

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

L. H. Simmonds, Inc. : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Stock Transfer Tax :
under Article 12 of the Tax Law for the Year 1981. :

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 5th day of October, 1984, he served the within notice of Decision by certified mail upon L. H. Simmonds, Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

L. H. Simmonds, Inc.
c/o Peter R. Cottrell, President
316 Fifth Ave., Room 301
New York, NY 10001

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
5th day of October, 1984.

David Parchuck

James A. [Signature]

Authorized to administer oaths
pursuant to Tax Law section 174

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

October 5, 1984

L. H. Simmonds, Inc.
c/o Peter R. Cottrell, President
316 Fifth Ave., Room 301
New York, NY 10001

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) 279A of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 90 days 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
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

STATE TAX COMMISSION

A formal hearing was held before Frank W. Barrie, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 26, 1984 at 1:15 P.M. Petitioner appeared by its president, Peter R. Cottrell. The Audit Division appeared by John P. Dugan, Esq. (Anna Colello, Esq., of counsel).

ISSUE

Whether stock transfer tax was properly imposed on the transfer of 477,500 shares of petitioner's stock, which was worth substantially less than the taxes imposed.

FINDINGS OF FACT

1. On November 18, 1982, petitioner, L. H. Simmonds, Inc., applied for a refund of New York State stock transfer tax in the amount of \$927.50. Petitioner provided the following explanation to support its application:

"It is requested that the tax paid be refunded in whole or in part inasmuch as the tax was over twice the total gross sales prices (\$520.00) of the transfers... Whereas Simmonds was audited twice in

prior years, our Secretary was never given a copy of the law or advised of possible tax consequences".

2. Petitioner paid stock transfer tax during 1981, under protest, on the following transfers of its stock:

<u>Date of Transfer</u>	<u>No. of Shares Transferred</u>	<u>Gross Selling Price</u>	<u>Price Per Share</u>	<u>Transferor</u>	<u>Transferee</u>	<u>Stock Transfer Tax</u>
July 20, 1978	100,000	\$220.00	.0022	Peter Cottrell	John Hrivnak	\$ 437.50
Dec. 21, 1979	200,000	200.00	.0010	Henry Meyer	John Hrivnak	350.00
Dec. 21, 1979	177,500	100.00	.0006	Peter Cottrell	Edward Valenti	350.00
		<u>\$520.00</u>				<u>\$1,137.50</u>

Petitioner received a statutory rebate of \$210.00¹ on the stock transfer tax paid on the transfers of December 21, 1979. Petitioner is seeking a refund of the balance, \$927.50.

3. On December 15, 1982, the Audit Division denied petitioner's refund request. The following explanation was provided:

"(T)here is no legal basis on which your refund claim can be approved and that we have no alternative but to deny your claim in its entirety".

4. Petitioner's principal business activity is finding sales representatives for manufacturers, in particular, manufacturers of industrial products. Petitioner initially charges a manufacturer approximately one hundred dollars for its assistance in finding a sales representative. If the representative proves satisfactory, there is an additional charge of several hundred dollars. Petitioner's business has not been profitable, and it has incurred operating losses in each of the past five years and has an operating deficit of over \$18,000.00. It appears to have no employees who receive taxable wages.

5. According to a letter dated November 29, 1980 from Peter Cottrell, petitioner's president, to the Stock Transfer Tax Section, the stock transfers

¹ Thirty percent (or \$210.00) of the \$700.00, which was paid on the transfers of December 21, 1979, was rebated to petitioner pursuant to Tax Law §280-a.

at issue "were essentially for the purpose of the selling stockholders recording actual sale transactions to determine their actual losses on their investments in the Company".

6. Prior owners of petitioner's stock, for unclear reasons, decided to capitalize it at one million shares of stock. John Hrivnak, an officer of petitioner, suggests that they "had big ideas".

7. Petitioner and its officers were unaware of the stock transfer tax rates² and their potential liability for the transfer of nearly one-half million shares of petitioner's stock. Petitioner (which is its own stock transfer agent) argued that the Stock Transfer Tax Section should have provided it with annual reporting forms or conducted regular annual field audits so that it would have been aware of potential stock transfer tax liabilities. Petitioner further argues that it would have reduced its capitalization from 1,000,000 shares to 1,000 shares if it had been aware of the way in which stock transfer tax liability is calculated. According to petitioner, if the Audit Division had timely audited the stock transfer on July 20, 1978, the transfers of December 21, 1979 would not have transpired.

CONCLUSIONS OF LAW

A. That although it is unfortunate that petitioner's liability for stock transfer tax of \$927.50 (which was imposed on the transfer of nearly one-half million shares of its stock) is greater than the gross selling price of \$520.00 for such shares, there is no basis in the law for the State Tax Commission to

² The tax rate is 1½¢ per share for a share with a selling price less than \$5.00 and where any single sale relates to shares of the same class which are issued by the same issuer, the tax may not exceed \$350.00. Pursuant to Tax Law §280-a, the effects of the stock transfer tax were phased out by October 1, 1981 through a series of rebates.

grant petitioner's refund application. The Commission is not empowered to create exceptions to the imposition of stock transfer tax.

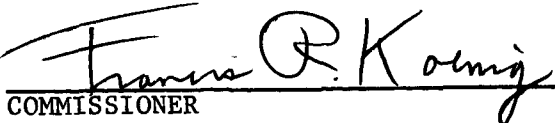
B. That the petition of L. H. Simmonds, Inc. is denied.


DATED: Albany, New York

STATE TAX COMMISSION

OCT 05 1984


PRESIDENT


COMMISSIONER


COMMISSIONER