

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Sherry Tobacco Corp. (Purchaser) : 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 6/1/72 - 8/31/75. :

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 3rd day of January, 1986, he served the within notice of Decision by certified mail upon Sherry Tobacco Corp. (Purchaser), the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sherry Tobacco Corp. (Purchaser)
Attn: Clifford Klein, Pres.
570 Derby Ave.
Woodmere, NY 11598

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
3rd day of January, 1986.

David Parchuck

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

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

January 3, 1986

Sherry Tobacco Corp. (Purchaser)
Attn: Clifford Klein, Pres.
570 Derby Ave.
Woodmere, NY 11598

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: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
Sherry Tobacco Corp.
and Eugene Gershon Indv. & as Officer : 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 6/1/72 - 8/31/75. :

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 3rd day of January, 1986, he served the within notice of Decision by certified mail upon Sherry Tobacco Corp., and Eugene Gershon Indv. & as Officer the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sherry Tobacco Corp.
and Eugene Gershon Indv. & as Officer
2537 Golden Avenue
Bronx, NY

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
3rd day of January, 1986.

David Parchuck

Carrie A. Haglund
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Sherry Tobacco Corp. :
and Eugene Gershon Indv. & as Officer : 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 6/1/72 - 8/31/75. :

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 3rd day of January, 1986, he served the within notice of Decision by certified mail upon Raymond Sharenow, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Raymond Sharenow
60 East 42nd St.
New York, NY 10017

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
3rd day of January, 1986.

David Parchuck

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

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

January 3, 1986

Sherry Tobacco Corp.
and Eugene Gershon Indv. & as Officer
2537 Golden Avenue
Bronx, NY

Gentlemen:

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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
Raymond Sharenow
60 East 42nd St.
New York, NY 10017
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
SHERRY TOBACCO CORP. (Seller) and	:	DECISION
EUGENE GERSHON, as Officer	:	
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, 1972	:	
through August 31, 1975.	:	

In the Matter of the Petition	:
of	:
SHERRY TOBACCO CORP. (Purchaser)	:
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, 1972	:
through August 31, 1975.	:

Petitioners, Sherry Tobacco Corp. (Seller) and Eugene Gershan, as Officer, 2537 Golden Avenue, Bronx, New York and Sherry Tobacco Corp. (Purchaser), 570 Derby Avenue, Woodmere, New York 11598, filed petitions 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, 1972 through August 31, 1975 (File Nos. 16478 and 16479).

A formal hearing was commenced before Robert F. Mulligan, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 24, 1978 at 9:15 A.M. and continued to conclusion on October 7, 1985 at 1:15 P.M. Petitioners appeared by Raymond Sharenow, C.P.A. The Audit Division appeared by Peter Crotty, Esq. (Samuel Freund, Esq., of

counsel) on August 24, 1978 and by John P. Dugan, Esq. (William Fox, Esq., of counsel) on October 7, 1985.

ISSUES

I. Whether the Audit Division properly determined petitioners' sales tax liability.

II. Whether petitioner Sherry Tobacco Corp. is liable as a bulk purchaser for the sales taxes determined to be due from petitioner Sherry Tobacco Corp. as seller.

FINDINGS OF FACT

1. On March 8, 1976, 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 petitioners Sherry Tobacco Corp. ("Sherry 1") and Eugene Gershon, as officer, in the amount of \$77,637.68 plus penalty and interest of \$29,829.49 for a total due of \$107,467.17 for the period June 1, 1972 through August 31, 1975. On the same date, the Audit Division issued an identical notice against petitioner Sherry Tobacco Corp. ("Sherry 2") as bulk purchaser pursuant to section 1141(c) of the Tax Law.

2. Sherry 1, was a tobacco seller which dealt primarily in wholesale transactions. On June 30, 1975 Sherry 1 sold most of its assets to Jonvanica Corp. which later changed its name to Sherry Tobacco Corp. (Sherry 2). Jonvanica notified the Audit Division of the sale but the exact date of notice is unclear. The auditor appears to have been acting under a September 17, 1975 notice date; a certified mail delivery receipt submitted by Sherry 2 indicated a postmark date of May 13, 1976.

3. Sherry 1 reported gross sales on its sales tax returns but no taxable sales for each quarter of the audit period. On audit, the auditor, using a

test period consisting of four days in January, 1975, examined sales invoices and cross-checked them against resale certificates to verify Sherry's claim of 100 percent sales for resale. The auditor found that 35 percent of sales for resale were substantiated and 65 percent were unsubstantiated. An allowance was made for charge sales since such sales were customarily made to retailers. Additionally, the percentage of unsubstantiated sales for resale was reduced to 50 percent and taxable sales were determined as follows:

Gross sales	\$14,514,289
Less charge sales	<u>-12,377,027</u>
Cash sales	2,137,262
Unsubstantiated	X .50
Taxable sales	<u>\$ 1,068,631</u>

4. On December 7, 1983, after the hearing had been commenced and continued, the Audit Division, based on the decision in Chartair, Inc. v. State Tax Commission, 65 A.D.2d.44, conceded that a test period audit should not have been performed and agreed to a reduction of the assessment to \$1,559.12 plus interest, representing the additional tax found due for the four days of the test period only.

5. A continued hearing was scheduled for December 8, 1983 and adjourned at petitioners' request. A continued hearing was again scheduled for October 7, 1985 on notice to all parties and no one appeared on behalf of any of the petitioners.

CONCLUSIONS OF LAW

A. That section 1132(c) of the Tax Law provides, in part, that sales will be deemed taxable at retail unless the vendor takes from the purchaser a proper resale certificate. Petitioners presented no documentation indicating that the sale for resale percentage computed by the auditor was erroneous and such unsubstantiated sales must be deemed sales at retail and subject to tax.

B. That section 1141(c) of the Tax Law provides, in part, that a bulk


sale purchaser must notify the Tax Commission of the sale ten days prior to taking possession or paying therefore. If the purchaser fails to so notify the Tax Commission, he will be personally liable for any sales taxes determined to be due from the seller to the extent of the amount of the purchase price or fair market value of the assets purchased, whichever is higher. No evidence was produced indicating that Sherry 2 notified the Department of Taxation and Finance of the impending sale ten days prior to June 30, 1975, the date of the transfer. Therefore, Sherry 2, as purchaser, is liable for the sales tax due from Sherry 1 to the extent of the purchase price.

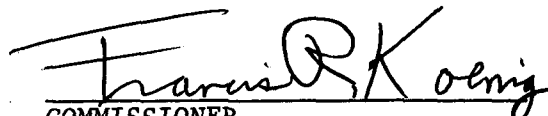
C. That the petitions of Sherry Tobacco Corp. (seller) and Eugene Gershon, as officer and Sherry Tobacco Corp. (purchaser) are granted to the extent indicated in Finding of Fact "4", that the Audit Division is directed to modify the notices of determination and demand for payment of sales and use taxes due issued March 8, 1976 accordingly; and that, except as so granted, the petitions are in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 03 1986


PRESIDENT


COMMISSIONER


COMMISSIONER

TA-77 (7/85)

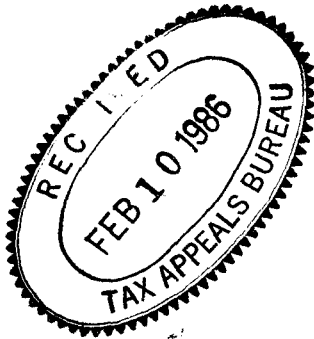
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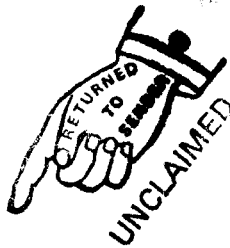
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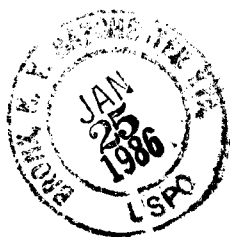
MAIL



Sherry Tobacco Corp.
and Eugene Gershon Indv. & as Officer
2537 Golden Avenue
Bronx, NY



OTICE



TA-36 (9/76)

State of New York - Department of Taxation and Finance
Tax Appeals Bureau

S.T.

REQUEST FOR BETTER ADDRESS

Requested by Tax Appeals Bureau Room 107 - Bldg. #9 State Campus Albany, New York 12227	Unit Tax Appeals Bureau Room 107 - Bldg. #9 State Campus Albany, New York 12227	Date of Request 2/11/86
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Please find most recent address of taxpayer described below; return to person named above.

Social Security Number	Date of Petition For. Dec. 1/7/86
Name Sherry Tobacco Corp.	
Address and Eugene Gershon Indlv. & co officer 2537 Golden Ave. Bronx, N. Y.	

Results of search by Files

<input type="checkbox"/> New address:	
<input type="checkbox"/> Same as above, no better address	
<input checked="" type="checkbox"/> Other:	Unclaimed

Searched by DP	Section	Date of Search 2/11/86
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PERMANENT RECORDFOR INSERTION IN TAXPAYER'S FOLDER

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

January 3, 1986

Sherry Tobacco Corp.
and Eugene Gershon Indv. & as Officer
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cc: Petitioner's Representative
Raymond Sharenow
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STATE OF NEW YORK

STATE TAX COMMISSION

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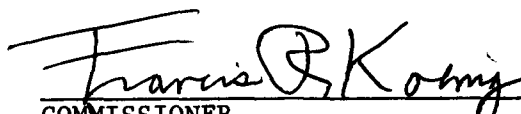
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DATED: Albany, New York

JAN 03 1986

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER