

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
William Kleess :
Officer of Competent Home Products, 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 6/1/80 - 11/30/82. :

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 16th day of July, 1985, he served the within notice of Decision by certified mail upon William Kleess, Officer of Competent Home Products, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

William Kleess
Officer of Competent Home Products, Inc.
RD #2 Box 448A
Red Hook, NY 12571

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
16th day of July, 1985.

David Parchuck

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

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

July 16, 1985

William Kleess
Officer of Competent Home Products, Inc.
RD #2 Box 448A
Red Hook, NY 12571

Dear Mr. Kleess:

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

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| In the Matter of the Petition | : | |
| of | : | |
| WILLIAM KLEESS, | : | DECISION |
| OFFICER OF COMPETENT HOME PRODUCTS, INC., | : | |
| 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, 1980 | : | |
| through August 31, 1982. | : | |

Petitioner, William Kleess, officer of Competent Home Products, Inc., RD 2, Box 448A, Red Hook, New York 12571, 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, 1980 through August 31, 1982 (File No. 47568).

A formal hearing was held before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Office Campus, Albany, New York, on March 13, 1985 at 9:15 A.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Thomas Sacca, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined additional sales taxes due from Competent Home Products, Inc. on the basis of external indices.

FINDINGS OF FACT

1. On July 15, 1983, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Competent Home Products, Inc. for taxes due of \$3,702.34, plus penalty of \$633.66 and interest of \$581.54, for a total due of \$4,917.54 for the period June 1, 1980 through August 31, 1982.

On the same date, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against the petitioner, William Kleess, based on the fact that he was an officer of Competent Home Products, Inc.

2. On September 2, 1983, the petitioner filed a timely petition for a hearing to review the notice of determination.

3. During the period at issue, Competent Home Products, Inc. ("the corporation"), a New Jersey corporation, was engaged in the sale of small kitchen appliances at fairs and trade shows throughout the United States. Petitioner, William Kleess, and Mikel A. Kleess were the officers of the corporation. Since 1980, the corporation had maintained storage facilities in Red Hook, New York.

4. During the period at issue, the corporation was not registered with the Audit Division as a vendor for collecting sales tax. Additionally, the corporation did not file New York corporation franchise tax reports.

On audit, the only records made available to the auditor were copies of the corporation's Federal income tax returns for the fiscal years ended June 30, 1980 through June 30, 1982. The petitioner indicated that the corporation did not maintain individual sales records for any fair or show nor could he provide the auditor with the amount of sales tax or rent paid at any fair or show.

In order to determine New York State sales, the auditor, based on the Federal income tax returns, determined that rent paid at fairs and shows to be 14.06 percent of gross sales. The auditor next reviewed the Department's files on trade shows and fairs to determine those attended by the corporation. The operators of the attended fairs provided the auditor with the rent paid. For

the audit period, total New York State sales were determined to be \$86,978.00, with a tax due thereon of \$5,297.08. Since the corporation had paid sales tax at various shows in New York State of \$1,594.74, additional tax due was \$3,702.34.

5. Petitioner testified that there were shows where the prospect of making sales was so limited that he left early, notwithstanding that rent had been paid in advance. Petitioner could provide no specific details of the shows where he left early.

6. Petitioner offered no substantial evidence to refute the findings of the Audit Division. He did not challenge the determination that he was an officer responsible for the taxes of the corporation.

CONCLUSIONS OF LAW

A. That section 1135(a) of the Tax Law provides that every person required to collect tax shall keep records of every sale and of all amounts paid, charged or due thereon and of the tax payable thereon. Such records shall include a true copy of each sales slips, invoice, receipt or statement.

B. That section 1138(a)(1) of the Tax Law provides, in pertinent part, that the amount of tax due shall be determined from such information as may be available. If necessary, the tax may be estimated on the basis of external indices, such as rent paid.

C. That the books and records of Competent Home Products, Inc. were inadequate and incomplete for purposes of determining taxable sales or sales tax due. Therefore, the use of external indices is permissible (Matter of Korba v. N.Y.S. Tax Commission, 84 A.D.2d 655). Accordingly, the Audit Division's determination of additional tax due was proper pursuant to section 1138(a)(1) of the Tax Law. Exactness is not required where it is the taxpayer's own failure to maintain proper records which prevents exactness in the determination

of sales tax liability (Matter of Markowitz v. State Tax Commission, 54 A.D.2d 1023).

D. That petitioner was a person required to collect tax on behalf of the corporation within the meaning of section 1131(1) of the Tax Law and is personally liable for the tax.

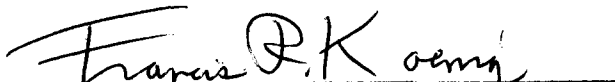
E. That the petition of William Kleess, officer of Competent Home Products, Inc., is denied.


DATED: Albany, New York

STATE TAX COMMISSION

JUL 16 1985


PRESIDENT


COMMISSIONER


COMMISSIONER

P 095 690 894

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1984-448-014

PS Form 3800, Feb. 1982

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| Sent to | <i>William Kless Huns</i> | |
| Street and no. | <i>Imperial Home Products Inc.</i> | |
| P.O. State and ZIP Code | <i>Ed #2 Box 448A</i> | |
| Postage | <i>Ed Hook NY 12571</i> | |
| 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 | | |