

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

April 27, 1983

Fontainebleau Novelties, Inc.
26 Jericho Turnpike
Jericho, NY 11753

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 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
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Morris Turetzky
Turetzky, Sternheim & Co.
114 Liberty St, Suite 204
New York, NY 10006
Taxing Bureau's Representative

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of
FONTAINEBLEAU NOVELTIES, INC.
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, 1975
through May 31, 1978.

DECISION

Petitioner, Fontainebleau Novelties, Inc., 26 Jericho Turnpike, Jericho, New York 11753, 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, 1975 through May 31, 1978 (File No. 25634).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 15, 1982 at 10:45 A.M. Petitioner appeared by Isaac Sternheim, CPA and Morris Turetzky, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Anna Colello, Esq., of counsel).

ISSUE

Whether the balance in petitioner's sales tax payable account in the general ledger which was attributable to sales prior to June 1, 1975 was properly held due on audit.

FINDINGS OF FACT

1. On January 2, 1979, as a result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Fontainebleau Novelties, Inc. covering the period June 1, 1975

through May 31, 1978. The Notice asserted tax due of \$5,890.01, plus penalty and interest of \$3,583.91, for a total of \$9,473.92.

2. Petitioner, by signature of Seymour Schenkman, president, executed a consent to extend the period of limitation for the issuance of an assessment for the period June 1, 1975 through May 31, 1978 to September 20, 1979.

3. On audit, the Audit Division found that petitioner consistently maintained a balance in its sales tax accrual account in its general ledger. The balance attributable to sales made in the audit period of June 1, 1975 through May 31, 1978 was \$1,389.92. Petitioner's balance attributable to sales made prior to June 1, 1975 was \$4,500.09. The Audit Division held the entire balance in petitioner's sales tax accrual account due to New York State on the grounds that the tax was collected from its customers as trustee of the State, and it remained a current liability of petitioner. The Audit Division thereby determined the sales tax deficiency of \$5,890.01.

4. It was petitioner's position that the sales tax held due on audit in the amount of \$4,500.09 accumulated from sales prior to June 1, 1975 and was therefore beyond the Statute of Limitations set forth in section 1147(b) of the Tax Law. Petitioner argued that all sales tax returns were filed for periods prior to June 1, 1975 and such returns filed were not fraudulent.

5. Petitioner offered no explanation of the excess sales tax collections over remittances for the audit period.

6. Petitioner argued that penalty and interest in excess of the minimum statutory rate should be cancelled; however, it offered no documentary evidence or testimony that the deficiency was due to reasonable cause.

CONCLUSIONS OF LAW

A. That section 1147(b) of the Tax Law provides, in part, "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."

B. That absent any evidence that returns filed for periods prior to June 1, 1975 were wilfully false or fraudulent or that returns were not filed, the audit results are limited to those excess sales tax collections not remitted subsequent to May 31, 1975.

C. That no explanation was given concerning petitioner's not reporting the entire accumulation of sales tax in its sales tax payable account; therefore, reasonable cause was not established for the abatement of penalty and interest in excess of the minimum statutory rate.

D. That the petition of Fontainebleau Novelties, Inc. is granted to the extent indicated in Conclusion of Law "B" above; that the Audit Division is directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued January 2, 1979 with applicable penalty and interest thereon; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

APR 27 1983

Roderica O. Chin
PRESIDENT

Francis R. Koenig
COMMISSIONER

[Signature]
COMMISSIONER