

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Columbia Southwind Hotel, Ltd. :

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 6/1/74-11/30/76. :

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 30th day of January, 1981, he served the within notice of Decision by mail upon Columbia Southwind Hotel, Ltd., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Columbia Southwind Hotel, Ltd.
c/o D. Moskowitz
165-17 65th St.
Flushing, NY 11365

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
30th day of January, 1981.

Courice P. Haycland

Jay Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Columbia Southwind Hotel, Ltd. :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
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Sales & Use Tax :
under Article 28 & 29 of the Tax Law
for the Period 6/1/74-11/30/76. :

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 30th day of January, 1981, he served the within notice of Decision by mail upon John A. Mitchell 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. John A. Mitchell
58-35 College Point Blvd.
Flushing, NY 11355

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
30th day of January, 1981.

Connie R. Hagelund

J. Vredenburg

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

January 30, 1981

Columbia Southwind Hotel, Ltd.
c/o D. Moskowitz
165-17 65th St.
Flushing, NY 11365

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) 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
John A. Mitchell
58-35 College Point Blvd.
Flushing, NY 11355
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
COLUMBIA SOUTHWIND HOTEL, LTD. : 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 June 1, 1974 through November 30, :
1976. :

Petitioner, Columbia Southwind Hotel, Ltd., c/o David Moskowitz, 165-17 65th Street, Flushing, New York 11365, 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 June 1, 1974 through November 30, 1976 (File No. 21765).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 17, 1980 at 1:15 P.M. Petitioner appeared by John A. Mitchell, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Samuel Freund, Esq., of counsel).

ISSUES

I. Whether petitioner's purchase of real estate and personal property constituted a bulk sale of the business assets of M & S Hotels, Inc. in accordance with the meaning and intent of section 1141(c) of the Tax Law.

II. Whether petitioner is liable for sales taxes due from M & S Hotels, Inc. pursuant to the bulk sale provisions of section 1141(c) of the Tax Law.

III. Whether the Audit Division accurately determined the sales tax liability of M & S Hotels, Inc. for the period June 1, 1974 through November 30, 1976.

FINDINGS OF FACT

1. On February 18, 1977, the Audit Division received a Notification of Sale, Transfer or Assignment in Bulk from petitioner Columbia Southwind Hotel, Ltd. regarding its purchase of the Hotel Columbia from M & S Hotels, Inc. It also gave notice of the sale of the Hotel Washington to Central Willow Hotel, Inc. by M & M Hotels, Inc. Said notification indicated December 30, 1976 as the scheduled date of sale and listed the total sales price of the real estate and personal property for both transactions as \$150,000.00. The total sales price of the furniture and fixtures was \$5,000.00 and tax was paid thereon of \$200.00. The notification was signed by David Moskowitz as president of both Columbia Southwind Hotel, Ltd. and Central Willow Hotel, Inc.

2. On April 27, 1977, the Audit Division notified Columbia Southwind Hotel, Ltd. (petitioner herein), as purchaser in the bulk sale and M & S Hotels, Inc. (seller) of a possible claim for New York State and local sales and use taxes due.

3. On July 26, 1977, the Audit Division issued notices of determination and demand for payment of sales and use taxes due against petitioner and the seller for taxes due of \$6,568.00, plus penalty and interest of \$2,904.88, for a total of \$9,472.88. The taxes due were determined based on a field audit of the sellers available books and records for the period June 1, 1974 through November 30, 1976. Petitioner was held liable for the taxes determined due from the seller pursuant to section 1141(c) of the Tax Law.

4. During the period at issue, M & S Hotels, Inc. operated the Hotel Columbia located in Sharon Springs, New York. The hotel opened the latter part of June and closed shortly after Labor Day. The charge to guests was on a weekly basis which included a room and three meals. The hotel was old and not in good condition. The rooms did not have televisions, telephones and in

most cases did not have private baths. The bathroom was located in the hallway. There was no restaurant or bar on the premises.

5. The accountant for M & S Hotels, Inc. provided the Audit Division with the following books and records for audit: general ledger, cash receipts and disbursements journal, Federal tax returns and sales tax returns. However, guest registration cards and purchase invoices were not available for examination to enable the Audit Division to verify the entries recorded in the cash receipts and disbursements journals. A reconciliation of gross sales revealed that such sales were understated by approximately \$3,400.00 as reported on the sales tax returns. The Audit Division contacted petitioner to obtain information regarding the business operations of the Hotel Columbia. Petitioner provided the following pertinent data: 88 rooms, 65 percent occupancy rate and average weekly charge of \$140.00 per person. Based on this information, the Audit Division determined gross sales of \$441,097.00 or an increase of \$164,200.00 over reported gross sales.

6. The Audit Division overstated the estimated gross sales of the Hotel Columbia referred to in Finding of Fact "5" in that the estimated gross sales of the Hotel Washington were included in its computation of the percentage of increase for 1976. The Hotel Washington is operated by a separate corporation, M & M Hotels, Inc., which ceased operations in 1975.

7. On December 14, 1977, at an informal conference held at the Bronx District Office, M & S Hotels, Inc. produced guest registration cards purporting to be all cards for the audit period for both the Hotel Columbia and Hotel Washington. The same registration cards were used by both hotels. The cards totaled \$271,574.00 as compared to sales reported on sales tax returns of \$290,830.00. Additionally, they were not in numerical sequence. Thus, the

Audit Division concluded that the cards were incomplete and did not adjust the tax previously determined.

At the conference, M & S Hotels, Inc. argued that the average percentage of occupancy was 45 percent rather than 65 percent.

8. Petitioner argued that the information given to the Audit Division with respect to occupancy percentages was erroneous in that such percentage was applicable only to the time it was requested (July 19, 1977) and was not meant to be construed as a seasonal average. Petitioner maintained that at the time it gave the Audit Division the information, it was just beginning its first season in operation, and therefore, was in no position to give an accurate average for the entire season.

9. Petitioner testified at the hearing that based on its experience with the operation of the hotel over three seasons, the occupancy percentage ranged from approximately 2 percent to 65 percent as follows:

2 percent	1st week
10 to 12 percent	2nd week
65 percent	3rd and 4th week
40 percent	5th week
20 percent	6th week
10 to 15 percent	7th and 8th week
5 percent	9th week

Petitioner also testified that its gross income was approximately \$90,000.00 in each of the years 1977 and 1978 and then declined to \$60,000.00 in 1979 due to the gasoline shortage. Petitioner discontinued business operations at the end of the 1979 season.

Based on the above estimated percentages, petitioner's gross sales for a season would be approximately \$40,000.00.

10. Petitioner contended that it purchased real estate and personal property, not the business, and therefore such transaction was not a bulk sale.

11. Petitioner acted in good faith at all times.

CONCLUSIONS OF LAW

A. That the real estate and personal property of M & S Hotels, Inc. were business assets and that the sale thereof constituted a bulk sale within the meaning and intent of section 1141(c) of the Tax Law.

B. That petitioner is liable for the taxes determined to be due from M & S Hotels, Inc. in accordance with the provisions of section 1141(c) of the Tax Law.

C. That M & S Hotels, Inc. did not maintain sufficient books and records for the Audit Division to determine the exact amount of taxable sales; therefore, the Audit Division properly determined the amount of tax due from such information as was available and external indices, pursuant to section 1138(a) of the Tax Law. However, based on Finding of Fact "6", the additional taxable sales are reduced to \$106,983.00. (Gross sales per season \$127,960 x 3 seasons in audit period = \$383,880.00 — reported sales \$276,897 = additional taxable sales \$106,983.00.)

D. That the petition of Columbia Southwind Hotels, Ltd. is granted to the extent indicated in Conclusion of Law "C"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued July 26, 1977, together with interest computed at the minimum statutory rate; and that, except as so granted, the petition is in all other respects denied.

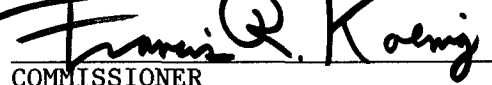
DATED: Albany, New York

JAN 30 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER