

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
H. G. Jensen :
Officer of Kiamesha Communications Corp. : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the Period :
3/1/78 - 11/30/79. :

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 9th day of November, 1984, he served the within notice of Decision by certified mail upon H. G. Jensen, Officer of Kiamesha Communications Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

H. G. Jensen
Officer of Kiamesha Communications Corp.
3932 Highland Avenue
Skaneateles, NY 13152

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
9th day of November, 1984.

David Parchuck

William A. DeGard
Authorized to administer oaths
pursuant to Tax Law section 174

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

November 9, 1984

H. G. Jensen
Officer of Kiamesha Communications Corp.
3932 Highland Avenue
Skaneateles, NY 13152

Dear Mr. Jensen:

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law 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
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
John M. Shannon
Milford & Lynch
2- Fennell St.
Skaneateles, NY 131520047
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

| | | |
|---|---|----------|
| In the Matter of the Petitions | : | |
| of | : | |
| H.G. JENSEN, | : | DECISION |
| Officer of Kiamesha Communications Corp. | : | |
| for Revision of Determinations or for Refunds | : | |
| of Sales and Use Taxes under Articles 28 and 29 | : | |
| of the Tax Law for the Period March 1, 1978 | : | |
| through November 30, 1979. | : | |

Petitioner, H.G. Jensen, Officer of Kiamesha Communications Corp., 3932 Highland Avenue, Skaneateles, New York, 13152, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1978 through November 30, 1979 (File No. 44499).

A small claims hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on February 3, 1984 at 9:15 A.M., with additional documents to be submitted on or before February 10, 1984. Petitioner appeared by Milford & Lynch (John M. Shannon, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUES

I. Whether timely petitions were filed challenging the assessments for the period March 1, 1978 through November 30, 1978 and December 1, 1978 through November 30, 1979.

II. Whether petitioner was a person required to collect and pay over sales taxes on behalf of Kiamesha Communications Corp. d/b/a Southern New York

Publishers within the meaning and intent of sections 1131(1) and 1133(a) of the Tax Law during the periods at issue herein.

FINDINGS OF FACT

1. The Audit Division issued a Notice and Demand for Payment of Sales and Use Taxes Due dated March 20, 1981 to petitioner, H.G. Jensen, as an officer of Kiamesha Communications Corp. doing business as Southern New York Publishers. The Notice assessed sales and use taxes for the period March 1, 1978 through November 30, 1978 in the amount of \$3,092.98 plus penalty of \$773.23 and interest of \$935.67 for a total amount due of \$4,801.88. The Notice stated that petitioner was personally liable as an officer for the sales and use taxes due from Kiamesha Communications Corp.

2. The Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated March 20, 1981 to H.G. Jensen as an Officer of Kiamesha Communications Corp. doing business as Southern New York Publishers. The Notice assessed sales and use taxes for the period December 1, 1978 through November 30, 1979 in the amount of \$6,063.48 plus penalty of \$500.21 and interest of \$222.24 for a total amount due of \$6,785.93. The Notice stated that petitioner was personally liable as an officer for the sales and use taxes due from Kiamesha Communications Corp.

3. New York State and Local Sales and Use Tax Returns were filed on behalf of Southern New York Publishers for the periods March 1, 1978 through May 31, 1978, June 1, 1978 through August 31, 1978 and September 1, 1978 through November 30, 1978. No sales tax was remitted with the returns although sales tax was reported to be due. Petitioner signed the return for the period ended November 30, 1978 and listed his title as president. Other individuals

signed the returns for the periods March 1, 1978 through May 31, 1978 and June 1, 1978 through August 31, 1978.

4. New York State Sales and Use Tax Returns were not filed for the quarterly period ended February 28, 1979 through the period ended November 30, 1979.

5. Prior to the periods in issue petitioner was the manager of Southern New York Publishers. This company had its headquarters in Ohio. The owners of Southern New York Publishers were interested in selling this firm.

6. Prior to November or December of 1977 petitioner met a Mr. Schalk and a Mr. Broderick who, with petitioner, decided to purchase Southern New York Publishers. Thereafter, in or about November or December of 1977 petitioner, Mr. Schalk and Mr. Broderick formed Kiamesha Communications Corp. ("Kiamesha") doing business as Southern New York Publishers. Upon forming Kiamesha, petitioner held the title of president, Mr. Schalk held the title of vice-president and secretary and Mr. Broderick was the treasurer.

7. Kiamesha was a corporation which published shopping guides and weekly newspapers. Kiamesha also engaged in "job printing".

8. As president, petitioner was active in all of the daily operations of Kiamesha. Petitioner had the authority to sign checks and would do so on occasion. However, in the normal course of business petitioner did not sign checks.

9. In or about the last few days of March, 1978 petitioner left Kiamesha to become the general manager of Lake Side Printing. Concomitant with the assumption of the new position, he moved to Campbell Hall, New York. It was agreed at this time that Mr. Broderick would assume the daily management of

Kiamesha. Petitioner did not discuss the disposal of his interest in Kiamesha at this time.

10. Petitioner left Kiamesha because he did not like the area where Kiamesha was located and because he felt he had greater career opportunities with Lake Side Printing.

11. Petitioner testified that after he left Kiamesha he was no longer involved in Kiamesha's daily activities and that his main concern was that of a stockholder. This portion of petitioner's testimony is not found convincing in view of the fact that he signed the return for the period ended November 30, 1978.

12. Petitioner's request to see the income, sales and expense records was not honored after he went to work for Lake Side Printing.

13. While petitioner was residing at Campbell Hall, New York, employees of Kiamesha would telephone petitioner and tell him the state of Kiamesha's business affairs. Through these conversations petitioner realized that Kiamesha was having difficulties and that he should resign.

14. On or about July 31, 1979 petitioner sent a letter to Messrs. Broderick and Schalk advising them that, effective July 31, 1979, he was resigning as president of Kiamesha and that he would no longer be responsible for any of Kiamesha's activities. In addition, petitioner specifically requested, in part, that his name be removed from all corporate checking accounts.

15. Sometime during 1979 or 1980 the premises of Kiamesha were damaged by a fire and subsequently it ceased operating. There has been neither a formal accounting nor a settling of business affairs between petitioner and Messrs. Broderick and Schalk. In addition there has never been a settlement of accounts with creditors.

16. In May, 1982 a Mr. Osterhout, who was an employee of the Audit Division, advised petitioner, in person, that petitioner was liable for sales and use taxes due from Kiamesha. Mr. Osterhout did not leave any papers with petitioner nor explain how the amount of the liability was determined.

17. In a letter postmarked May 24, 1982 petitioner received the notices mentioned in Findings of Fact "1" and "2". On July 27, 1982 separate petitions, challenging each of the notices in issue, were received by the Tax Appeals Bureau.

CONCLUSIONS OF LAW

A. That section 1138(a)(1) provides, in part, that the determination that tax is due shall become finally and irrevocably fixed unless the person against whom tax is assessed requests a hearing within ninety days after the person is given notice of the determination. In view of Finding of Fact "17", it is clear that petitioner filed timely petitions challenging the determination that tax was due for the period March 1, 1978 through November 30, 1978 and December 1, 1978 through November 30, 1979.

B. That, in general, section 1133(a) of the Tax Law imposes upon any person required to collect tax imposed by Article 28 of the Tax Law, personal liability for the tax imposed, collected, or required to be collected. Section 1131(1) of the Tax Law defines persons required to collect tax to include, among others, corporate officers and employees who are under a duty to act for such corporation in complying with the requirements of Article 28.

C. That the determination of whether an individual is a person or officer under a duty to act for the corporation is based upon the facts presented (Vogel v. New York State Department of Taxation and Finance, 98 Misc.2d 222). The relevant factors include, but are not limited to: the individual's daily

involvement in the corporation; the individual's participation and involvement in the financial affairs of the corporation; the individual who prepared and signed the sales and use tax returns; the individual's authority to draft checks on the firm's bank account; and, in the case of a closely-held corporation, the individual's knowledge of the affairs of the firm and benefits from the firm's profits (Matter of Robert Gattie, State Tax Commission, September 5, 1980).

D. That petitioner is found to be a person under a duty to collect sales and use taxes for Kiamesha for the period March 1, 1978 through July 31, 1979. This determination is based upon the facts that petitioner remained an officer of Kiamesha during the period; that petitioner had authority to draft checks on the firm's checking account; that petitioner remained knowledgeable about Kiamesha's affairs through conversations with Kiamesha's employees; and that, in view of petitioner's having signed the return for the period ended November 30, 1978, he clearly remained involved with Kiamesha's obligation to remit New York State sales and use taxes after he went to work for Lake Side Printing.

E. That petitioner was not a person under a duty to collect sales and use taxes for Kiamesha for the period August 1, 1979 through November 30, 1979. This conclusion is based upon the fact that during this period petitioner did not have any involvement with Kiamesha's business affairs other than that of a stockholder.

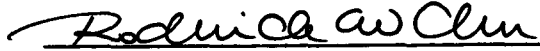
F. That the petition filed for the assessment period March 1, 1978 is denied and the Notice and Demand for Payment of Sales and Use Taxes Due is sustained. The petition filed for the assessment period December 1, 1978 through November 30, 1979 is granted to the extent indicated in Conclusion of Law "E" and the Audit Division is directed to reduce the assessment by the

amount of the sales and use taxes assessed for the period August 1, 1979 through November 30, 1979. The petition is, in all other respects, denied.

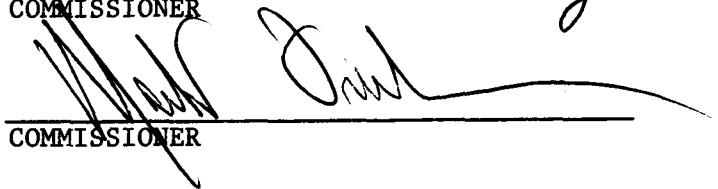
DATED: Albany, New York

STATE TAX COMMISSION

NOV 09 1984


PRESIDENT


COMMISSIONER


COMMISSIONER

P 693 168 878

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

| | | | |
|--|---|------------------------------|----------|
| ★ U.S.G.P.O. 1983-403-517 PS Form 3800, Feb. 1982 | Sent to | H.G. Jensen | |
| | Street and No. | Off. of Kiamacha Comm. Corp. | |
| | P.O., State and ZIP Code | 3932 Highland Ave. | |
| | Postage | Skaneateles, NY | \$ 13.52 |
| | 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 | | | |

P 693 168 879

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

| | | | |
|--|---|-----------------|----------|
| ★ U.S.G.P.O. 1983-403-517 PS Form 3800, Feb. 1982 | Sent to | John M. Shannon | |
| | Street and No. | Milford & Lynch | |
| | P.O., State and ZIP Code | 2 - Fennell St. | |
| | Postage | Skaneateles, NY | \$ 13.52 |
| | 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 | | | |