

STATE OF NEW YORK  
STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
National Tires, Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of :  
Corporation Franchise Tax :  
under Article 9A of the Tax Law :  
for the Fiscal Years Ending 2/28/70, 71, 73 & 12/31/73.

State of New York  
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 17th day of October, 1980, he served the within notice of Decision by certified mail upon National Tires, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

National Tires, Inc.  
c/o Roger H. Talich  
P.O. Box 5887  
Denver, CO 80217

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
17th day of October, 1980.

*Dorothy A. Bank*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION  
ALBANY, NEW YORK 12227

October 17, 1980

National Tires, Inc.  
c/o Roger H. Talich  
P.O. Box 5887  
Denver, CO 80217

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance  
Deputy Commissioner and Counsel  
Albany, New York 12227  
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petitions  
of  
NATIONAL TIRES, INC.  
for Redetermination of a Deficiency or  
for Refund of Corporation Franchise Tax  
under Article 9A of the Tax Law for the  
Fiscal Years ending February 28, 1970,  
February 28, 1971, February 28, 1973 and  
December 31, 1973.

---

:  
:  
:  
DECISION  
:  
:  
:  
:  
:  
:  
:

Petitioner, National Tires, Inc., P.O. Box 5887, Denver, Colorado 80217, filed petitions for redetermination of a deficiency or for refund of corporation franchise tax under Article 9A of the Tax Law for the fiscal years ending February 28, 1970, February 28, 1971, February 28, 1973 and December 31, 1973 (File Nos. 14401 and 17228).

A formal hearing was held before Louis M. Klein, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Campus, Albany, New York, on June 13, 1977 at 9:15 A.M. Petitioner appeared by its assistant treasurer, Roger H. Talich. The Audit Division appeared by Peter Crotty, Esq. (Laurence E. Stevens, Esq., of counsel).

ISSUE

Whether petitioner's activities within New York State exceed the minimum standards set forth in Title 15 USC section 381, thereby enabling New York to impose a tax on petitioner's net income.

FINDINGS OF FACT

1. Petitioner, National Tires, Inc., failed to file timely New York State corporation franchise tax returns for the fiscal years ending February 28, 1970, February 28, 1971, February 28, 1973 and December 31, 1973.

2. On May 15, 1973, the Corporation Tax Bureau issued statements of audit adjustment against petitioner, imposing corporation franchise taxes for the fiscal years ending February 28, 1970 and February 28, 1971 in the sums of \$11,010.32 and \$23,396.27, respectively, inclusive of interest, on the grounds that petitioner's activities within New York State exceeded solicitation which is exempt from taxation under Title 15 USC section 381. Accordingly, notices of deficiency dated May 15, 1973, were issued for those amounts.

3. On July 2, 1976, the Corporation Tax Bureau issued statements of audit adjustment against petitioner, imposing corporation franchise taxes for the periods ending February 28, 1973 and December 31, 1973, in the sums of \$18,723.00 and \$13,167.00, inclusive of interest, respectively. This was done on the grounds that petitioner's activities within New York State exceeded solicitation which is exempt from taxation under Title 15 USC section 381. Accordingly, notices of deficiency dated July 2, 1976 were issued for those amounts.

4. Thereafter, petitioner filed petitions for redetermination of the deficiencies, which petitions were dated July 27, 1973 and September 28, 1976.

5. During the periods at issue, petitioner had only one or two employees within New York. These employees were in reality salesmen who carried the title of district manager. Petitioner had no property, no inventories, no office, no telephone listings and no business address in New York.

6. Petitioner's products were sold directly to only one customer, known by the names of NAPA (National Automotive Parts Association) or Genuine Parts Company. These products consisted of automotive hoses and belts and were sold by NAPA under NAPA's trade name.

7. The duties of the district managers are to promote the sale of the petitioner's products. They promote these products by calling upon NAPA and

the customers of NAPA. The calls on the customers of NAPA are made with NAPA's salesmen. When making these calls, the district managers may spot-check inventories, update automotive parts catalogs, arrange displays, advise on the proper use of promotional materials, assist in assessing the demand for petitioner's products, assist the customers of NAPA in acquiring new customers and survey fleets of vehicles for which of the products of the petitioner may be of proper use in that type of vehicle.

8. The petitioner also had a zone manager who would visit New York State to review the operation.

#### CONCLUSIONS OF LAW

A. That Title 15 U.S.C. section 381 provides in pertinent part as follows:

"(a) No State...shall have power to impose...a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person...are either, or both, of the following:

(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and if approved, are filled by shipment or delivery from a point outside the State; and

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer...to fill orders resulting from such solicitation are orders described in paragraph (1).

(b) The provisions of subsection (a) shall not apply to the imposition of a net income tax by any State...with respect to -

(1) any corporation...incorporated under the laws of such State; or

(2) any individual who...is domiciled in, or a resident of, such State."

B. That petitioner's activities in New York State through its district managers and zone managers did not exceed the mere solicitation of orders. Accordingly, the State is precluded by Title 15 U.S.C. section 381 from imposing

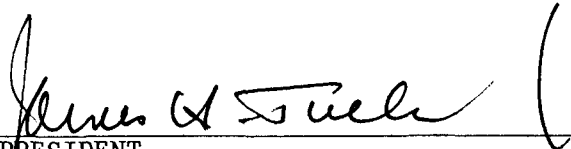
a net income tax on petitioner's income. Matter of the Gillette Company v. State Tax Commission, 56 A.D.2d 475, aff'd 45 N.Y. 2d 846.

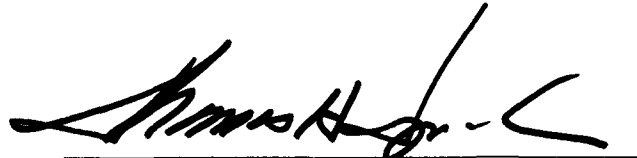
C. That the claims for redetermination or for refund of corporation franchise tax of petitioner, National Tires, Inc., are granted, and that the notices of deficiency issued on May 15, 1973 and July 2, 1976 are cancelled in full.

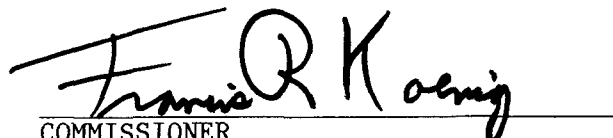
DATED: Albany, New York

OCT 17 1980

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER