

STATE TAX COMMISSION

Cammie
Authorized to administer oaths
pursuant to Tax Law section 174

STATE TAX COMMISSION

Carrie A. Haglund
Authorized to administer oaths
pursuant to Tax Law section 174

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

September 21, 1984

Marlene Manufacturing Corp.
c/o Herbert Morrison
45 West 60th St.
New York, NY 10023

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
Max Friedman
Wilfred Wyler & Co., CPA's
200 Park Ave., Room 2305
New York, NY 10166
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
MARLENE MANUFACTURING CORP. : 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 June 1, 1977 :
through February 29, 1980. :

Petitioner, Marlene Manufacturing Corp., c/o Herbert Morrison, 45 West 60th Street, New York, New York 10023, 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, 1977 through February 29, 1980 (File No. 36729).

A small claims 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 January 25, 1984 at 9:15 A.M. Petitioner appeared by Max Friedman, CPA. The Audit Division appeared by John P. Dugan, Esq. (Herbert Kamrass, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly disallowed certain nontaxable sales claimed by petitioner.

II. Whether petitioner is liable for bulk sales tax determined due by the Audit Division on leasehold improvements.

III. Whether petitioner is entitled to a credit for a portion of the sales tax it collected from American Chicle Co.

FINDINGS OF FACT

1. Petitioner, Marlene Manufacturing Corp., was engaged in the manufacture of wooden trays for the confectionary and baking industries. The business was sold on January 22, 1980.

2. On December 18, 1981, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period June 1, 1977 through February 29, 1980 for taxes due of \$6,004.60, plus interest of \$1,439.74 for a total of \$7,444.34.

3. Petitioner executed consents extending the period of limitation for assessment of sales and use taxes for the period at issue to December 20, 1981.

4. On audit, the Audit Division analyzed sales invoices for the period June 1, 1977 through January 31, 1980. The auditor selected 151 invoices on a statistical basis out of a total of 653 invoices. This analysis resulted in disallowed nontaxable sales of \$2,865.13 subject to an 8 percent tax rate and \$7,389.76 subject to a 4 percent tax rate. The additional tax due on these amounts represented .2 percent and .26 percent, respectively, of the total sales analyzed. The sales were disallowed because petitioner did not have exemption certificates on file and could not substantiate that the merchandise was delivered to purchasers outside New York State. The above percentages were applied to total sales for the audit period of \$589,316.64 to arrive at additional taxes due of \$2,710.86 on disallowed nontaxable sales.

The Audit Division also attempted to reconcile sales tax charged on invoices with sales tax paid over with returns filed and found that collections exceeded payments by \$1,683.50. Petitioner was held liable for said amount.

An examination of purchase invoices revealed use taxes due of \$297.02. It was also found that petitioner overpaid \$152.36 in sales tax on electricity purchases which was credited against the use tax liability. These amounts are not in dispute.

When the business was sold, petitioner reported and paid a bulk sales tax of \$272.00 on the furniture and fixtures transferred in the sale. The Audit Division reviewed the contract of sale which allocated the purchase price as follows:

a) inventory	\$25,777.00
b) office equipment, furniture and fixtures	\$ 3,400.00
c) leasehold improvements	\$18,320.00

The Audit Division assessed additional tax of \$1,465.60 on the leasehold improvements.

5. Petitioner agreed to the use of the test period method of audit.

6. Petitioner requested exemption certificates from the customers on claimed nontaxable sales which were disallowed on audit. The certificates, however, were not returned. Petitioner also attempted to obtain bills of lading to substantiate out of state sales. These records had been left with the purchaser of the business who indicated that he disposed of such records.

7. Petitioner collected 8 percent sales tax on sales made to American Chicle Co. Petitioner argued that the trays sold to American Chicle constituted manufacturing equipment and were therefore only subject to the 4 percent New York City tax. At the hearing, petitioner claimed a credit for the tax erroneously collected from American Chicle Co.

American Chicle Co. did not at any time furnish an exemption certificate to petitioner or seek a refund from petitioner.

8. With respect to the additional bulk sales tax, petitioner argued that the \$18,320.00 allocated to leasehold improvements in the contract of sale was in error. Petitioner maintained that at no time were leasehold improvements made to that extent.

9. The fixed asset account in petitioner's books and records showed the following balances:

	<u>Machinery and Fixtures</u>	<u>Leasehold Improvements</u>
June 1, 1977	\$ 9,859.74	\$10,666.18
October 31, 1978	13,317.47	10,666.18
Accumulated depreciation to November 1, 1978	9,926.28	5,107.63
Depreciation per Federal tax return to Oct. 31, 1979	269.40	1,046.89
	<u>\$ 3,121.79</u>	<u>\$ 4,511.66</u>

CONCLUSIONS OF LAW

A. That section 1132(c) of the Tax Law provides, in part, that 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 shall be upon the person required to collect tax. Unless a vendor shall have taken from the purchaser a certificate in such form as the Tax Commission may prescribe to the effect that the property was purchased for resale or for some use by reason of which the sale is exempt from tax under section 1115, the sale is considered a taxable sale at retail. Where such a certificate has been furnished to the vendor, the burden of proving that the receipt is not taxable shall be solely upon the customer.

Petitioner failed to sustain the burden of proof imposed by section 1132(c) to show that those sales for which no exemption certificates were on file were nontaxable. Accordingly, petitioner is liable for the tax it failed to collect from the customers pursuant to section 1133(a) of the Tax Law.

B. That the contract for the sale of the business specifically provided that all leasehold improvements were included in the sales price and allocated \$18,320.00 of the sales price to such improvements. Petitioner failed to establish that the contract was in error or that the improvements were permanent in nature so as to constitute nontaxable capital improvements. Therefore, the Audit Division properly held petitioner liable for additional bulk sales tax of \$1,465.60.

C. That section 1139(a) of the Tax law provides, in pertinent part, that no refund or credit shall be made to any person of tax which he collected from a customer until he shall first establish that he has repaid such tax to the customer.

Petitioner has not repaid any sales tax to American Chicle Co. and therefore, is not entitled to the credit referred to in Finding of Fact "7".

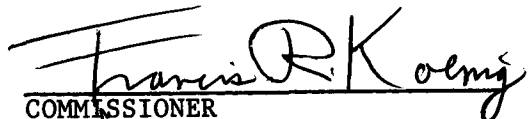
D. That the petition of Marlene Manufacturing Corp. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 18, 1981 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

SEP 21 1984


PRESIDENT


COMMISSIONER


COMMISSIONER

P 693 168 663

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

PS Form 3800, Feb. 1982 * U.S.G.P.O. 1983-403-517	Sent to	Max Friedman	
	Street and No.	W. Fred Wyer & Co., CPA's	
	P.O., State and ZIP Code	100 Park Ave., Rm 2305	
	Postage	NY, NY 10166	
	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 693 168 662

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

PS Form 3800, Feb. 1982 * U.S.G.P.O. 1983-403-517	Sent to	Martene Manufacturing Co.	
	Street and No.	C/O Herbert Morrison	
	P.O., State and ZIP Code	415 West 60th St.	
	Postage	NY, NY 10023	
	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			