

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Sam Kaufman :
Officer of Donald Furniture Showroom, Inc. : 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 3/1/78-3/31/81. :

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 31st day of January, 1984, he served the within notice of Decision by certified mail upon Sam Kaufman, Officer of Donald Furniture Showroom, Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sam Kaufman
Officer of Donald Furniture Showroom, Inc.
115 E. 87th St.
New York, NY 10028

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
31st day of January, 1984.

David Parchuck

James A. Hegeman
Authorized to administer oaths
pursuant to Tax Law section 174

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

January 31, 1984

Sam Kaufman
Officer of Donald Furniture Showroom, Inc.
115 E. 87th St.
New York, NY 10028

Dear Mr. Kaufman:

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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
SAM KAUFMAN, OFFICER	:	DECISION
OF DONALD FURNITURE SHOWROOM CORP.	:	
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, 1978	:	
through March 31, 1981.	:	

Petitioner, Sam Kaufman, Officer of Donald Furniture Showroom Corp., 115 East 87th Street, New York, New York 10028, 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, 1978 through March 31, 1981 (File No. 33958).

A formal 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 April 19, 1983 at 10:45 A.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Lawrence Newman, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly estimated the tax liability of Donald Furniture Showroom Corp. on the basis of external indices.

II. Whether Sam Kaufman was a responsible officer of Donald Furniture Showroom Corp. under sections 1131(1) and 1133 of the Tax Law prior to February, 1979.

FINDINGS OF FACT

1. On May 20, 1981, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Sam Kaufman as officer of Donald Furniture Showroom Corp. (Donald) covering the period March 1, 1978 through March 31, 1981. The Notice asserted additional sales tax due of \$141,399.73 plus penalty and interest of \$51,466.61 for a total due of \$192,866.34.

2. The Audit Division attempted to perform a field audit on the books and records of Donald Furniture Showroom Corp. The auditor was informed by the petitioner that the business was discontinued as of March, 1981 and that all books and records of the business were stolen from his car.

Since no records were available for audit, the Audit Division obtained the amount of rent paid from the corporation's landlord. The Audit Division divided Donald's monthly rent expense of \$1,368.00 by 2.79 percent, the average percentage of rent to gross sales based on Dun & Bradstreet business statistics. The Audit Division determined that Donald had made monthly gross sales of \$49,032.00 and total gross sales of \$1,814,184.00 for the audit period. All sales were deemed to be taxable sales with the resultant sales tax due thereon of \$145,134.72. Total sales tax reported by Donald of \$3,734.99 was deducted therefrom, leaving additional sales tax due of \$141,399.73.

3. The record does not indicate that any further contacts were made with petitioner after the initial contact to perform the field audit. The auditor did verify that a new business was at the location after March, 1981.

4. Donald operated a furniture showroom on the 10th floor of a factory-type building that housed other showrooms. The business location was at 192-196 Lexington Avenue, New York City. Petitioner maintained that sales were primarily wholesale, the business entrance having been lettered "To the Trade

Only". Petitioner acknowledged however that retail sales were made occasionally. Donald also made sales at facilities in the United Nations purportedly for export to other countries.

5. Petitioner contended that all sales tax collections were properly remitted on sales and use tax returns filed. Petitioner offered no evidence of the amount of the corporation's actual sales receipts. Gross sales were not reported on sales and use tax returns filed. No corporation tax returns were filed during the period petitioner operated the business.

6. Petitioner testified that he and a business associate took over the business operation as of February, 1979. Prior to that time the business was operated by one Donald Solin.

Petitioner did not deny financial responsibility for the corporation on and after February, 1979. Petitioner was signatory on a check remitting sales taxes for the period December 1, 1979 through February 29, 1980. The Audit Division did not introduce any sales and use tax returns bearing petitioner's signature or that of his associate for the period prior to February, 1979.

7. Petitioner argued that the reconstruction of Donald's gross receipts was inaccurate in that the rental paid also included utilities. Petitioner estimated that the utilities constituted one half of the rent. No evidence, however, was submitted to support this allegation.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides for the use of external indices such as rental paid to determine tax due when returns filed are insufficient or when information is not available.

That petitioner had no records available for audit in order to verify the accuracy of the sales and use tax returns filed by the corporation. Resort

to Dun & Bradstreet statistics to determine sales receipts based on rent paid was not an unreasonable calculation. Accordingly, the determination by the Audit Division of gross receipts was proper in accordance with the provisions of Tax Law §1138(a).

B. That once it is established that the Audit Division's independent determination was permissible, the burden of proof is upon petitioner to show that the Audit Division's determination should be overturned. Petitioner has failed to meet that burden with respect to gross sales determined by the Audit Division.

C. That section 1132(c) of the Tax Law provides in part, as follows:

"For the purpose of the proper administration of this article and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property or services... are subject to tax until the contrary is established, and the burden of proving that any receipt... is not taxable hereunder shall be upon the person required to collect tax or the customer. Unless (1) a vendor shall have taken from the purchaser a certificate in such form as the tax commission may prescribe... or (2) the purchaser prior to taking delivery, furnishes to the vendor: any affidavit, statement or additional evidence... which the tax commission may require demonstrating that the purchaser is an exempt organization... the sale shall be deemed a taxable sale at retail."

Petitioner failed to show that any of the receipts determined by the Audit Division were nontaxable sales.

D. That petitioner was not a person required to collect tax within the meaning of section 1131(1) of the Tax Law prior to February, 1979, and therefore bears no personal liability under section 1133(a) of the Tax Law for the taxes assessed for periods prior thereto.

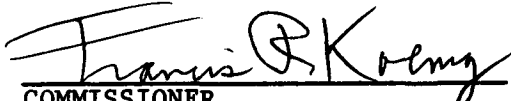
E. That the petition of Sam Kaufman is granted to the extent indicated in Conclusion of Law "D"; that the Audit Division is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 20, 1981; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 31 1984


PRESIDENT


COMMISSIONER


COMMISSIONER

P 470 315 397

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Sam Kaufman	
Street and No.	
115 E. 87th St. Apt. 10	
City, State and ZIP Code	
New York, NY 10025	
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