

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

JERRY'S KIDDIE DASHERY, 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 December 1, 1981  
through August 31, 1983.

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Petitioner, Jerry's Kiddie Dashery, Inc., 1655 First Avenue, New York, New York 10028, 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 December 1, 1981 through August 31, 1983 (File No. 60442).

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 October 22, 1986 at 9:15 A.M., with all briefs to be submitted by January 19, 1987. Petitioner appeared by Lester E. Levin, CPA and Jerome D. LeBowitz, Esq. The Audit Division appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

#### ISSUE

Whether the Audit Division properly disallowed certain sales which petitioner claims to have been exempt from sales tax by virtue of the fact that said sales were made to diplomatic personnel or officers of permanent missions to the United Nations.

#### FINDINGS OF FACT

1. On February 8, 1985, the Audit Division issued to Jerry's Kiddie Dashery, Inc. (hereinafter "petitioner") a Notice of Determination and Demand

for Payment of Sales and Use Taxes Due for the period December 1, 1981 through August 31, 1983 in the amount of \$21,154.89, plus penalty of \$5,162.04 and interest of \$6,158.63, for a total amount due of \$32,475.56.

2. Petitioner operated a children's clothing store located at 1655 First Avenue, New York, New York, a location which is near the United Nations headquarters. Said store commenced operation in 1955. Petitioner was incorporated in 1962 and continued to operate the clothing store until April 1985.

3. In 1984, a field audit of petitioner was performed by the Audit Division. Gross sales reported on petitioner's Federal corporation income tax returns did not agree with amounts reported by petitioner on its New York State sales tax returns. Pursuant to an agreement with petitioner's representative, a test period audit was performed using petitioner's sales invoices for the months of November 1981, March 1982 and July 1982. From an examination of these invoices, it was determined that petitioner had reported 43.1 percent of its sales as exempt sales to diplomatic personnel or officers of permanent missions to the United Nations (hereinafter "mission officers"). The invoices contained the diplomat's or mission officer's identification number and the country represented, but contained neither the diplomat's or mission officer's name nor any other information required by the Audit Division for a properly completed exemption certificate. Petitioner did not obtain a completed form ST-126, New York State and Local Sales Tax Certificate of Diplomatic and Consular Tax Exemption from its diplomat or mission officer customers. All of the sales which petitioner alleges were made to diplomatic or mission officer personnel were disallowed by the Audit Division and were held, therefore, to be subject to sales tax.

4. Petitioner alleges that the Department of Taxation and Finance has failed to properly alert and advise taxpayers on current policies regarding

documentation required to substantiate sales to diplomatic or mission officer personnel. As part of its petition, petitioner attached a copy of Volume 12, Number 1 of Sales Tax Newsletter (March 1985) which petitioner contends is evidence of a new departmental policy of enforcement which, prior to the issuance of new photo identification cards (DTF-10), was not uniformly enforced. Petitioner further contends that Form ST-126, New York State and Local Sales Tax Certificate of Diplomatic and Consular Tax Exemption, was not issued until May 1983, a date which is subsequent to most of the period at issue herein.

CONCLUSIONS OF LAW

A. That Department of Taxation and Finance Form ST-126, New York State and Local Sales Tax Certificate of Diplomatic and Consular Tax Exemption, was initially issued by the Department in September 1965.

B. That Volume 5, Number 1 of Sales Tax Newsletter (March 1977) which was sent to all registered vendors, provided, in pertinent part, as follows:

"DON'T JUST TAKE A NUMBER

Acceptance by a vendor of an identification number or exemption number, instead of a properly completed exemption certificate, does not relieve the vendor of his responsibility for collecting tax. To be properly completed, all the required information on the exemption certificate must be entered and the certificate must be signed."

C. That 20 NYCRR 529.6, filed on November 24, 1982 and which was, therefore, in effect for three of the seven sales tax quarters at issue herein, provided, in pertinent part, that when claiming exemption from sales tax, diplomatic personnel and/or mission officers or their spouses must furnish the vendor with a properly completed certificate of diplomatic and consular tax exemption and must also present his or her numbered identification card to the vendor for a signature comparison. Subdivisions (a)(5) and (b)(4) of 20 NYCRR 529.6 provided that:

"A certificate is properly completed when it contains the:

- (i) date the certificate is executed;
- (ii) identification card number;
- (iii) name and address of the issuer;
- (iv) official title of the person to whom the identification number was assigned;
- (v) country represented; and
- (vi) signature of the issuer of the certificate."

D. That it is the practice of the Department of Taxation and Finance to mail to every registered vendor copies of each Sales Tax Newsletter. **As** indicated in Finding of Fact "4", petitioner, in furtherance of its position, attached a copy of Volume 12, Number 1 (March 1985) of said newsletter. It may **be presumed, therefore, that since petitioner commenced doing business in its corporate form in 1962 and was a registered vendor for such purposes, it also received a copy of Volume 5, Number 1 (March 1977) of such newsletter, the** pertinent portions of which are set forth in Conclusion of Law "B", supra. Despite this presumption, the existence of Form **ST-126** and the promulgation of pertinent regulations (20 NYCRR 529.6) by the State Tax Commission, petitioner failed to obtain properly completed exemption certificates from mission officers and/or diplomats, sales to whom petitioner alleges are exempt from the imposition of sales tax. Petitioner obtained from these purchasers only the identification numbers and countries represented and failed to obtain a properly completed certificate or, in the alternative, all of the information required **on** such certificate. By its failure to obtain a properly completed certificate or obtain all of the required information, petitioner has failed to meet its burden of proving that such sales were made to diplomats and/or mission officers and are, therefore, exempt from the imposition of sales tax.

E. That the petition of Jerry's Kiddie Dashery, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued February 8, 1985 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

APR 06 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER