

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

MERRY TWINS SERVICENTER, INC.  
AND MITCHELL SKOLNIK, AS OFFICER

for Revision of a Determination or for Refund :  
of Sales and Use Taxes under Articles 28 and  
29 of the Tax Law for the Periods March 1, 1979 :  
through November 30, 1981.

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DECISION

In the Matter of the Petition

of

JOSEPH SKOLNIK, OFFICER OF :  
MERRY TWINS SERVICENTER, 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 Periods March 1, 1979  
through November 30, 1981.

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Petitioners, Merry Twins Servicenter, Inc. and Mitchell Skolnik as officer, c/o 5612 18th Avenue, Brooklyn, New York 11204, 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 March 1, 1979 through November 30, 1981 (File Nos. 52781 and 52782).

Petitioner, Joseph Skolnik, officer of Merry Twins Servicenter, Inc., c/o 5612 18th Avenue, Brooklyn, New York 11204, 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 March 1, 1979 through November 30, 1981 (File No. 52783).

A consolidated 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 January 28, 1987 at 9:15 A.M., with additional evidence to be submitted by February 28, 1987. Petitioners appeared by Isaac Sternheim, CPA. The Audit Division appeared by John P. Dugan, Esq., (Patricia Brumbaugh, Esq., of counsel).

#### ISSUES

I. Whether the Audit Division properly estimated tax due on sales of gasoline; tires, batteries and accessories; and repair services.

II. Whether petitioners, Joseph Skolnik and Mitchell Skolnik, were persons required to collect and pay sales and use taxes on behalf of Merry Twins Servicenter, Inc.

#### FINDINGS OF FACT

1. On March 7, 1984, the Audit Division issued to petitioner Merry Twins Servicenter, Inc. ("Merry Twins") a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period March 1, 1979 through November 30, 1981, asserting sales and use taxes due under Articles 28 and 29 of the Tax Law in the amount of \$55,606.37 plus penalty and interest. On the same date, identical notices were issued to petitioners Joseph Skolnik and Mitchell Skolnik, asserting their personal liability as officers of Merry Twins for the taxes said to be due from the corporation.

2. As president of Merry Twins, Joseph Skolnik executed a series of seven consents extending the period of limitation for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1979 through November 30, 1980 to March 20, 1984.

3. During the audit period, Merry Twins operated a gasoline station which sold gas, oil and tires, batteries and accessories ("TBA"); performed State inspections; performed mechanical repair work and did bodywork on automobiles.

4. Before beginning an examination of Merry Twins' books and records, the auditor obtained a Retailer Information Sheet from Pride Oil Corporation ("Pride"), showing Merry Twins as one of Pride's customers.

5. Upon request, Merry Twins provided the following books and records for audit: State sales tax returns, State and Federal income tax returns, a cash receipts journal, some sales and purchase invoices, a check disbursements journal, a general ledger and some resale and exempt organization certificates.

6. The auditor reviewed Merry Twins' books and records and found purchases of Texaco gasoline from Jal Oil Corporation, but no purchases of gasoline from Pride. Consequently, the auditor deemed Merry Twins' books and records inadequate to verify taxable sales, and she proceeded to estimate sales and use taxes due on the basis of information available. The audit procedure utilized is outlined below.

(a) Audited gasoline sales

Texaco gasoline purchases were obtained from Jal Oil Corporation. The auditor went to Pride's business office and transcribed from its books the total number of gallons of gasoline purchased by Merry Twins from Pride. Total gallons of Pride and Texaco gasoline were multiplied by the statewide average gasoline selling price as determined by an Audit Division survey. This resulted in audited gasoline sales of \$778,475.00.

(b) Audited sales of motor oil and TBA

The auditor obtained Merry Twins' total purchases of motor oil and TBA from its cash disbursements journal. She segregated the purchases into three categories: (1) parts, accessories and oil; (2) tires and batteries; and (3) bodywork. She then estimated total gross sales in each category through the following steps:

- (1) Using Merry Twins' purchase and sales invoices for the period December 1, 1980 through February 28, 1981, the auditor computed the following average markups:

Parts, accessories and oil	142.27%
Tires and batteries	48.87%

- (ii) Merry Twins also performed bodywork on cars. Its sales invoices were not sufficiently detailed to enable the auditor to categorize and mark up the various materials used; therefore, she surveyed similar audits in her district office's files and on that basis estimated a markup of 150 percent on all materials used in bodywork.
  - (iii) Total purchases in all categories were reduced by three percent to allow for pilferage.
  - (iv) The audited markups were applied to the adjusted total purchases to calculate audited gross sales of \$1,168,642.00.
- (c) Nontaxable sales

Using sales invoices for the periods December 1, 1980 through February 28, 1981 and June 1, 1979 through August 31, 1979, the auditor performed a test of Merry Twins' claimed nontaxable sales.

- (i) Merry Twins' claimed nontaxable sales consisted of sales for resale, sales to exempt organizations, State inspections and excise taxes included in the selling price of Texaco gasoline. Since Merry Twins reported no sales of Pride gasoline, no allowance was made for excise taxes related to those sales in this portion of the audit.
  - (ii) The auditor was able to verify 38.373 percent of Merry Twins' claimed nontaxable sales for the test periods. That percentage was applied to Merry Twins' claimed nontaxable sales for the audit period to arrive at audited nontaxable sales of \$225,658.00. The auditor added \$10,740.00 to that amount, representing nontaxable excise taxes included in the selling price of the Pride gasoline, to determine total audited nontaxable sales of \$236,398.00.
- (d) Other sales

Merry Twins ceased doing business in the latter part of 1981. At that time, all inventory and physical assets were sold. Sales taxes of \$2,237.84 were assessed on the sale of these assets.

7. After performing the above audit work, the auditor calculated additional taxable sales as follows:

Total Gross Sales	
T.B.A., oil and bodywork	\$1,168,642.00
Gasoline sales	<u>778,475.00</u>
Total gross sales	\$1,947,117.00
Nontaxable sales	<u>(236,398.00)</u>
Audited taxable sales	\$1,710,719.00
Reported taxable sales	<u>(1,043,839.00)</u>
Additional taxable sales	\$ 666,880.00

8. The auditor determined that sales tax in the amount of \$53,368.53 was due on these additional taxable sales of \$666,880.00. In addition, a sales tax of \$2,237.84 was assessed on sales of inventory and physical assets at the time the business was closed. Thus, Merry Twins' total sales tax liability was determined to be \$55,606.37.

9. In determining the dollar amount of Merry Twins' parts purchases for the audit period, the auditor included payments in the amount of \$105,019.00 made to King Bear Enterprises, Inc. ("King Bear"). A franchise agreement between Merry Twins and King Bear substantiates that \$38,000.00 of those total payments were for franchise and advertising fees, rather than parts.

10. The King Bear franchise agreement was signed by Joseph Skolnik on behalf of Merry Twins on August 18, 1977 (approximately 18 months before the first audit period under consideration).

11. Joseph Skolnik was a shareholder and president of Merry Twins. He claimed not to remember the extent of his shareholding; however, the record indicates that he held approximately 50 percent of the corporate shares. While serving as an officer of Merry Twins, Joseph Skolnik was self-employed in the real estate business. He was not active in the day-to-day operations of the station. Joseph Skolnik was authorized to and did write checks on Merry Twins' corporate account.

12. Mitchell Skolnik was the secretary of Merry Twins. He worked at the gas station performing a variety of tasks (pumping gas, talking to customers,

writing work orders), but he claimed to have had no managerial control over its operations. Mitchell Skolnik signed at least three sales tax returns on behalf of Merry Twins. On two of those returns, his title *is* shown as "bookkeeper", and on the other it is shown as "secretary". He also signed checks *on* Merry Twins' corporate account. It is Mitchell Skolnik's position that he signed checks and tax returns merely as a matter of convenience when none of the other officers were present to do so.

13. Mitchell Skolnik asserted that he became an officer of Merry Twins in November of 1979 and severed his ties with the corporation sometime before November of 1981. On January 15, 1982, Mitchell Skolnik signed a Corporation Franchise Tax Report for the year 1980 on behalf of Merry Twins.

14. Petitioners denied that Merry Twins had ever purchased gasoline from Pride and suggested that the auditor had erroneously transcribed purchase records pertaining to a different corporation.

#### CONCLUSIONS OF LAW

A. That inasmuch as petitioners did not introduce credible evidence to the contrary, it is concluded that Merry Twins did purchase gasoline from Pride.

B. That in light of the fact that Merry Twins' purchases from Pride were not reflected on its books and records, the auditor justifiably concluded that those books and records were inadequate to verify Merry Twins' reported taxable sales. Where the taxpayer's records are properly deemed inadequate, as they were here, the Audit Division *is* required by Tax Law § 1138(a)(1) to determine the amount of tax due from such information as may be available. Any audit methodology reasonably calculated to reflect the sales taxes due may be utilized by the Audit Division, and the taxpayer must then show that the method of audit

or amount of tax assessed was erroneous (Carmine Restaurant, Inc. v. State Tax Commission, 99 AD2d 581).

C. That the audit methodology employed here was reasonably calculated to reflect the taxes due. However, petitioners have established that Merry Twins' parts purchases for the audit period were overstated in the amount of \$38,000.00. Merry Twins' tax liability will be recalculated by reducing its purchases of parts, accessories and oil by \$38,000.00 and applying a markup of 142.27 percent to the resulting amount. Petitioners have produced no other evidence to support an adjustment of the audit results.

D. That section 1133(a) of the Tax Law imposes personal liability for taxes required to be collected under Article 28 upon a person required to collect such tax. A person required to collect such tax is defined as "any officer, director or employee of a corporation... who as such officer, director or employee **is** under **a** duty to act for such corporation... in complying with any requirement of [Article 28]" (Tax Law § 1131[1]). Pertinent inquiries in determining whether a person has such a duty to act for the corporation include, ~~inter alia~~, authorization to sign the corporate tax return, responsibility for management or maintenance of the corporate books, authorization to hire or fire employees, and benefits the officer received from the corporate profits (Blodnick v. State Tax Commission, 507 NYS2d 536). Neither Joseph Skolnik nor Mitchell Skolnik has established that he was not a person required to collect tax under Article 28. Joseph Skolnik (1) was a fifty percent shareholder of Merry Twins, (2) was authorized to and did execute legally binding agreements on behalf of the corporation, and (3) admitted to being an authorized signatory on the corporate accounts. Mitchell Skolnik (1) was an authorized signatory on the corporate accounts, (2) actually signed corporate checks, and (3) signed

sales and use tax returns submitted on behalf of Merry Twins. Inasmuch as Mitchell Skolnik presented no documentary evidence showing the exact date when his association with the corporation began, it is concluded that he was a responsible officer or employee throughout the audit period. Petitioners' simple denial **of** responsibility for the corporation's financial affairs is not sufficient to absolve them **of** such responsibility.

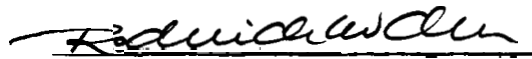
E. That the petition **of** Merry Twins Servicenter, Inc. and Mitchell Skolnik, as officer, **is** granted to the extent indicated in Conclusion of Law "C"; that the notices of determination and demands for payment of sales and use taxes due issued on March 7, 1984 shall be modified accordingly; and that in all other respects, the petition is denied.

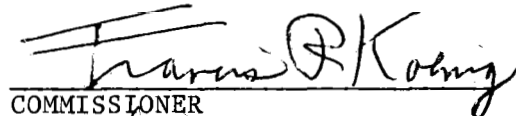
F. That the petition of Joseph Skolnik **is** granted to the extent indicated in Conclusion of Law "C"; that the Notice of Determination and Demand for Payment of Sales and Use Taxes Due **issued** March 7, 1984 shall be modified accordingly; and that in all other respects, the petition is denied.

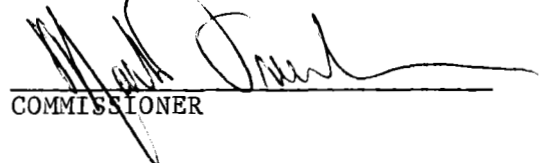
DATED: Albany, New York

STATE TAX COMMISSION

MAY 29 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER