

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
S & T Famous Bags, 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 3/1/79-2/28/82.

:

:

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 15th day of February, 1985, he served the within notice of Decision by certified mail upon S & T Famous Bags, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

S & T Famous Bags, Inc.
1308 Kings Hgwy.
Brooklyn, NY 11229

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
15th day of February, 1985.

David Parchuck

James J. O'Sullivan
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
S & T Famous Bags, 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 3/1/79-2/28/82. :

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 15th day of February, 1985, he served the within notice of Decision by certified mail upon Philip Trestyn, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Philip Trestyn
Trestyn, Trestyn & Pugsley
276 5th Avenue
New York, NY 10001

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
15th day of February, 1985.

David Parchuck

Bernie A. Hagelund
Authorized to administer oaths
pursuant to Tax Law section 174

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

February 15, 1985

S & T Famous Bags, Inc.
1308 Kings Hgwy.
Brooklyn, NY 11229

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
Philip Trestyn
Trestyn, Trestyn & Pugsley
276 5th Avenue
New York, NY 10001
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
S & T FAMOUS BAGS, 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 March 1, 1979
through February 28, 1982.

:
:
:
DECISION
:

Petitioner, S & T Famous Bags, Inc., 1308 Kings Highway, Brooklyn, New York 11229, 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, 1979 through February 28, 1982 (File No. 42283).

A small claims hearing was held before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 4, 1984 at 1:15 P.M., with all briefs to be submitted by December 4, 1984. Petitioner appeared by Philip Trestyn, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Michael Gitter, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined additional sales taxes due from petitioner for the period March 1, 1979 through February 28, 1982.

FINDINGS OF FACT

1. On January 20, 1983, the Audit Division, as the result of a field audit, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against the petitioner, S & T Famous Bags, Inc., for additional taxes due of \$22,491.76, plus interest of \$5,593.65, for a total amount due of \$28,085.41 for the period March 1, 1979 through February 28, 1982.

2. The petitioner, by signature of its president, Stefen Tanner, executed a consent extending the period of limitation for assessment of sales and use taxes for the period March, 1979 through February, 1982 to March 20, 1983.

3. On January 26, 1983, petitioner filed a petition protesting the notice and said petition was timely received on February 11, 1983.

4. During the period under review, petitioner operated a retail business at 1308 Kings Highway, Brooklyn, New York, selling therefrom ladies' handbags and accessories.

5. On audit, petitioner failed to produce the sales and shipping documents required to support the nontaxable sales as reported on the sales and use tax returns filed. In the absence of adequate books and records, the examiner for the Audit Division utilized the federal income tax returns filed by petitioner for the fiscal years ended November 30, 1980 and November 30, 1981 to determine an average markup on purchases of 51.83 percent. He then adjusted the purchases per books (\$930,569.00) to allow for a merchandise inventory and applied the average markup thereto to arrive at audited taxable sales of \$1,362,738.00. Since petitioner reported taxable sales of only \$1,083,285.00 on the returns filed, an additional tax due was computed of \$22,491.76.

6. Petitioner argued that the examiner in the determination of audited taxable sales, utilized the accounts payable ledger account rather than the purchases account. Petitioner offered no substantial evidence as to the discrepancy in the balances in the accounts payable and purchases ledger accounts for the period under review.

7. Petitioner further argued that a major portion (\$267,764.00) of the additional taxable sales figure (\$279,453.00) represented sales of handbags shipped out of state to customers in the States of Florida or California.

Allegedly, 250 letters were mailed to the out of state customers for confirmation of their purchases and some 60 responses were received. At the hearing, a total of 11 said letters were introduced into evidence which account for sales in the amount of \$6,095.63.

CONCLUSIONS OF LAW

A. That petitioner failed to maintain adequate books and records from which the actual amount of tax due could be determined. The Audit Division's resort to the use of external indices in order to determine the tax due was therefore proper (Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44.).

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 (People ex rel. Kohlman & Co. v. Law, 239 N.Y. 346.).

C. That petitioner submitted proof to show that it made sales which were shipped out of state in the amount of \$6,095.63 in accordance with Finding of Fact "7", supra.

D. That the petition of S & T Famous Bags, Inc. is granted to the extent indicated in Conclusion of Law "C" supra; the Audit Division is hereby directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued January 20, 1983; and that except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

FEB 15 1985

STATE TAX COMMISSION

Roderick W. Allen
PRESIDENT
Francis R. Koenig
COMMISSIONER
Mark J. Smith
COMMISSIONER

P 693 169 600

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517

Sent to	<i>S E T Thomas Sup Co</i>	
Street and No.	<i>1308 1st Ave</i>	
P.O., State and ZIP Code	<i>Brooklyn NY 11229</i>	
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 693 169 601

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517

Sent to	<i>Philip Trestyk</i>	
Street and No.	<i>276 5th Ave</i>	
P.O., State and ZIP Code	<i>New York NY 10001</i>	
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