

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

S & H SERVICE CENTER, LTD.

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, 1983  
through November 30, 1983.

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Petitioner, S & H Service Center, Ltd., 196-41 Northern Boulevard, Flushing, New York 11360, 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, 1983 through November 30, 1983 (File No. 51515).

A hearing was held before Jean Corigliano, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 28, 1986 at 9:45 A.M., with all briefs to be submitted by February 9, 1987. Petitioner appeared by Peter R. Newman, Esq. The Audit Division appeared by John P. Dugan, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

#### ISSUE

Whether petitioner has shown that it is not liable for sales and use taxes due as asserted by the Audit Division.

#### FINDINGS OF FACT

1. On January 16, 1984, the Audit Division issued to petitioner, S & H Service Center, Ltd., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period September 1, 1983 through November 30, 1983, asserting sales and use taxes due in the amount of \$35,000.00. The notice contained the following explanation:

"The following taxes are determined to be due from Gallagher's Triangle Shell and represents your liability, as purchaser, in accordance with Section 1141(c) of the Sales Tax Law."

The notice also stated that petitioner's liability as purchaser was limited to the purchase price of the business or \$35,000.00.

2. Following a field audit, the Audit Division determined that the books and records of Gallagher's Triangle Shell ("Gallagher's") were inadequate for the purpose of verifying its sales tax liability. Consequently, Gallagher's tax liability was estimated on the basis of information provided by Gallagher's accountant and third party verification of Gallagher's gasoline purchases. The total amount of sales and use tax determined to be due from Gallagher's was \$37,428.05.

3. Petitioner presented no evidence bearing upon either (1) the bulk sale transaction which the Audit Division asserted as the basis of its assessment, or (2) the audit methodology utilized by the Audit Division or the results obtained.

4. After all evidence was received, petitioner made a motion to dismiss on two grounds: (1) that the Audit Division failed to prove that a bulk sale transfer had occurred; and (2) that the Audit Division failed to prove that a notice of determination had been sent to Gallagher's.

#### CONCLUSIONS OF LAW


A. That the burden of proof to overcome tax assessments rests upon the petitioner (~~see, e.g.~~, Clarence R. Oliver Post Memorial, Inc. v. State Tax Commission, 101 AD2d 921). Petitioner has not even alleged facts which, if proven, would relieve it of the liability asserted against it. Consequently, there is no basis for modification or cancellation of the assessment.

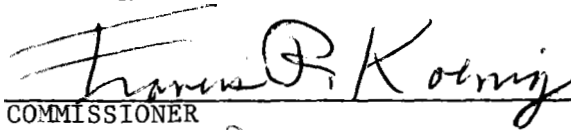
B. That the petition of S & H Service Center, Ltd. is denied, and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on January 16, 1984 is sustained.

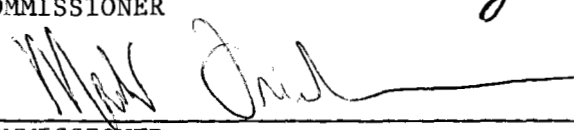
DATED: Albany, New York

STATE TAX COMMISSION

MAR 20 1987

  
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PRESIDENT

  
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COMMISSIONER

  
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COMMISSIONER