

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Application

of

MORRIS WITTENBERG,  
d/b/a MORRIS TOYLAND

DETERMINATION

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.

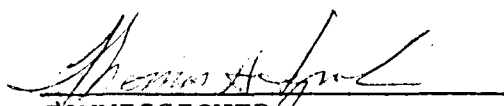
C. That the determination under review is redetermined to be \$6,555.20 with penalty and interest of \$1,293.37 for a total of \$7,848.57. Said sum is due together with such further interest as shall be computed under section 1145 of the Tax Law.

DATED: Albany, New York  
August 6, 1976

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER