

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Continental Arms Corp. : 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 6/1/79-5/31/82. :

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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 17th day of January, 1986, he served the within notice of Decision by certified mail upon Continental Arms Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Continental Arms Corp.  
697 Fifth Ave.  
New York, NY 10022

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  
17th day of January, 1986.

David Parchuck

James A. Hagedorn

Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Continental Arms Corp. : AFFIDAVIT OF MAILING  
  
for Redetermination of a Deficiency or Revision :  
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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 17th day of January, 1986, he served the within notice of Decision by certified mail upon Abraham S. Guterman, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Abraham S. Guterman  
Hess, Segall, Guterman, Pelz, Steiner & Barovick  
230 Park Avenue  
New York, NY 10169

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  
17th day of January, 1986.

David Parchuck

James J. Anderson  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

January 17, 1986

Continental Arms Corp.  
697 Fifth Ave.  
New York, NY 10022

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  
Abraham S. Guterman  
Hess, Segall, Guterman, Pelz, Steiner & Barovick  
230 Park Avenue  
New York, NY 10169  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
CONTINENTAL ARMS 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, 1979	:	
through May 31, 1982.	:	

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Petitioner, Continental Arms Corp., 697 Fifth Avenue, New York, New York 10022, 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, 1979 through May 31, 1982 (File No. 45178).

A hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 23, 1985 at 1:15 P.M., with all briefs to be submitted by July 24, 1985. Petitioner appeared by Hess, Segall, Guterman, Pelz, Steiner & Barovick (Abraham S. Guterman, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUES

I. Whether certain merchandise sold by petitioner was delivered within New York State, thereby subjecting the receipts from said sales to New York sales tax.

II. Whether it was proper for the Audit Division to assess additional sales tax due on the basis of a test period.

FINDINGS OF FACT

1. On June 20, 1983, subsequent to the conduct of a field examination, the Audit Division issued to petitioner, Continental Arms Corp. (hereinafter "Continental"), a Notice of Determination and Demand for Payment of Sales and Use Taxes Due. Said Notice encompassed the period June 1, 1979 through May 31, 1982 and assessed additional sales and use taxes due of \$56,977.59, plus interest of \$15,502.71, for a total amount due of \$72,480.30. The periods ending August 31, 1979, November 30, 1979 and February 29, 1980 were held open for assessment by virtue of petitioner's execution of three consents extending the period of limitations for assessment.

2. The aforementioned Notice was primarily based on the Audit Division's disallowance of claimed nontaxable sales of \$705,234.31 (resulting in tax due of \$56,901.59). Said Notice also included tax due of \$76.00 for purchases of fixed assets. Petitioner conceded that \$76.00 of tax was due on purchases of fixed assets.

3. During the years at issue, petitioner was involved in the retail sale of firearms, including such items as handguns, rifles and ammunition. The disallowed nontaxable sales of \$705,234.31 represented sales of firearms made to nonresident aliens.

4. In order to purchase a firearm from Continental, a nonresident alien would first visit petitioner's showroom located in New York City and select the merchandise he or she desired. The nonresident alien could not take delivery of any firearms at the showroom since Federal law required that the firearms must either be shipped directly out of the country or delivered by the vendor to a common carrier for foreign delivery. On its sales invoice, petitioner would note the nonresident alien's name, foreign address, passport number, and

the manner in which the customer intended to depart the State (generally the airline, the flight number and the date and time of departure).

5. Prior to the period at issue, petitioner would deliver the nonresident alien's firearm directly to the aircraft departing for a foreign country and the captain or a crew member from said aircraft would issue Continental a receipt. Due to greatly increased security at airport terminals, the airlines would no longer permit Continental to board the aircraft and deliver firearms. To circumvent this problem, a new procedure was adopted wherein petitioner would contact the nonresident alien purchaser at the airport terminal and, in the presence of the baggage agent of the airline carrier, the purchaser's luggage was opened, the firearm placed therein, the luggage closed and then delivered to the baggage agent for forwarding to the aircraft. No receipt was issued by a representative of the airline. The new procedure was in effect throughout the entire period under audit.

6. Petitioner did not charge or collect sales tax on those sales made to nonresident aliens which were delivered pursuant to the new procedure described in Finding of Fact "5", supra. Continental maintains that it made delivery to a common carrier (the baggage agent for the airline carrier) via the only available procedure and that delivery took place outside New York. Petitioner argues that to impose a sales tax under these circumstances would violate the commerce clause, the import-export clause and the supremacy clause of the United States Constitution. It is the Audit Division's position that delivery took place at the airport in New York, thereby subjecting the receipt from said transaction to New York sales tax.

7. During the audit period in question, petitioner maintained complete and adequate books and records. As the audit began, petitioner's accountant

would not agree to the use of a test period and would not sign a "Test Period Agreement Form". However, the Audit Division initially used a test period, presumably to determine if a detailed audit was warranted. The Audit Division presented petitioner's accountant with the results of the test period audit, specifically its position that the aforementioned sales to nonresident aliens were taxable. Petitioner's accountant stated that he was of the opinion that the Audit Division's position was totally without merit. He subsequently denied the Audit Division further access to petitioner's books and records. At the hearing held herein, petitioner's president testified that in his conversations with the accountant no mention was made that the Audit Division was denied access to Continental's books and records. Petitioner's accountant did not appear at the hearing held herein to offer his testimony.

8. Petitioner also maintained that its sales to nonresident aliens were not of a regular and periodic nature and that to project the results of the test period over the entire audit period distorted the computation of tax due. No evidence was adduced at the hearing to support this allegation.

#### CONCLUSIONS OF LAW

A. That 20 NYCRR 525.2(a)(3) provides that "[t]he sales tax is a 'destination tax', that is, the point of delivery or point at which possession is transferred by the vendor to the purchaser or designee controls both the tax incident and the tax rate."

B. That, in the instant matter, actual physical possession of the merchandise was transferred by Continental to its customer while such customer was still in New York. The merchandise in question was not delivered by petitioner to a common carrier for delivery outside the State. Since the customer took possession within New York, these sales were properly held subject to sales tax

(Matter of Jacques Francais Rare Violins, Inc., State Tax Comm., October 5, 1984).

C. 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). Although Continental maintained complete books and records, said books and records must be made readily available to the Audit Division for examination. Since petitioner's accountant denied the Audit Division access to Continental's books and records, it was proper for the Audit Division to utilize a test period.

D. That petitioner has failed to show that its sales to nonresident aliens were not made on a regular and periodic basis. Accordingly, it was proper for the Audit Division to project the results of the test period over the entire audit period.


E. That the constitutionality of the laws of the State of New York are presumed at the administrative level.

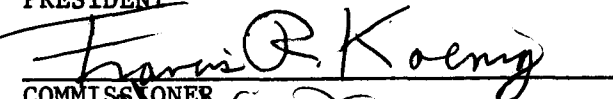
F. That the petition of Continental Arms Corp. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated June 20, 1983 is sustained.

DATED: Albany, New York

JAN 17 1986

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER



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**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>Continental Arms Corp</i>	
Street and No. <i>1097 5th Ave</i>	
P.O., State and ZIP Code <i>New York, NY 10022</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	

P 684 313 127

**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>William J. Lichten</i>	
Street and No. <i>220 Lexington Ave</i>	
P.O., State and ZIP Code <i>New York, NY 10017</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	