

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Philip & Rosanne Birnbach :
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Personal Income & :
Unincorporated Business Taxes under Articles 22 & :
23 of the Tax Law for the Years 1979 - 1980. :
:

AFFIDAVIT OF MAILING

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 21st day of August, 1985, he served the within notice of Decision by certified mail upon Philip & Rosanne Birnbach, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Philip & Rosanne Birnbach
47 Columbia Place
Brooklyn, NY 11201

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
21st day of August, 1985.

David Parchuck

James P. Hegelund
Authorized to administer oaths
pursuant to Tax Law section 174

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

August 21, 1985

Philip & Rosanne Birnbach
47 Columbia Place
Brooklyn, NY 11201

Dear Mr. & Mrs. Birnbach:

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) 690 & 722 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 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
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 OF NEW YORK

STATE TAX COMMISSION

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| In the Matter of the Petition | : | |
| of | : | |
| ARCHIE P. ANTONELLI & SONS, 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 Ended May 31, | : | |
| 1979. | : | |

Petitioner, Archie P. Antonelli & Sons, Inc., 1 Farmstead Road, New Windsor, New York 12550, 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 ended May 31, 1979 (File No. 46711).

A hearing was held before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 10, 1985 at 9:00 A.M. Petitioner appeared by Thomas R. DiGiovanni, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Mark F. Volk, Esq., of counsel).

ISSUE

Whether petitioner is liable for sales and use tax on the purchase of vending machines from General Management Systems Corp.

FINDINGS OF FACT

1. On July 15, 1983, as the result of a field audit of General Management Systems Corp. ("General"), the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against the petitioner, Archie P. Antonelli & Sons, Inc., for taxes due of \$2,894.00, plus interest of

\$1,238.75, for a total amount due of \$4,132.75 for the period ended May 31, 1979. The notice provided the following explanation:

"Tax is due on the transfer of tangible personal property, in accordance with the provisions of Sections 1138 and 1141(c) of the Sales Tax Law."

2. On August 2, 1983, the petitioner timely filed a petition for a hearing to review the notice of determination. Petitioner asserts that sales of routes and vending machines were the regular business of General and, therefore, the sale at issue was not a bulk sale. Since the sale at issue was not a bulk sale, petitioner claims that the July 15, 1983 notice covering the period ended May 31, 1979 was untimely. Petitioner further contends that the total sales price for the route and vending machines included sales tax.

3. It is the position of the Audit Division that the sale at issue was a retail sale subject to tax under section 1105(a) of the Tax Law and that, since General did not file a sales and use tax return for the period ended May 31, 1979, the July 15, 1983 notice was timely.

4. During the period 1979 through 1983, General's income consisted of management fees, sales of bulk coffee and other vending machine products to vending machine operators and sales of bulk coffee to individual vending locations operated by it. In addition, in January or February, 1979, General purchased numerous vending machines capable of dispensing soda, coffee, snacks, hot canned food, cold food and cigarettes. The petitioner established two routes with said machines and initiated the sale of items therein.

5. On February 27, 1979, General sold one of the routes with vending machines to JMT Vending Corp for \$50,311.00 and, on May 1, 1979, sold the other route with vending machines to petitioner for \$86,549.80. The auditor assessed sales and use taxes of \$2,894.00 against the petitioner based on the valuation

of the vending machines at \$55,400.00. The sale to petitioner consisted of 28 vending machines at five locations throughout Dutchess County. There was no evidence in the sales agreement that sales tax was an element of the sales price.

On June 29, 1983, the Audit Division sent a Notice of Claim to Purchaser to petitioner advising petitioner that the Audit Division has received information that petitioner was the purchaser in the bulk sale of General's business assets.

6. Throughout the period 1979 to 1983, General was not registered as a vendor for sales tax purposes with the Audit Division and, further, had not filed sales and use tax returns for this period. A sales tax Certificate of Registration on behalf of General was completed and submitted to the Audit Division by the auditor.

7. At the hearing held herein, petitioner contended that in 1979, General's business operations changed from that of servicing vending machine operators to being primarily that of developing and selling routes with vending machines. Petitioner further contended that it knew of at least eight routes with vending machines that were established and sold by General. Petitioner offered no evidence to support its contentions.

8. There was no evidence presented that the petitioner filed a sales and use tax return for the period ended May 31, 1979.

CONCLUSIONS OF LAW

A. That section 1105(a) of the Tax Law imposes a sales tax on the receipts from every retail sale of tangible personal property, with certain exceptions not relevant here.

B. That section 1131(1) defines persons required to collect tax to include every vendor of tangible personal property or services.

C. That section 1133(b) of the Tax Law provides the following:

"(b) Where any customer has failed to pay a tax imposed by this article to the person required to collect the same, then in addition to all other rights, obligations and remedies provided, such tax shall be payable by the customer directly to the tax commission and it shall be the duty of the customer to file a return with the tax commission and to pay the tax to it within twenty days of the date the tax was required to be paid."

Section 1147(b) provides, in pertinent part, that:

"(b) The provisions of the civil practice law and rules or any other law relative to limitations of time for the enforcement of a civil remedy shall not apply to any proceeding or action taken by the state or the tax commission to levy, appraise, assess, determine or enforce the collection of any tax or penalty provided by this article. However, except in the case of a wilfully false or fraudulent return with intent to evade the tax, no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return; provided, however, that where no return has been been filed as provided by law the tax may be assessed at any time...".

D. That whether or not a bulk sale took place, i.e. whether General's regular business was the development and sale of routes with vending machines, is not determinative of the taxes at issue. General was required to collect sales tax on receipts from the sale of vending machines to petitioner pursuant to section 1105(a) of the Tax Law. Since General failed to collect the taxes at issue, said taxes were payable by petitioner directly to the Audit Division pursuant to section 1133(b) of the Tax Law. Additionally, since General did not file a sales and use tax return for the period ended May 31, 1979, the three-year statute of limitations as specified in section 1147(b) of the Tax Law is inapplicable.

E. That the petition of Archie P. Antonelli & Sons, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued July 15, 1983 is sustained.

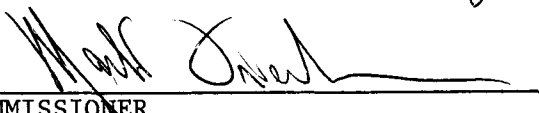
DATED: Albany, New York

STATE TAX COMMISSION

AUG 21 1985


PRESIDENT


COMMISSIONER


COMMISSIONER