

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

MORRIS WITTENBERG

D/B/A MORRIS TOYLAND

AFFIDAVIT OF MAILING

For a Redetermination of a Deficiency or
a Revision of a Determination or a Refund
of Sales and Use
Taxes under Article(s) 28 and 29 of the
Tax Law for the ~~Year(s) or Period(s)~~
~~XXXXXXXXXX~~
August 1, 1965 - August 31, 1967.

State of New York
County of Albany

Carmen Mottolese, being duly sworn, deposes and says that
she is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 6th day of August, 1976, she served the within
Notice of Determination by ~~(certified)~~ mail upon Morris Wittenberg
d/b/a Morris Toyland ~~(representative of)~~ the petitioner in the within proceeding,
by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed
as follows: Morris Wittenberg
d/b/a Morris Toyland
1896 Third Avenue
New York, New York

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 ~~(representative)~~
~~XXXXXX~~ petitioner herein and that the address set forth on said wrapper is the
last known address of the ~~(representative of the)~~ petitioner.

Sworn to before me this

6th day of August, 1976.

Carmen Mottolese

Janet Mack



ADDRESS YOUR REPLY TO

TELEPHONE: (518) 457-3850

Dear Mr. Wittenberg:

cc: ~~XXXXXXXXXX:XXXXXXXXXX~~

TA-1.12 (1/76)

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
	:	
of	:	
	:	
MORRIS WITTENBERG,	:	DETERMINATION
d/b/a MORRIS TOYLAND	:	
	:	
for Revision of a Determination or for	:	
Refund of Sales or Use Taxes Due under	:	
Articles 28 and 29 of the Tax Law for	:	
the Periods August 1, 1965 through	:	
August 31, 1967.	:	

Morris Wittenberg, d/b/a Morris Toyland, 1896 Third Avenue, New York, New York, filed an application under sections 1138 and 1250 of the Tax Law for a hearing to review a determination of sales taxes due under Articles 28 and 29 of the Tax Law for the periods August 1, 1965 through August 31, 1967.

Said determination was asserted by Notice No. 90,753,979 issued February 5, 1968, and is in the amount of \$7,103.77 plus interest and penalty of \$1,293.37 for a total of \$8,397.14.

A hearing was duly held on October 21, 1975, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, before Nigel G. Wright, Hearing Officer. The applicant appeared by its sole owner, Morris Wittenberg. The Sales Tax Bureau was represented by Peter Crotty, Esq., appearing by

Michael Alexander, Esq. The record of said hearing has been duly examined and considered.

ISSUES

The issues in this case are the amount of applicant's taxable sales and the rate at which sales tax should be computed.

FINDINGS OF FACT

1. Applicant, Morris Wittenberg, does business as a sole proprietor under the name of Morris Toyland at 1896 Third Avenue, New York City. His sales consist mostly of toys and stationary. He also repairs bicycles.

2. Applicant sells toys to some organizations exempt from sales tax. These included churches, settlement houses and youth programs. These sales to exempt organizations had not become a great part of applicant's business prior to the close of the period under review. Applicant asserts that on many small sales to children he chose to absorb the sales tax. However, applicant has shown no documentation of this.

3. Applicant filed sales tax returns. The amounts shown for taxable sales for the entire audit period amounted to 62.42% of the reported gross sales. The statutory sales tax rate at the time was 5%.

4. An audit was made of applicant's business. The month of March, 1967 was used as a test period. The applicant could produce bills to exempt organizations to account for only 3.45% of his gross receipts. Applicant has not produced any further documentation as to items of sales which would be exempt from tax.

5a. The determination under review is computed on the basis of taxable sales amounting to 96.55% of the reported gross sales. The applicant's reported total sales are accepted as filed.

b. The determination computes the applicable sales tax rate to take into account over-collections by applicant under the bracket system of collection. The auditor used a figure of 5.15% which is based on his own experience of auditing retail stores. He did not, however, check this against applicant's own records.

CONCLUSIONS OF LAW

A. That the taxable sales as audited are found to be correct. The applicant has the burden of showing the amount of any additional amount of exempt sales which should be subtracted from gross sales. This burden has not been met.

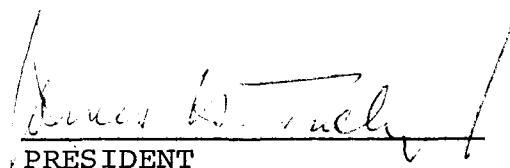
B. That the tax should be computed at the statutory rate and not at any higher effective rate. The effective rate used in the audit under review is not based on an examination of this applicant's own experience. Applicant has shown no reason why the

penalty and interest should be reduced below the amount stated in the determination under review.

C. That the determination under review is redetermined to be \$6,555.20 with penalty and interest of \$1,293.37 for a total of \$7,848.57. Said sum is due together with such further interest as shall be computed under section 1145 of the Tax Law.

DATED: Albany, New York
August 6, 1976

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER