

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Guinan Kenworth :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax
under Article(s) 28 & 29 of the Tax Law :
for the Period 3/1/78 - 2/28/81.

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 12th day of June, 1986, he/she served the within notice of Decision by certified mail upon Guinan Kenworth the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Guinan Kenworth
3 Tobey Woods
Pittsford, NY 14534

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
12th day of June, 1986.

Janet M. Snay

Daniel J. Rivallo
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

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State of New York :

ss.:

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David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 12th day of June, 1986, he served the within notice of Decision by certified mail upon Warren Welch, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Warren Welch
Greisberger, Zicari, McConville, Cooman, Morin & Welch, P.C.
25 East Main St.
Rochester, NY 14614

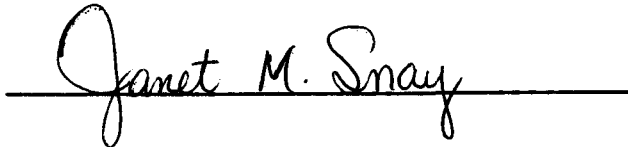
and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

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
12th day of June, 1986.



Authorized to administer oaths
pursuant to Tax Law section 174



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

June 12, 1986

Guinan Kenworth
3 Tobey Woods
Pittsford, NY 14534

Dear Mr. Kenworth:

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
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
Warren Welch
Greisberger, Zicari, McConville, Cooman, Morin & Welch, P.C.
25 East Main St.
Rochester, NY 14614

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
GUINAN KENWORTH	:	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 March 1, 1978	:	
through February 28, 1981.	:	

Petitioner, Guinan Kenworth, 3 Tobey Woods, Pittsford, New York 14534, 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, 1978 through February 28, 1981 (File No. 35131).

A hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, 259 Monroe Avenue, Rochester, New York, on June 4, 1985 at 9:15 A.M., with all briefs to be submitted by October 4, 1985. Petitioner appeared by Greisberger, Zicari, McConville, Cooman, Morin & Welch, P.C. (Warren Welch, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUE

I. Whether the Audit Division properly disallowed certain sales of motor vehicles which petitioner claimed to be exempt from sales tax.

II. Whether a questionnaire in the form of a letter sent by petitioner to its customers was sufficient to substantiate claimed exempt sales where the use of such a letter was suggested by a tax conferee.

FINDINGS OF FACT

1. During the period in issue, petitioner owned and operated a truck dealership in Rochester, New York which sold and serviced large trucks and tractor trailers.

2. On June 20, 1981, the Audit Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due covering the period March 1, 1978 through February 28, 1981 asserting taxes due of \$354,892.00 plus minimum statutory interest.

3. On audit, the Audit Division conducted a complete examination of petitioner's books and records. Among other things, this involved a review of all documents contained in petitioner's files, including sales invoices and related documents such as purchase orders, contracts and cancelled checks. In the case of approximately 107 sales claimed by petitioner as not subject to sales tax by virtue of section 1117(a) of the Tax Law, at least one document listing a New York address for the purchaser was found. No exemption certificates were on file for any of these sales. Because petitioner failed to produce any documents to substantiate its claims of exemption, the Audit Division disallowed all claimed exempt sales. This resulted in an increase in taxable sales of \$5,197,470.00 with a tax due thereon of \$354,602.28. In addition, expense purchases were examined for the calendar year 1980 revealing additional tax due of \$289.72.

4. On the basis of documentation submitted by petitioner following a pre-hearing conference, the Audit Division accepted several of the claimed exempt sales reducing the assessment by \$41,690.50. A payment of \$1,093.32 was applied to the revised assessment resulting in a tax due of \$312,108.18.

5. Petitioner maintained that it was relieved of duty to collect tax on each of the sales in question on one or more of three alternate grounds: delivery took place outside of New York State; the vehicle was sold to a non-resident not doing business in New York State; the vehicle was to be used in interstate and foreign commerce and that, because section 1132(f) of the Tax Law prevents registration of a vehicle in New York State until applicable taxes have been paid, the responsibility for payment of the tax rests solely with the purchaser of such a vehicle if and when it is used within the State. After the pre-hearing conference, petitioner solicited signed statements from its purchasers to substantiate the claimed exempt sales. A form letter was used stating, "We have been advised by the New York State Tax Commission that a sales tax liability may exist for the purchase of your tractor;" and advising the purchaser to review the statements below and check the one that applies:

1. New York State Sales Tax has been paid. (Submit proof of payment)
2. Delivery was taken outside of New York.
3. Sales Tax has been paid in another state at time of licensing. The state is _____. (Show proof of payment)

6. Petitioner received the following responses to its letter as summarized below:

- (a) Seventy-six letters were returned with statement number two checked, indicating that delivery took place outside of New York State. Sixty-one of these letters showed a New York address for the purchaser. The balance showed no address or an out of state address. One of these letters was accompanied by a document showing that a truck purchased from petitioner in 1978 was registered in Illinois in 1982. Handwritten notations on some of the letters appear to be Interstate Commerce Commission registration numbers. A few were accompanied by separate statements or handwritten notes indicating that delivery occurred outside of New York.

- (b) One letter bearing a New York address was returned with a notation stating the purchaser was located in Georgia at the time the sales transaction occurred. An incomplete certificate of purchase was included.
- (c) One notarized statement was received stating that delivery of the purchaser's truck was made outside of New York State and that New York license plates were later obtained for that truck. No documentation was provided in support of the affidavit.
- (d) Three certificates of purchase were returned fully completed and claiming exemption from sales tax on the basis that the purchaser was a non-resident, had no permanent place of abode in New York State and was not carrying on business in the State. The purchasers were identified as:

C. J. Kain
Henry Squires (H & G Enterprises)
H. Anderson Trucking Co., Inc.

- (e) One affidavit was received from Marta Mazzarisi of Azteca Transport, stating that the purchase was not subject to New York Sales Tax because the purchaser was a non-resident corporation which had no permanent place of business in New York and that the motor vehicle will not be used in carrying on a trade or business in New York State.
- (f) One letter was returned with a check made out to the New York State Tax Commission. This was applied to the outstanding assessment (Finding of Fact "4", supra).

7. The Audit Division maintained that the statements and affidavits described above were inadequate to substantiate claimed exempt sales. Petitioner alleged that a tax conferee approved the form letter before it was sent and that the statements obtained were in substantial compliance with the Tax Law.

8. After the hearing, petitioner submitted two garage policies issued to Guinan Truck Centers, Inc. by the Safeguard Insurance Company for the years 1979 and 1980. Included in the policies was a "Drive-Away" Collision Coverage Endorsement which purportedly provided insurance to petitioner for the delivery of trucks. The endorsement was subject to two stipulations pertinent to this

inquiry. Provision number two required the insured to provide the insurance company with a monthly statement "of the points of origin and destination and the factory price of each automobile driven, towed, or carried...by the insured, from point of purchase or distribution to point of destination if such points are more than 50 road miles apart." Provision number four provides that the earned premium for the "Drive-Away" coverage would be computed monthly in accordance with a schedule of rates taking into account the factory price of the vehicle and the number of miles it was transported. Petitioner did not produce copies of statements required by provision two showing vehicles transported nor provide evidence of additional premiums paid in accordance with provision number four.

CONCLUSIONS OF LAW

A. That the sales tax is imposed on the receipts, unless specifically exempted, of every retail sale of tangible personal property [Tax Law §1105(a)]. There is a presumption in the law that all such receipts are subject to tax, and the burden of proving otherwise is placed upon the person required to collect the tax [Tax Law §1132(c)]. The tax is both a "transaction tax" and a "destination tax"; that is, liability for the tax arises at the point of delivery or the point at which liability transfers from the vendor to the purchaser [20 NYCRR §525.2(a)(2) and (a)(3)]. Petitioner has not presented credible evidence to show that any of the sales transactions at issue were excluded from the operation of the sales tax because delivery occurred outside New York State. Standing alone, the self-serving statements of petitioner's customers are not adequate for this purpose. This is especially true in light of the fact that in each case petitioner's own business records contained a New York address for the purchaser, indicating that the purchaser either was doing

business or had a permanent place of abode in this state. Furthermore, petitioner's failure to produce any documents kept in the normal course of business which show transport or delivery of any vehicle outside New York State weighs heavily against a finding in its favor.

B. That the completed form letters collected by petitioner were insufficient to substantiate its claimed exempt sales. The letter itself required proof of payment where the taxpayer claimed sales tax had been paid in New York State or elsewhere. Only one purchaser made this claim, and he remitted payment of New York sales tax only after receiving the letter under consideration. Those purchasers who allegedly took delivery outside of New York offered no proof at all to substantiate their claims. To the extent that the form letter failed to require such proof, it was wholly inadequate.

C. That an exemption from the sales tax is provided by section 1117 of the Tax Law in the case of certain sales of motor vehicles. Receipts from such sales may not be subject to the sales tax, despite taking of physical possession within this state, where the purchaser furnishes to the vendor an affidavit stating that the purchaser (1) is a nonresident; (2) has no place of permanent abode in this state; and (3) is not engaged in carrying on in this state any employment, trade, business or profession in which the motor vehicle will be used in this state [Tax Law §1117(a)]. Petitioner provided four affidavits which meet these requirements. Accordingly, the Audit Division is directed to reduce the assessment by giving credit for the exempt sales made to the purchasers identified in Finding of Fact "6(d) and (e)".

D. That petitioner was a person required to collect tax pursuant to section 1131(1) of the Tax Law. Section 1132, subdivision (f) of the Tax Law, which provides that a purchaser may not register a vehicle in New York until it is

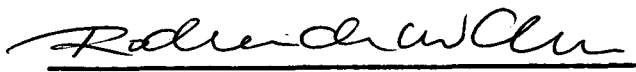
proven that the sales tax was paid, does not relieve the petitioner of its duty to collect the tax when collecting the price to which it applies. This is true whether or not the vehicle is ultimately destined for use in interstate commerce.

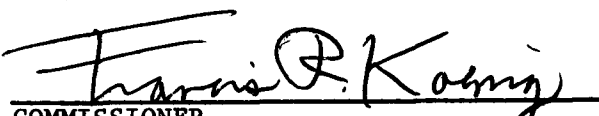
E. That the petition of Guinan Kenworth is granted to the extent indicated in Finding of Fact "4" and Conclusion of Law "C"; that the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 20, 1981 shall be modified accordingly; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

JUN 12 1986


PRESIDENT


COMMISSIONER


COMMISSIONER

P 319 372 724

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL
(See Reverse)

★ U.S.G.P.O. 1985-480-794

PS Form 3800, June 1985

Sent to Wannen, Welch	
Street and No. Greisberger, Zicari, McConville, Coonan, Whorin, Welch, PC.	
P.O., State and ZIP Code 25 East Main St. Rochester, N.Y. 14614	
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 319 372 723

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL
(See Reverse)

★ U.S.G.P.O. 1985-480-794

PS Form 3800, June 1985

Sent to Guinan Kenworth	
Street and No. 3 Tobey Woods	
P.O., State and ZIP Code Pittsford, N.Y. 14534	
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	