

STATE OF NEW YORK

STATE TAX COMMISSION

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| In the Matter of the Petition | : | |
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| of | : | |
| CENTRAL TOY AND STATIONERY, 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, 1979 | : | |
| through May 31, 1983. | : | |

Petitioner, Central Toy and Stationery, Inc., 22-02 Astoria Boulevard, Astoria, New York 11102, 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, 1983 (File No. 50509).

A hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 18, 1986 at 2:45 P.M. Petitioner appeared by its president, Stanley Sturm. The Audit Division appeared by John P. Dugan, Esq. (Laura M. Nath, Esq., of counsel).

ISSUE

Whether the Audit Division's imposition of tax on certain sales claimed by petitioner to have been nontaxable sales was proper.

FINDINGS OF FACT

1. On December 8, 1983, following a field audit, the Audit Division issued to petitioner, Central Toy and Stationery, Inc., two notices of Determination and Demand for Payment of Sales and Use Taxes Due, covering together the period June 1, 1979 through May 31, 1983, in the aggregate amount of \$2,117.27, plus interest. Validated consents had been executed previously on

petitioner's behalf extending to December 20, 1983 the period of limitations on assessment for the audit period in question.

2. Petitioner is engaged in business as a toy and stationery wholesaler. A small portion of petitioner's business also included retail toy and stationery sales until late 1982, when they ceased.

3. The aforementioned deficiency, premised upon disallowance of a portion of petitioner's claimed nontaxable sales, arises as the result of a field audit of petitioner's business conducted by the Audit Division during 1983.

4. At the outset, the auditor requested to review petitioner's records, including documentation pertaining to sales claimed by petitioner as nontaxable sales for resale. Petitioner's sales are recorded per its bank deposits and petitioner maintains collection sheets on which are listed its collections from its various clients. Petitioner did not have resale certificates available with respect to its claimed nontaxable sales nor were sales invoices with respect thereto made available. The auditor, maintaining this left no means of verifying claimed nontaxable sales, requested and received petitioner's agreement to a one-month test period for which verification of claimed exempt sales would be attempted by resorting to information on petitioner's collection sheets.

5. The month of May 1981 was agreed upon and the auditor gave petitioner's representative blank resale certificates to be completed with the requisite information for each of the approximately 150 to 200 customers who made purchases from petitioner during May of 1981.

6. Several resale certificates were returned to the auditor, and an initial disallowance of 53 percent of petitioner's claimed nontaxable sales during the test month was calculated by the auditor. Thereafter, for those

sales for which resale certificates were not obtained by petitioner, the auditor checked the names and addresses listed on petitioner's collection sheets against the Audit Division master computer listing of vendors' I.D. numbers and addresses, in order to see if allowance of exemption on petitioner's sales could be made.

7. In this fashion, the aforementioned disallowance percentage was reduced to 1.023 percent of claimed nontaxable sales for the month of May 1981. The disallowed sales represented five different individual sales to four different purchasers on petitioner's May 1981 collection sheets, for which there were neither resale certificates provided nor any reference on the Audit Division computer listings of registered vendors as checked by the auditor.

8. In numerical format, the \$2,117.27 deficiency represents sales tax due on unsubstantiated nontaxable sales totalling \$26,124.00 for the entire audit period, with such latter amount calculated as follows:

$$\frac{\text{Unsubstantiated exempt sales May 1981}}{\text{Sales by petitioner during May 1981}} = \frac{\$ 550.37}{\$53,817.90} = 1.023\% \text{ disallowance}$$

$$1.023\% \times \$2,553,475.00 \text{ (audit period total claimed nontaxable sales)} = \underline{\underline{\$26,124.00}}$$

9. Petitioner admits, with respect to the four purchasers in question, that resale certificates were not obtained, either initially upon petitioner's sales to these four purchasers, or thereafter at the time of audit. Petitioner asserts that these purchasers are no longer in business and efforts to locate their operators and obtain information proved fruitless. Petitioner maintains that it was unaware of requirements to obtain resale certificates from its purchasers in order to substantiate and be afforded protection upon audit of claimed nontaxable sales. Finally, petitioner asserts that since, between its efforts and the auditor's efforts, nearly all sales in the test month have been

allowed exemption as sales for resale, the remaining sales disallowed as such should be accepted and the deficiency at issue should be cancelled.

CONCLUSIONS OF LAW

A. That section 1101(b)(4)(i) of the Tax Law defines a retail sale as "[a] sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property".

B. That section 1132(c) of the Tax Law provides, in pertinent part, that:

"[I]t shall be presumed that all receipts for property or services of any type mentioned in subdivisions (a), (b), (c) and (d) of section eleven hundred five, all rents for occupancy of the type mentioned in subdivision (e) of said section, and all amusement charges of any type mentioned in subdivision (f) of said section, are subject to tax until the contrary is established, and the burden of proving that any receipt, amusement charge or rent is not taxable hereunder shall be upon the person required to collect tax or the customer. Except as provided in subdivision (h) of this section, unless (1) a vendor... shall have taken from the purchaser a certificate in such form as the tax commission may prescribe,... to the effect that the property or service was purchased for resale or for some use by reason of which the sale is exempt from tax... the sale shall be deemed a taxable sale at retail."

C. That with respect to the claimed but disallowed exempt sales in question, petitioner could have protected itself by taking properly completed resale certificates from the purchasers at the time of the sales. Not having done so leaves the burden of proving entitlement to exemption upon petitioner, and here that burden has not been met. Petitioner was unable to supply requisite information concerning these purchasers. Moreover, as opposed to the balance of petitioner's customers, there was no record of these purchasers as being registered vendors with the Audit Division. Accordingly, petitioner has not substantiated its claim that the sales were properly exempt as sales for resale.


D. That the petition of Central Toy and Stationery, Inc. is hereby denied and the notices of determination dated December 8, 1983 are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

OCT 15 1986


PRESIDENT


COMMISSIONER


COMMISSIONER