

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
M & B Appliances, 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 12/1/75-11/30/78. :

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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 25th day of April, 1984, he served the within notice of Decision by certified mail upon M & B Appliances, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

M & B Appliances, Inc.  
83-11 Broadway  
Elmhurst, NY 11373

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  
25th day of April, 1984.

David Parchuck

Quinn P. [Signature]  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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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 25th day of April, 1984, he served the within notice of Decision by certified mail upon John R. Serpico, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John R. Serpico  
186 Joralemon St.  
Brooklyn, NY 11201

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 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  
25th day of April, 1984.

David Parchuck

Quinn R. Hays  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

April 25, 1984

M & B Appliances, Inc.  
83-11 Broadway  
Elmhurst, NY 11373

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, 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 R. Serpico  
186 Joralemon St.  
Brooklyn, NY 11201  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
M & B APPLIANCES, INC.	:	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 December 1, 1975	:	
through November 30, 1978.	:	

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Petitioner, M & B Appliances, Inc., 83-11 Broadway, Elmhurst, New York 11373, 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 December 1, 1975 through November 30, 1978 (File No. 28446).

A formal hearing was commenced before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 21, 1982 at 1:15 P.M. and concluded at the same offices on September 23, 1982 at 1:15 P.M., with all briefs to be filed on or before January 10, 1983. Petitioner appeared by John R. Serpico, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Anna Colello, Esq., of counsel).

ISSUES

I. Whether it was proper for the Audit Division to determine the amount of tax due on the basis of a test period.

II. Whether certain merchandise sold by M & B Appliances, Inc. was delivered in New York necessitating the collection of sales tax from petitioner's customers.

III. Whether certain sales made by M & B Appliances, Inc. were for resale.

IV. Whether the Audit Division properly issued notices of determination and demand to the officers of M & B Appliances, Inc.

FINDINGS OF FACT

1. On October 11, 1979, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner M & B Appliances, Inc. ("the corporation") for the period December 1, 1975 through November 30, 1978. The Notice assessed sales and use taxes due of \$130,621.20, plus penalty of \$27,523.46 and interest of \$25,711.93, for a total amount due of \$183,856.59. On the same day, the Audit Division issued notices of determination and demand for payment of sales and use taxes due to Inder S. Bindra and Man M. Munjal as, respectively, petitioner's president and vice-president. The taxes assessed against each of the officers in the notices were the same as the taxes assessed against the corporation, except that use tax in the amount of \$1,625.56 was not assessed.

2. On January 6, 1980 the corporation's accountant sent a letter objecting to the Audit Division's findings based upon a field audit. The letter was accepted as a timely petition.

3. In performing the audit, the auditor requested all ledgers pertaining to the period, federal returns, cash receipts book, cash disbursements book, sales journal, purchase journal, worksheets to determine how the sales tax returns were prepared, and fixed asset invoices. The accountant employed by the corporation during this period advised the auditor that some of the books and records were in India and that there was a problem in retrieving them. Accordingly, the auditor, the auditor's supervisor, and the corporation's accountant agreed upon a three-month test period.

4. The only records of sales provided were bank statements. Cash register tapes, ledgers or a day book recording sales were not provided. The corporation did have a cash disbursements book but it was not completed for the audit

period. The corporation also had limited cash receipts records. The auditor also obtained sales and purchase invoices for the period December 1, 1976 through February 28, 1977.

5. The auditor found that the sales tax returns were prepared from bank statements.

6. The auditor accepted the corporation's gross sales as reported after comparing the sales reported on the corporation's federal income tax returns and after performing a markup test.

7. The auditor conducted a test of the corporation's purported nontaxable sales for the period December 1, 1976 through February 28, 1977. The test was conducted in two parts. An examination of sales for resale and out-of-state sales were examined as one part and "Air India" sales were examined as the second part.

8. In the first part of the test, the auditor examined the exempt organization or resale certificates provided by the corporation for the three-month period agreed upon. Thereafter, the auditor developed a percentage of disallowed exempt sales based upon the number of sales for which petitioner did not provide a certificate, provided an incomplete certificate, or failed to show out-of-state delivery. The amount of the disallowed sales was divided by the total reported nontaxable sales for the quarter resulting in a percentage of disallowed sales of 8.61 percent. This percentage was then applied to the reported nontaxable sales for the audit period. These computations resulted in additional tax due of \$25,275.92.

9. The second portion of the field audit concerned sales wherein the corporation claimed it would deliver merchandise to the Air India passenger ticket counter at Kennedy International Airport, for export. The auditor found

a number of sales invoices which had a stamp of Air India on the invoice. The corporation claimed that these sales were exempt from sales and use tax on the ground that delivery took place outside New York State. However, the corporation could not provide the auditor with any export documentation. The auditor took the position, on the basis of correspondence with individuals employed by Air India, that delivery of the parcels was made within New York State. During the period examined, \$50,027.00 or 35.33 percent of the corporation's purported exempt sales were made in this manner. This percentage was applied to petitioner's reported exempt sales for the audit period resulting in additional taxable sales of \$1,296,459.00 and additional tax due of \$103,716.72.

10. The auditor found that the corporation purchased fixed assets in the amount of \$20,537.00. Since the corporation did not produce the invoices pertaining to these purchases or other proof that tax was paid, the corporation was assessed \$1,628.56 in use tax.

11. The corporation is engaged in retail and wholesale trade. The merchandise which the corporation sells includes such varied item as pens, luggage, and television sets.

12. A substantial portion of the corporation's sales arises from individuals who are planning a trip to India via Air India. These customers purchase merchandise which is designed for the electrical circuits used overseas. The corporation advises these customers that, if they do not wish to pay sales tax, the corporation will place the merchandise on the airplane as part of the customer's luggage.

13. If the personnel of Air India know the particular customer of the corporation, they will accept delivery of the package from the corporation's

driver and hold it for the customer until the airplane departs. If the customer wishes to see the package before the airplane departed for India, he can do so.

14. In those instances where Air India personnel do not know the customer, the corporation's driver delivers the merchandise to the ticket counter of Air India on the day of the customer's flight and waits for the customer to check in for the flight. After the customer arrives at the Air India ticket counter and has his ticket validated, the corporation's driver places the merchandise onto the luggage conveyer belt. Thereafter, the passenger receives a claim ticket in order to be able to obtain the merchandise after the airplane arrives in India. The driver also has an employee of Air India stamp the corporation's invoices to establish that an employee of Air India accepted the merchandise for the Air India baggage department.

15. The corporation's drivers are instructed that the customer is not permitted to take possession of the merchandise personally. If the customer wishes to take possession of the merchandise, the driver is directed to return the merchandise to the store.

16. It is the corporation's practice to collect sales tax on items of less than \$200.00 because the savings to the customer arising from not paying sales tax is not as much as the corporation's delivery charge. If the item sold costs in excess of \$200.00, the corporation charges the customer for the cost of the item and a delivery charge. The Air India stamp is the only proof the corporation has that the corporation's driver delivered the merchandise to an employee of Air India and that the merchandise is being shipped out of the country.



17. The reason the corporation had its customers' merchandise shipped as baggage rather than as cargo is that the cost of shipping items as cargo substantially exceeds the cost of shipping the merchandise as excess baggage.

18. A portion of the disallowed sales for resale involved sales made to Atlantic Imports and Exports. After the audit was completed, the corporation attempted to obtain a resale certificate from this customer but was unable to do so because Atlantic Imports and Exports was no longer in business.

19. When the corporation made a sale for resale, the sales invoice would indicate that the sale was exempt from sales tax and, in a proper instance, list the name of the tax exempt purchaser and the exemption number.

20. At the hearing, the corporation offered testimony that it employed a bookkeeper that maintained records such as ledgers, cash receipts journal, sales ledger, and purchase records. No evidence was offered, however, that these records were made available to the auditor. It was the corporation's practice that when a customer wished to have merchandise shipped overseas as excess baggage, the sales invoice would indicate which flight of Air India the customer would be on and the day of departure. However, none of the invoices examined by the auditor during the test period contained this information.

#### CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides, in part, that if a return required to be filed is incorrect or insufficient, the Tax Commission shall determine the amount of tax due on the basis of that information which may be available. Resort to the use of a test period to determine the amount of tax due must be based upon an insufficiency of record keeping which makes it virtually impossible to determine such liability and make a complete audit (Matter of Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44). Inasmuch as

the only records of the corporation's sales which were provided to the Audit Division were bank deposits with unexplained credit memos, the corporation's records were insufficient for the verification of taxable sales and the proper collection of taxes thereon. Therefore, the Audit Division properly utilized a three-month test period to determine the sales which were subject to sales and use tax. It is also noted that petitioner's accountant agreed to the use of the three-month test period.

B. That "...the point of delivery or point at which possession is transferred by the vendor to the purchaser controls both the tax incident and the rate of tax." (20 NYCRR 525.2(3))\* . While the sales by the corporation to Air India passengers differ from the typical sale for export situation, the corporation has shown that Air India in fact received the merchandise sold by the corporation and delivered it to the corporation's customers upon their arrival in India. Thus, the merchandise sold by the corporation which was routed to its destination through Air India was not delivered in New York and therefore not subject to New York sales tax.

C. That a sale for resale is not considered a retail sale subject to tax (Tax Law §1101(b)(4); 20 NYCRR 526.6(c))\* . However, "[a] sale for resale will be recognized only if the vendor receives a properly completed resale certificate." (20 NYCRR 526.6(c)(2))\* . Since the corporation did not produce properly completed resale certificates, the Audit Division properly disallowed a portion of the purported exempt sales as sales for resale.

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\* The regulations cited herein became effective September 1, 1976. However, they expressed the then existing policy of the New York State Tax Commission.

D. That section 1131(1) of the Tax Law provides, in substance, that "persons required to collect tax" or "person required to collect any tax imposed by this article" includes not only every vendor of tangible personal property, but also "...any officer or employee of a corporation...who as such officer or employee is under a duty to act for such corporation in complying with any requirement of this article...". Generally, the persons defined in section 1131(1) of the Tax Law "are personally liable for the tax imposed, collected or required to be collected under this article" (Tax Law §1133(a)). Section 1138(a) of the Tax Law provides that if a required return is not filed, or if the return that is filed is incorrect, the amount of tax due shall be determined and notice of this determination shall be given to the person liable for the collection. The returns filed by the corporation were incorrect (see Conclusion of Law "C", supra) and therefore, the Audit Division properly issued notices of determination and demand to petitioner's corporate officers.

E. That the Audit Division is directed to modify the notices of determination and demand for payment of sales and use taxes due issued to Inder S. Bindra and Man M. Munjal by eliminating therefrom the amount of sales and use taxes in issue arising from the corporation's sales which were routed to their destination via Air India.

F. That the petition of M & B Appliances, Inc. is granted to the extent of Conclusion of Law "B"; that the Audit Division is directed to modify the notices of determination and demand for payment of sales and use taxes due

issued October 11, 1979 to the corporation and its officers accordingly; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

APR 25 1984

*Richard A. Cline*  
PRESIDENT

*Francis R. Koenig*  
COMMISSIONER

*Mark J. Smith*  
COMMISSIONER

P 440 976 951

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
MAB Appliances, Inc.	
Street and No.	
83-11 Broadway	
City, State and ZIP Code	
Amherst, NY 11373	
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 440 976 952

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
John R. Serpico	
Street and No.	
186 Graham St.	
City, State and ZIP Code	
Brooklyn, NY 11201	
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