

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
MEISLINS RESTAURANT & JANITORIAL SUPPLIES, 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 September 1, 1980	:	
through May 31, 1983.	:	

Petitioner, Meislins Restaurant & Janitorial Supplies, Inc., P.O. Box 8, Whitesboro, New York 13492, 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 September 1, 1980 through May 31, 1983 (File No. 48979).

A hearing was held before Jean Corigliano, Hearing Officer, at the offices of the State Tax Commission, 207 Genesee Street, Utica, New York, on August 12, 1986 at 1:15 P.M. Petitioner appeared by Daniel S. Cohen, Esq. The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUE

Whether the Audit Division properly disallowed certain claimed exempt sales.

FINDINGS OF FACT

1. On December 20, 1983, as the result of a field audit, the Audit Division issued against petitioner, Meislins Restaurant & Janitorial Supplies, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period September 1, 1980 through May 31, 1983, asserting a tax due of \$8,883.64 plus minimum interest.

2. Petitioner owned and operated a retail and wholesale merchandising business specializing in candy crafting supplies, such as chocolate and molds, restaurant supplies and janitorial supplies. Sales were made by three avenues: traveling salesmen solicited orders, primarily from retail establishments; customers purchased items through a mail order catalogue; and both wholesale and retail cash sales were made from a storefront location in petitioner's warehouse.

3. On audit, it was determined that petitioner's books and records were in good condition. Gross sales and exempt sales made by petitioner's salesmen and through mail order were accepted as reported. However, the auditor determined that petitioner's records were inadequate to substantiate claimed exempt cash sales made at its store.

4. Petitioner's in-store cash sales were recorded on a cash register, and a tape was maintained. Cashiers were responsible for segregating exempt and taxable sales. Exempt sales included sales for resale and sales made to exempt organizations such as the Boy Scouts, the American Legion and various church organizations. The cash register tape generated a record of total taxable sales and total exempt sales and identified individual sales by product category. Petitioner wrote out invoices or sales receipts for all of its customers, but only kept a copy when a sale of candy was made. The auditor deemed the register tapes inadequate to verify that tax was collected on all nonexempt sales.

5. The auditor selected three days from each year in the audit period to use as a test period. Exempt sales shown on the register tapes were matched against invoices where available. Using this method, the auditor was able to substantiate all claimed exempt candy sales. However, since petitioner did not retain a copy of the customer's receipt for non-candy sales, they were all

deemed unsubstantiated. In the nine day test period, 37.679 percent of petitioner's total sales were found to be unsubstantiated exempt sales. Accordingly, that percentage of claimed exempt cash sales was disallowed in each sales tax quarter under consideration, resulting in additional taxable sales of \$182,383.00 with a tax due on that amount of \$8,454.57.

6. The auditor also found sales tax due of \$429.07 on recurring purchases and purchases of fixtures and equipment. That portion of the assessment is not in issue.

7. Petitioner produced testimonials from individual customers who claimed to have made purchases from petitioner during the audit period. The testimonials do not identify the products purchased, the price of the individual items or the dates on which the alleged purchases occurred. Some of the customers claimed to be tax exempt organizations; others did not. Petitioner requested that these statements be deemed memoranda of sales in accordance with 20 NYCRR 533.2(b).

CONCLUSIONS OF LAW

A. That the sales tax is imposed on the receipts, unless specifically exempted, of every retail sale of tangible personal property (Tax Law §1105[a]). There is a presumption in the law that all such receipts are subject to tax, and the burden of proving otherwise is placed upon the person required to collect the tax (Tax Law §1132[c]).

B. That inasmuch as petitioner had no verifiable records to establish that certain of its cash sales were exempt from sales tax by virtue of having been sold either to a tax exempt organization or for resale, petitioner has not overcome the presumption that such sales were subject to tax.

C. That 20 NYCRR 533.2(b) provides that:

"(1) Every person required to collect tax...must keep records of every sale...and all amounts paid, charged or due thereon.... The records must contain a true copy of each:

(i) sales slip, invoice, receipt, contract, statement or other memorandum of sale[.]"

D. That the testimonials solicited by petitioner from its customers are not "true cop[ies] of each...memorandum of sale". Accordingly, they are not sufficient to substantiate petitioner's claimed exempt sales.

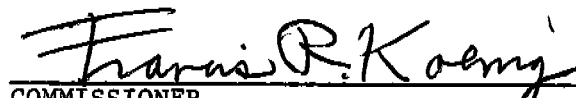
E. That the petition of Meislins Restaurant & Janitorial Supplies, Inc. is denied in full, and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on December 20, 1983 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

DEC 23 1986


PRESIDENT


COMMISSIONER

 
COMMISSIONER