recent date which has been referred to the proper Bureau and will be answered as soon as possible. The first postcard is postmarked December 4, 1978; the second is postmarked December 12, 1980. On December 10, 1980, a stop collection was placed on the assessment against Peter Pan.

10. Petitioner asserts that the Department's failure either to provide Peter Pan with a hearing or to proceed with collection efforts against Peter Pan prevents it from asserting taxes due against petitioner.

CONCLUSIONS OF LAW

A. That Tax Law, Section 1141, subdivision (c) requires the State Tax Commission, upon timely receipt of a notice from the purchaser in a bulk sale, to give notice to the purchaser, within ninety days of the receipt of such

notice, of the total amount of any taxes which the state claims to be due from the seller. Upon receipt of proper notification of the State's claim, the purchaser may make payment of such claims from any sums of money, property or choses in action withheld from the seller under this provision of the law. The State Tax Commission complied fully with this statute by issuing a notice of determination and demand to petitioner on September 13, 1983.

B. That the Tax Commission also complied fully with its own regulations (see, 20 NYCRR 537.6) by sending to petitioner and its escrow agent notices of possible claim for New York State and local sales and use taxes with unequivocal instructions not to release any consideration to the seller until the seller's liability was finally determined and satisfied.

C. That the State may not be estopped "from collecting taxes lawfully imposed and remaining unpaid in the absence of statutory authority" (McMahon v. State Tax Commission, 45 A.D.2d 625, 627). Furthermore, there is no statutory duty or responsibility imposed on the State to first obtain tax due from the seller in a bulk sale transaction (Matter of Edward M. Burns d/b/a Studio B, State Tax Commission, December 14, 1982).

D. That petitioner has made full payment in the amount of \$7,153.94 for all taxes due and all penalties have been cancelled by the Audit Division. However, petitioner remains liable for minimum statutory interest on the amount of the tax paid.

E. That the petition of Cornwall Variety Store, Inc. is granted to the extent indicated in Conclusion of Law "D"; that the Notice of Determination and

Demand for Payment of Sales and Use Taxes Due issued on September 13, 1983 shall be reduced accordingly; and that, except as so granted, the petition is denied.

DATED: Albany, New York

JUN 12 1986

STATE TAX COMMISSION

Roderick W. Chen
PRESIDENT

Francis R. Kaung
COMMISSIONER

Mark J. [unclear]
COMMISSIONER