STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
H. R. Scott, Inc. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Sales & Use Tax :
under Article 28 & 29 of the Tax Law
for the Period 6/1/72-5/21/75. :

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 18th day of January, 1980, he served the within notice of Determination by mail upon H. R. Scott, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

H. R. Scott, Inc.
64 Exchange Pl.
New York, NY 10004

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
18th day of January, 1980.

Joanne Knapp

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
H. R. Scott, Inc. :

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Sales & Use Tax :
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for the Period 6/1/72-5/21/75. :

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 18th day of January, 1980, he served the within notice of Determination by mail upon Allen H. Toby the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Allen H. Toby
Charles Hecht & Co.
595 Madison Ave.
New York, NY 10022

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 of the 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
18th day of January, 1980.

Joanne Knapp

J. Vredenburg

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

January 18, 1980

H. R. Scott, Inc.
64 Exchange Pl.
New York, NY 10004

Gentlemen:

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

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1138 & 1243 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
Allen H. Toby
Charles Hecht & Co.
595 Madison Ave.
New York, NY 10022
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
H. R. SCOTT, INC.	:	DETERMINATION
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 June 1, 1972 through May 31, 1975.	:	

Applicant, H. R. Scott, Inc., 64 Exchange Place, New York, New York 10004, filed an application 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 June 1, 1972 through May 31, 1975 (File No. 14759).

A small claims hearing was held before Raymond J. Siegel, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 14, 1978 and was continued on November 27, 1978. Applicant appeared by Charles Hecht & Company (Allen H. Toby, CPA). The Audit Division appeared by Peter Crotty, Esq. (Robert Felix and Frank Levitt, Esqs., of counsel).

ISSUES

I. Whether applicant, by posting a sign stating that sales tax is included in taxable sales, has properly charged and collected sales tax on its sales of cigars and cigarettes.

II. Whether applicant properly reported its taxable sales.

III. Whether the penalties and interest in excess of the minimum statutory rates should be cancelled.

FINDINGS OF FACT

1. Applicant, H. R. Scott, Inc., operated a cigar store located in New York City. Applicant filed New York State and local sales tax returns for the period June 1, 1972 through May 31, 1975.

2. A timely filed consent extending the period of limitation for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law was obtained by the Sales Tax Bureau for the period June 1, 1972 through May 31, 1975.

3. On April 26, 1976, as the result of an audit of applicant's books and records, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against applicant, H. R. Scott, Inc., and Elliott Blum, individually and as officer, for the period June 1, 1972 through May 31, 1975, for taxes due of $1,924.40, plus penalty and interest of $806.57, for a total due of $2,730.97.

4. Applicant displayed a placard at applicant's store which stated that the sales price included sales tax. Applicant recorded on its books the total sales price which included sales tax. Applicant computed its taxable sales and sales tax due by reducing total receipts per records by nontaxable sales and sales to other jurisdictions (those subject to State rate only). The balance was divided by 1.07 (6/1/72 through 6/30/74) and 1.08 (7/1/74 through 5/31/75). The sales subject to only the State rate were divided by 1.04 (6/1/72 through 5/31/75). This procedure segregated the taxable sales and the sales tax due.

5. On audit, the Audit Division did markup tests on cigars and cigarettes based on costs and selling prices for the month of August, 1975; the resultant markups of 43 percent and 31.3 percent, respectively, were based on the Audit Division's determination that the selling prices did not include sales tax. This determination was made because the placard displayed by applicant did not

separately state the selling price and the sales tax due thereon. Accordingly, the Division recomputed the tax due on cigar and cigarette sales, using the markups of 43 percent and 31.3 percent, respectively, to arrive at additional tax due of $1,573.44 on the sale of cigars and cigarettes. The New York State sales, on which only the State tax rate of 4 percent had been paid, were analyzed for the month of January, 1975. The auditor found that some of these sales were made in New York City and that the wrong tax rate was applied to applicant's taxable sales. This resulted in an error rate of 66.5 percent on New York State sales and a tax due thereon of $350.96.

6. Applicant, H. R. Scott, Inc., contended that the purchase markup percentages are overstated and should be reduced to reflect the inclusion of sales tax in applicant's selling price of cigars and cigarettes.

7. Applicant also contended that by displaying the sign stating that sales tax was included in the selling price applicant was putting the public on notice that sales tax was being charged and that applicant was not circumventing the meaning and intent of Section 1133(d) of the Tax Law by holding out to the public that the tax is not considered as an element in the price to the customer.

8. Applicant at all times acted in good faith.

CONCLUSIONS OF LAW

A. That applicant, H. R. Scott, Inc., charged and collected sales tax on sales of cigars and cigarettes.

B. That the markup percentages used by the Audit Division in computing additional sales tax due from applicant on sales of cigars and cigarettes are not reflective of applicant's selling price since they pre-suppose that no sales tax was charged and collected and therefore, the additional tax due on the markup of cigars and cigarettes in the sum of $1,573.44 is cancelled.

C. That the Audit Division properly computed the error rate of 66.5 percent on tax paid for New York State sales.

D. That the penalties and interest in excess of the minimum statutory rate are cancelled.

E. That the application of H. R. Scott, Inc. is granted to the extent of reducing the additional taxes due for the period June 1, 1972 through May 31, 1975 from $1,924.40 to $350.96; that such tax due shall be together with interest at the minimum statutory rate. The Audit Division is hereby directed to modify accordingly the Notice of Determination and Demand for Payments of Sales and Use Taxes Due issued April 26, 1976. Except as so granted, the application is in all other respects denied.

DATED: Albany, New York

JAN 1 8 1980

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER