

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Webbs Motel, Inc. :
and Webb's Harbor Lanes and Restaurant, 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 :
5/31/75-11/30/77. :

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 April, 1985, he served the within notice of Decision by certified mail upon Webbs Motel, Inc. and Webb's Harbor Lanes and Restaurant, Inc., the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Webbs Motel, Inc.
and Webb's Harbor Lanes and Restaurant, Inc.
c/o Paul V. Webb, Jr.
111 W. Second St.
Jamestown, NY 14701

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 April, 1985.

David Parchuck

Barrie A. Dwyer
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Webbs Motel, Inc. :
and Webb's Harbor Lanes and Restaurant, 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 5/31/75-11/30/77. :

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 April, 1985, he served the within notice of Decision by certified mail upon Paul V. Webb, Jr., the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Paul V. Webb, Jr.
Erickson, Webb & Scolton
111 W. Second St.
Jamestown, NY 14701

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 April, 1985.

David Parchuck

Barbara A. [Signature]
Authorized to administer oaths
pursuant to Tax Law Section 174

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

April 15, 1985

Webbs Motel, Inc.
and Webb's Harbor Lanes and Restaurant, Inc.
c/o Paul V. Webb, Jr.
111 W. Second St.
Jamestown, NY 14701

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
Paul V. Webb, Jr.
Erickson, Webb & Scolton
111 W. Second St.
Jamestown, NY 14701
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions :
of :
WEBB'S MOTEL, INC. : DECISION
AND WEBB'S HARBOR LANES AND RESTAURANT, INC. :
for Revision of Determinations or for Refunds :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period May 31, 1975 :
through November 30, 1977. :

Petitioners, Webb's Motel, Inc. and Webb's Harbor Lanes and Restaurant, Inc., c/o Paul V. Webb, Jr., 111 West Second Street, Jamestown, New York 14701, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period May 31, 1975 through November 30, 1977 (File Nos. 23170 and 22716).

A small claims hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on May 24, 1984 at 1:15 P.M., with all briefs to be submitted by August 1, 1984. Petitioners appeared by Paul V. Webb, Jr., Esq. The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUE

Whether a portion of certain payments made to petitioners by another entity, namely Webb's Candies, Inc., were payments for leasing of tangible personal property and thus were subject to sales tax pursuant to section 1105(a) of the Tax Law.

FINDINGS OF FACT

1. On March 16, 1978, the Audit Division issued to petitioner Webb's Harbor Lanes and Restaurant, Inc. ("Webb's Harbor Lanes") a Notice of

Determination and Demand for Payment of Sales and Use Taxes Due for the quarterly periods ended May 31, 1975 through November 30, 1977 in the amount of \$2,116.24, plus interest.

2. On July 31, 1978, the Audit Division issued to petitioner Webb's Motel, Inc. ("Webb's Motel") a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the quarterly periods ended May 31, 1975 through November 30, 1977 in the amount of \$1,046.56, plus interest.

3. Petitioners had executed consents dated November 30, 1977 allowing sales and use taxes due for the period June 1, 1974 through August 31, 1977 to be assessed on or before December 20, 1978.

4. As the result of a pre-hearing conference, the assessment issued to Webb's Harbor Lanes has been reduced to \$1,328.59, plus interest (see Finding of Fact "11", infra.).

5. Paul V. Webb, Sr., is the principal owner and operator of three separate corporations, namely Webb's Motel and Webb's Harbor Lanes, petitioners herein, and Webb's Candies, Inc. ("Webb's Candies"). Webb's Candies was incorporated in or about 1953, Webb's Harbor Lanes was incorporated in or about 1965 and Webb's Motel was incorporated in or about 1969. These three entities are each located at West Lake Road, Mayville, New York and are essentially operated together as a year round resort at this one location. Webb's Motel operates a twenty room motel complex, while Webb's Harbor Lanes operates a restaurant and an eight lane bowling alley.

6. Prior to 1975, each of the three entities maintained its own complete set of accounting books and records, including separate payrolls, journals, ledgers, etc. A single bookkeeper, working in one office, handled all of the separate bookkeeping functions for each of the three entities.

7. In or about 1975, the above-described accounting system was changed in an effort to simplify the system and reduce the amount of bookkeeping entailed in maintaining separate sets of bookkeeping records for each of the three entities. On the advice of Mr. James Schantz, who has served continuously as accountant for the three entities since their incorporation (and prior thereto from 1947 as accountant for Paul V. Webb d/b/a Webb's Candies), the bookkeeping system was combined so that all bookkeeping was handled under Webb's Candies. The operations of Webb's Motel and Webb's Harbor Lanes, including all revenues, expenses, payroll, etc., were accounted for under Webb's Candies. In essence, all current operating items (i.e. current assets and current liabilities) were put on one set of books under Webb's Candies, while all long-term (capital) assets and liabilities remained on the books of the other two entities. Webb's Motel and Webb's Harbor Lanes ceased filing sales and use tax returns, with all information required on such returns being reported on sales tax returns filed by Webb's Candies. However, each of the three entities continued to file their own separate U.S. Corporation Income Tax Returns and New York State Corporation Franchise Tax Reports.

8. There was no transfer of ownership, control, possession or use of any assets owned by either Webb's Motel or Webb's Harbor Lanes to Webb's Candies in conjunction with the aforementioned accounting system change. However, Mr. Schantz did project the anticipated amounts of cash needed by Webb's Harbor Lanes and Webb's Motel to pay, on a monthly basis, the mortgages, real property taxes and insurance expense owed by each of these two entities, and Webb's Candies transferred funds each month in the amount of \$3,783.00 to Webb's Harbor Lanes and \$4,190.00 to Webb's Motel to enable the latter two entities to pay such expenses.

9. The above-noted projection, based solely on the anticipated expenses associated with the two entities' real property (i.e. mortgage payments, real estate taxes and insurance), was periodically increased based on improvements to the real estate, and the concomitant tax and insurance expense increases associated therewith. The projection did not encompass consideration of any other items. In fact, the cash flow projection fell short of being adequate by \$6,191.96 for Webb's Harbor Lanes and \$17,177.54 for Webb's Motel over the duration of the period at issue.¹

10. When petitioners ceased filing sales tax returns, the Audit Division assumed that a bulk sale had occurred and commenced an audit of the three entities. Upon audit, it was discovered that no bulk sale had occurred. However, the auditor determined that there was an oral lease of the assets of the two petitioners to Webb's Candies, and that the monthly payments from Webb's Candies represented the lease payments. Accordingly, the auditor imposed sales tax (at seven percent) on the portion of the monthly payments allocated by him to represent payments for leasing tangible personal property (taken from petitioners' depreciation schedules) pursuant to the following formula:

$$\frac{\text{Net Book Value of Tangible Personal Property}}{\text{Net Book Value of All Property}} \times \text{total of monthly payments}^2$$

1 The Audit Reports introduced in evidence as State's Exhibits "N" and "O" note that the monthly payments also included amounts for corporate income and franchise taxes.

2 The original audit results were based on cost values rather than net book values. However, after a pre-hearing conference, the latter values were determined to be appropriate. A list of the items of tangible personal property is appended hereto as Schedule "A".

11. The assessment against Webb's Harbor Lanes has been reduced, as noted, to \$1,328.59 (see Finding of Fact "4", supra), consisting of \$1,152.35 based on the alleged lease of tangible personal property and \$176.24 based on tax due on the purchase of fixtures and equipment. Neither evidence nor argument was offered concerning this latter item, and it appears that Webb's Harbor Lanes does not contest liability for such amount.

12. Webb's Motel's sales tax liability has been reported under Webb's Candies since May 1, 1975, while Webb's Harbor Lanes' sales tax liability has been reported under Webb's Candies since September 1, 1976. The auditor found no underreporting of sales tax for either of the petitioners in any area other than the noted \$176.24 found on purchases of furniture and fixtures, and the alleged lease payments at issue.

13. Since the above-noted dates, Webb's Candies has purchased and paid for for all expenses associated with maintenance and repair of the land, buildings and equipment of the other two entities and has purchased and paid for all equipment replacements and improvements of the other two entities. Items of tangible personal property bought in this manner by Webb's Candies after the noted dates have been carried on the books of and depreciated by Webb's Candies. The items owned by the other two entities, as listed in Schedule "A" (attached), were reflected on the corporate tax returns of such entities and were depreciated by them.

14. Petitioners asserted that some of the items listed in Schedule "A" (attached), including the air conditioners, televisions, bowling alleys, fixtures and "some" equipment were built into the realty of the two entities and could not be removed without substantial damage to the buildings. Thus petitioners maintain that such items constituted realty rather than tangible

personal property which would not in any event be subject to tax as asserted herein. No further specifics were provided with regard to such items, the manner in which they were built into the realty or the nature or extent of damage which would result if such items were removed.

CONCLUSIONS OF LAW

A. That Tax Law section 1101(a)(5) defines the term "sale" as:

"[a]ny transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, ...".

B. That 20 NYCRR 526.7 provides, in relevant part, as follows:

"Sale, selling or purchase. [Tax Law, §1101(b)(5)] (a) Definition.

(1) The words sale, selling or purchase mean any transaction in which there is a transfer of title or possession, or both, of tangible personal property for a consideration.

(2) Among the transactions included in the words sale, selling or purchase are exchanges, barter, rentals, leases or licenses to use or consume tangible personal property.

* * *

(b) Consideration. The term consideration includes monetary consideration, exchange, barter, the rendering of any service, or any agreement therefor. Monetary consideration includes assumption of liabilities, fees, rentals, royalties or any other charge that a purchaser, lessee or licensee is required to pay.

(c) Rentals, leases, licenses to use. (1) The terms rental, lease, license to use refer to all transactions in which there is a transfer of possession of tangible personal property without a transfer of title to the property. Whether a transaction is a 'sale' or a 'rental, lease or license to use' shall be determined in accordance with the provisions of the agreement."

C. That the monthly payments flowing from Webb's Candies to each of the petitioners herein did not represent lease payments for tangible personal property subject to sales tax. There was, as noted, no transfer of title, ownership, possession or use of any of the items in question, which items

remained under the ownership and operation of the separate entities. In fact, the payments did not represent consideration, but rather were distributions by Webb's Candies of the income of each of the petitioners back to such petitioners in order to allow them to pay the cash expenses which related to the property they continued to own and upon which there existed outstanding liabilities (i.e. mortgages, real estate taxes, etc.). These monthly payments were based solely on a projection of such expenses, and in fact fell short of equalling actual expenses. In sum, the substance of the transactions indicates an attempt to centralize petitioners' accounting systems but not the existence of lease payments subject to sales tax.³ Finally, in view of the foregoing, it is unnecessary to discuss the assertion raised by petitioners in Finding of Fact "14", supra.

D. That the petition of Webb's Motel, Inc. is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated July 31, 1978 is cancelled. That the petition of Webb's Harbor Lanes and Restaurant, Inc. is granted to the extent that sales tax assessed on the monthly payments is cancelled, but is denied with respect to the portion of the assessment relating to tax due in the amount of \$176.24 on purchases of furniture and fixtures (see Finding of Fact "11", supra), and the Notice of Determination and

3 It is arguable that items of tangible personal property purchased by Webb's Candies and carried on its books but used by the other two entities could result in a taxable lease. However, that situation was not presented and accordingly we need not address it.

Demand for Payment of Sales and Use Taxes Due dated May 16, 1978, as modified
in accordance herewith, is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

APR 15 1985

Rodriguez
PRESIDENT

Francis R. Koenig
COMMISSIONER

W. H. J. J.
COMMISSIONER

SCHEDULE "A"

ITEMS INCLUDED AS TANGIBLE PERSONAL PROPERTY

WEBB'S MOTEL

Snowmobile
Furniture and fixtures
Office equipment
T.V. sets
Air conditioning
Road signs
Machinery and equipment
Laundry equipment
Linen

WEBB'S HARBOR LANES

Bowling equipment
Furniture and fixtures
Pinsetters
Trucks and equipment
Vending machines
Bowling alley
Restaurant equipment
Signs
Linens

P 693 169 725

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517

PS Form 3800, Feb. 1982

| | |
|---|----|
| Sent to <i>Webb, Mark J. & Mary E.</i> | |
| Street and No. <i>Webb, Mark J. & Mary E.</i> | |
| P.O., State and ZIP Code <i>111 W 2nd St</i> | |
| Postage <i>Postmaster NY 14701</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 | |

P 693 169 726

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517

PS Form 3800, Feb. 1982

| | |
|---|----|
| Sent to <i>Paul V Webb, Jr.</i> | |
| Street and No. <i>Cricken Webb & Son</i> | |
| P.O., State and ZIP Code <i>111 W 2nd St</i> | |
| Postage <i>Postmaster NY 14701</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 | |