

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

May 6, 1983

Savemart, Inc.
and Fred Babitz and Ben Blank as Officers
c/o Michael Cook
104 E. 40th St.
New York, NY 10016

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
Michael Cook
104 E. 40th St.
New York, NY 10016
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Savemart, Inc. :
and Fred Babitz and Ben Blank as Officers :
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 :
3/1/75-8/31/78. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

David Parchuck, 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 6th day of May, 1983, he served the within notice of Decision by certified mail upon Savemart, Inc., and Fred Babitz and Ben Blank as Officers, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Savemart, Inc.
and Fred Babitz and Ben Blank as Officers
c/o Michael Cook
104 E. 40th St.
New York, NY 10016

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
6th day of May, 1983.

David Parchuck

Amie A. DeLuca

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Savemart, Inc. :
and Fred Babitz and Ben Blank as Officers : **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 3/1/75-8/31/78. :

State of New York
County of Albany

David Parchuck, 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 6th day of May, 1983, he served the within notice of Decision by certified mail upon Michael Cook the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Michael Cook
104 E. 40th St.
New York, NY 10016

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
6th day of May, 1983.

David Parchuck

Annice A. Heyland

**AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174**

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
SAVEMART, INC. and : DECISION
FRED BABITZ and BEN BLANK :
as officers :
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 March 1, 1975 :
through August 31, 1978. :

Petitioner Savemart, Inc., 332 East 149th Street, Bronx, New York 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 March 1, 1975 through August 31, 1978. Petitioners Fred Babitz, 104 East 40th Street, New York, New York and Ben Blank, 108 Edgecliff Terrace, Yonkers, New York, officers of Savemart, joined in the petition of Savemart, Inc. (File Nos. 27251, 27252 and 27254).

A formal hearing was held before Nigel G. Wright, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on October 22, 1980 and continued on March 16, 1981 through March 20, 1981. The petitioners appeared by Michael Cook, Esq. The Audit Division appeared by Ralph Vecchio, Esq. (Irwin Levy and Samuel J. Freund, Esqs., of counsel).

ISSUE

Whether a sales tax pursuant to section 1105(a) of the Tax Law and a fraud penalty pursuant to section 1145(a)(2) of the Tax law are due on sales of \$2,896,782.10 made by Savemart, Inc. between March 1, 1975 and February 28, 1976 and identified on its books as wholesale sales to "Sam Schwartzstein care of Kennedy & Cohen".

FINDINGS OF FACT

1. a. On June 20, 1979, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued for the period March 1, 1975 through August 31, 1978 to Savemart, Inc. ("Savemart") of 332 East 149th Street, Bronx, New York 10451. This was in the amount of \$248,708.69 plus penalty of \$132,930.06 and interest of \$103,412.83 for a total of \$485,051.58.

b. Full penalty and interest was asserted for the quarters ending May 31, 1975 and August 31, 1975. A fifty percent fraud penalty plus full interest was asserted for the quarters ending November 30, 1975 and February 28, 1976. Full penalty and interest was asserted for the remaining quarters in the audit period.

2. Also on June 20, 1979 notices of determination and demand for payment of sales and use taxes due for the same period were issued to Fred Babitz, 145 Chadwick Place, Glen Rock, New Jersey and Ben Blank of 502 Park Avenue, New York, New York each as an officer of Savemart. These were each in the amount of \$246,611.80 plus penalty of \$132,153.03 and interest of \$102,757.18 for a total of \$481,522.01. (These determinations include the same amounts included in the determination against Savemart except for an amount of tax due on purchases which is included in the determination against Savemart and which is excluded from the determinations against the officers.)

3. a. The major portion of these determinations concern \$2,896,782.10 of sales by Savemart which petitioners allege were made to "Sam Schwartzstein care of Kennedy & Cohen". These sales were made entirely in the four calendar quarters between March 1, 1975 and February 28, 1976. The sales tax due thereon consists of \$231,742.57 out of the \$235,705.07 (excluding penalty and interest) assessed for those four periods. This would represent a 33 percent

increase over the taxes of \$702,991.96 reported due on the returns. With respect to these sales the auditor asserts that "these sales are actually unreported taxable retail sales which were fraudulently categorized as wholesale sales delivered out of state".

b. The remaining part of the audit has not been contested by the petitioners. It includes amounts due for use tax on purchases and sales tax due on sales (other than the Schwartzstein sales referred to above) alleged to be exempt as wholesale sales, out-of-state sales and consular sales but for which petitioners have not furnished adequate documentation.

4. a. Savemart is a large retailer and wholesaler of televisions and other appliances. Its principal place of business and its warehouse are located at 332 East 149th Street, Bronx, New York. It owns and operates 26 retail stores all within the New York City metropolitan area. Fred Babitz is its vice-president, in charge of distribution, inventory and wholesale transactions. Mr. Solomon Klein was the comptroller of Savemart during the audit period. He has retired from Savemart. He did not testify at the hearing. For the three and one-half year audit period Savemart's sales tax returns show gross sales of \$42,349,809.00 and taxable sales of \$35,836,811.00. Its average markup on purchases was 28 percent.

b. From 75 percent to 80 percent of Savemart's purchases are from the Zenith Corporation. It claims to be the biggest dealer of Zenith products in the country.

c. The price which Savemart pays for its purchases is negotiated to be the lowest it can get in return for a specified volume over a period of time. A typical purchase might be eight million dollars of television sets over a period of six months to a year. To obtain a low cost it is advantageous

for Savemart to make volume commitments far in excess of its own retail capacity with the expectation that the surplus will be sold at a wholesale price or even lower. It expects to turn over its investment four times a year.

d. The sales of each store were logged to that particular store.

e. Savemart maintained many bank accounts for use by its many stores.

Petitioners allege money was transferred frequently between these accounts.

The biggest account was with Franklin National Bank.

5. The sales of \$2,896,782.10 here in issue are recorded on Savemart's books and records. These books and records show sales of approximately 9,600 television sets on 61 separate invoices or statements of account. These were shipped on 27 separate bills of lading each issued by Container Service Company of 1269 McBride Avenue, West Patterson, New Jersey and later of 3445 Paterson Plank Road, Bergen, New Jersey. These showed receipt of the merchandise at 338 East 149th Street, Bronx, New York and showed the consignee to be Samuel Schwartzstein care of K & C Warehouse, 7600 N.W. 26th Street, Miami, Florida. The invoices show that a discount of usually 18 percent or 20 percent was given on the goods. Mr. Schwartzstein is most likely the single largest purchaser that Savemart has ever had. Savemart however has made many large volume sales to out-of-state purchasers.

6. a. "Kennedy & Cohen" was a very large distributor of televisions and other appliances in the south. It is well known in the industry. It had a warehouse in Miami, Florida, which is several city blocks long.

b. Kennedy & Cohen has gone out of business. Prior thereto it had been the subject of investigation by the Federal Bureau of Investigation and the Internal Revenue Service. These investigations apparently concerned violations of the Fair Trade Laws and large inventory shortages. Most of its

records have been lost or destroyed. Bankruptcy proceedings under Chapter 11 of the Bankruptcy Act were commenced with respect to Kennedy & Cohen on or before January 21, 1976. The business has been in the custody of M. L. Reese of P.O. Box 450628 Miami, Florida who is identified by the parties hereto as a "receiver".

c. "Southern Factors" was a corporation owned or controlled by the same interests as owned and controlled Kennedy & Cohen. Its books and records were intermingled with the books and records of Kennedy & Cohen. Its activities consisted of purchasing goods apparently as an agent of Kennedy & Cohen.

7. Samuel Schwartzstein was for a time a resident of Coral Gables, Florida where he was a home guest of Mr. Sam Magazine. No other information is known about Mr. Schwartzstein.

8. a. Container Service Co. was the trade name of a Vincent A. Marchese of Elizabeth, New Jersey. No such firm was ever registered with the Interstate Commerce Commission. It was first located at 1269 McBride Avenue, West Paterson, New Jersey. Later it moved to 3445 Paterson Plank Road, North Bergen, New Jersey. Mr. Marchese can not now be located. The address in West Paterson, New Jersey is the location of the McBride Car Wash Inc., the principle officer of which was George Olmo of Cloister, New Jersey who now has a place of business in Paterson, New Jersey. Mr. Olmo, by affidavit, confirms that he rented office and parking space to Mr. Vincent Marchese doing business as Container Service Co. between June 1973 and early 1974. The address in North Bergen, New Jersey is a parking area for trucks and a truck weighing station which also contains a small office building rented primarily by trucking companies.

b. Mr. George Gillette, who resided at 74 Reno Avenue, Staten Island, New York acted as the manager for Container Service Co. He also operated his

own business as a truck broker, under the name of "Martin Ranger, Ranger Intermodel Company". His own business shared offices with Container Service Co. both at West Paterson, New Jersey and North Bergen, New Jersey. Mr. Gillette told a tax department auditor that Container Service Co. acted as a "broker" in arranging for the television sets to be picked up by "gypsy truckers" which he would contact at the Jersey Truck Center in South Kearney, New Jersey. Mr. Gillette retired from all business in December 1976. In May 1979 an auditor spoke to him on the telephone. He cannot presently be located.

9. The sales here in issue came about in the following way (as testified to by Fred Babitz, Vice-President of Savemart): A telephone call was received by Mr. Babitz from a Sam Schwartzstein of Coral Gables, Florida. Mr. Schwartzstein was interested in the claim of Savemart to be the number one Zenith distributor in the country. This telephone call was followed by a visit by Mr. Schwartzstein to the office of Mr. Babitz. Mr. Schwartzstein negotiated an order for the "surplus" Zenith television sets that Savemart wished to sell. These were to be shipped to himself "care of Kennedy & Cohen" warehouse at 7600 North West 26th Street, Miami, Florida and would be picked up by a trucker which Mr. Schwartzstein designated and paid for. The goods would be paid for prior to shipment by cash, travelers checks or bank cashiers checks. Mr. Babitz received a phone call from Mr. George Gillette who stated he was to transport the merchandise for Mr. Schwartzstein. When truckload quantities of orders accumulated, Mr. Babitz would telephone Mr. Gillette to send a truck. A truck would arrive and the driver would sign for the merchandise. Mr. Babitz assumed that Mr. Schwartzstein was a representative of Kennedy & Cohen but he did not, and he had no interest in, questioning Mr. Schwartzstein about this. Sales subsequent to the first were accomplished in the same way.

10. a. The Audit Division attempted to corroborate the petitioners' account of the transactions in question by seeking to inspect the books and records of Container Service Co. and of Kennedy & Cohen. Books and records for Container Service Co. could not be found. Books and records for Kennedy & Cohen were mostly lost or destroyed.

b. An audit was made of one bank, National City Bank. Photocopies of deposit slips with supporting checks were obtained for the four months of October 1975, November 1975, December 1975 and January 1976. These showed no checks coming from either Sam Schwartzstein or from Kennedy & Cohen. Deposit tickets were further requested for the two months of March 1975 and April 1975.

c. The deposits for the month of October 1975 were examined in detail. Of the total deposits of \$1,752,729.64, cash amounted to \$129,068.88 (the biggest item was for \$9,697.51), checks on New York and New Jersey banks amounted to \$974,805.43, checks on the banks outside of New York and New Jersey amounted to \$29,411.72 (all such items are noted as coming from the "Domestic Finance Corporation" of St. Louis, Missouri) and "unexplained" deposits amount to \$648,855.33. Among these unexplained deposits is an item of \$281,701.39 which is represented by a credit memo from a Bronx branch of the First National City Bank as the proceeds of a certificate of deposit. The remaining unexplained deposits amounted to \$367,153.94.

d. The audit which was commenced on or about March 13, 1978, encountered certain obstacles. A cash journal for 1975 which an auditor had examined has been apparently lost and was not available later in the audit. Some of Savemart's books and records were in the hands of its own independent auditors for other purposes. The bills of lading for the sales in question were originally

described by petitioners as having been disposed of, although later on they were given to the auditor.

e. The audit proceeded in part by sampling methods.

f. The Audit Division correctly concluded that its examination of the bank accounts of Savemart did not completely corroborate the sales here in question.

g. The Audit Division did not audit the retail stores of Savemart for the period of March 1, 1975 to February 28, 1976 although it did audit those stores for a later period.

CONCLUSIONS OF LAW

A. That section 1105(a) of the Tax Law imposes a sales tax upon every retail sale of tangible personal property. The sales tax is a "destination tax", that is, the point of delivery or point at which possession is transferred by the vendor to the purchaser or designee controls both the tax incident and the tax rate. 20 NYCRR 525.2(a)(3).

B. That "(a) sale of goods in which delivery is taken by the purchaser within the seller's state is a local transaction which is taxable; 'neither the commerce clause nor the Fourteenth Amendment... prevents the imposition of the tax on... an intrastate transaction'...(a)nd it is immaterial 'that the goods are to be transported out of [the taxing state] immediately on delivery', for the 'consumption of the transaction was an event within [the taxing state] which gave it authority to levy the tax on...the sales,'" (citation omitted). (F & M Schaefer Brewing Co. v. Gerosa, 4 NY 2d 423, 427 [1958] appeal dismissed, 358 U.S. 282 [1959]).

Further, the delivery in New York State of tangible personal property sold in this state to a non-ICC carrier employed by the purchaser is accordingly

a transaction subject to sales tax. "The failure to assess sales tax on ICC pick-ups does not bar the Tax Commission from assessing sales tax on non-ICC pick-ups. The Tax Commission is not put to the choice of taxing either all sales or none." (In re Seafarer Fiber Glass Yachts, Inc., 475 F.Supp. 1097, 1100 [ED NY 1979]).

C. That section 1132(c) of the Tax Law provides, in part, that all sales of tangible personal property are subject to sales tax unless the seller shall have taken from the purchaser a properly executed resale certificate.

D. That petitioner Savemart failed to secure a resale certificate from Sam Schwartzstein for the television sets sold to him. Accordingly, the sale in which the goods were delivered in New York State are retail sales subject to tax.

E. That section 1145(a)(2) of the Tax Law, which permits the imposition of a 50% penalty in the case of fraud, was enacted by the Legislature for the purpose of creating greater compliance with the Sales and Use Tax Law. The provision is substantially similar to the provision which already existed in the Tax Law with respect to deficiencies of, inter alia, personal income tax in section 685(e) (N.Y. Legis. Ann., 1975, p.350). Thus, the burden of proof at a hearing to establish fraud is upon the Audit Division. That the Audit Division has failed to establish that the failure to pay over the tax was due to fraud; therefore, the fraud penalty imposed for the periods ended November 30, 1975 and February 28, 1976 is cancelled.


F. That the petition of Savemart, Inc., Fred Babitz and Ben Blank is granted to the extent indicated in Conclusion of Law "E" above. The Audit Division is hereby directed to accordingly modify the notices of determination

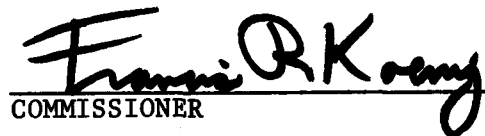
and demand for payment of sales and use taxes due issued June 20, 1979. Except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

MAY 06 1983


PRESIDENT


COMMISSIONER


COMMISSIONER

P 389 758 903
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>SAVE Mart, Inc. and Fred Babitz and Ben Blank as officers c/o Michael Cook</i>	
Street and No. <i>104 E. 40th St</i>	
P.O., State and ZIP Code <i>New York, NY 10016</i>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982

P 389 758 904
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Michael Cook</i>	
Street and No. <i>104 E. 40th St.</i>	
P.O., State and ZIP Code <i>New York, NY 10016</i>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982