

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Wheelin & Rockin, 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 3/1/78-11/30/80. :

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 Wheelin & Rockin, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Wheelin & Rockin, Inc.
4720 5th Ave.
Brooklyn, NY 11220

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 C. Haglund
Authorized to administer oaths
pursuant to Tax Law section 174

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

January 17, 1986

Wheelin & Rockin, Inc.
4720 5th Ave.
Brooklyn, NY 11220

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 :
WHEELIN & ROCKIN, INC. : 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 November 30, 1980.

Petitioner, Wheelin & Rockin, Inc. 4720 5th Avenue, Brooklyn, New York, 11220, 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 November 30, 1979 (File No. 45870).

A formal hearing was held before Frank W. Barrie, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 26, 1984 at 11:15 A.M., and continued to conclusion on September 17, 1984 at 1:15 P.M., with additional evidence submitted on July 3, 1985. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether the petitioner was entitled to a hearing on assessment despite having made a demand for hearing more than 90 days after the notice of sales tax assessment was mailed.

II. Whether the Audit Division properly disallowed certain of petitioner's claimed nontaxable sales.

III. Whether certain deposits made to petitioner's bank account were derived from sources other than sales.

FINDINGS OF FACT

1. Petitioner, Wheelin & Rockin, Inc., ("Wheelin & Rockin") 4720 5th Avenue, Brooklyn, New York is a New York corporation engaged in the business of selling phonograph records, audio tapes and related merchandise.

2. On June 18, 1982, as a result of a field audit, the Audit Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period March 1, 1978 through November 30, 1980 in the amount of \$16,615.92 plus interest of \$4,333.69 for a total of \$20,949.61.

3. The notice was sent by certified mail to petitioner's corporate address, which is 68 Willowbrook Court, Staten Island, New York. This is also the home address of one of the corporation's co-owners. After two unsuccessful attempts at delivery, the Post Office returned the notice to the Audit Division.

4. On June 24, 1983, approximately one year after the notice was issued, the Audit Division received a petition for revision of determination from Wheelin & Rockin. Edward Pavia, Co-owner and President of Wheelin & Rockin, asserted that the notice was sent to a private residence rather than the corporation's actual place of business, and as a result, it was never received.

5. The Audit Division does not contend that petitioner actually received the notice but argues that the petitioner is not entitled to have the petition considered by the Tax Commission because the demand for a hearing was made more than 90 days after the notice of assessment was mailed.

6. By its president, Wheelin & Rockin executed a consent extending the period of assessment of sales and use taxes for the period March 1, 1978 through November 30, 1980 to June 20, 1982.

7. In order to verify petitioner's reported taxable sales, the auditor performed a cash reconciliation of deposits to petitioner's checking account.

Total deposits amounted to \$650,374.00. Credit was given for the deposits which the petitioner established, to the satisfaction of the Audit Division, as coming from a source other than taxable sales. Petitioner claimed \$317,604.00 as nontaxable sales for resale. Of this amount, \$139,232.00 was disallowed, leaving \$178,372.00 in audited nontaxable sales. In addition, deposits in the sum of \$14,424.00 were attributed to business loans and an additional \$18,510.00 was credited for sales tax previously remitted, resulting in audited taxable sales of \$439,068.00 ($\$178,372.00 + \$14,424.00 + \$18,510.00 = \$211,306.00$; $\$650,374.00 - \$211,306.00 = \$439,068.00$). Petitioner reported taxable sales of \$231,347.00. Consequently, the Audit Division determined that the petitioner failed to report \$207,721.00 in taxable sales upon which \$16,615.92 was assessed.

8. At the hearing, the auditor testified that a total of \$9,156.00 in claimed nontaxable sales was disallowed because of the petitioner's failure to produce resale certificates at the time of the audit. However, the auditor testified that properly documented certificates had not been requested from the petitioner, "so the vendor did not know to bring the resale certificates". Following the hearing, the petitioner submitted eleven resale certificates which account for \$5,271.00 in nontaxable sales for resale.

9. The Audit Division conceded that \$2,571.00 representing sales to out of state vendors should not be treated as taxable sales.

10. The Audit Division rejected a resale certificate allegedly received by petitioner from K & B Record, Inc. ("K & B") bearing the identification number 0676-54-729 SS because its own records failed to establish the existence of a vendor of that name with that resale number. It is unclear whether the Audit Division disputes the existence of K & B or merely the correctness of the identification number.

11. Petitioner submitted a certified copy of a certificate of incorporation for K & B, a sales invoice carrying the name and logo of K & B, and a copy of a document from the New York City Division of Real Property which indicates that K & B held a lease with New York City from November 8, 1971 to November 19, 1980. Sales invoices showing sales from Wheelin & Rockin to K & B during the audit period in the amount of \$93,939.30 were also submitted. K & B is no longer doing business.

12. Nontaxable sales for resale were made to A & N Records ("A & N") in the amount of \$22,219.00. Despite the existence of a valid resale certificate, the Audit Division disallowed these claimed nontaxable sales apparently on the basis of a handwritten note from an employee of that company stating that A & N had made one purchase from Wheelin & Rockin in March 1981, i.e. approximately three months after the end of the audit period. Petitioner offered invoices showing sales to A & N in the amount of \$22,219.00 made during the period in question. In support of its contention that such sales had occurred, petitioner submitted a letter on company letterhead from the owner of A & N confirming the accuracy of Wheelin & Rockin's invoices.

13. Certain deposits made to Wheelin & Rockin's bank account were derived from sources other than sales as follows:

A. The owners of Wheelin & Rockin owned a New Jersey music store and maintained a separate New Jersey bank account for its operation. On occasion, certain New Jersey taxes were paid from Wheelin & Rockin's New York account, and the money was later reimbursed from the New Jersey bank account. Deposits totalling \$4,843.92 are traceable to these reimbursements.

B. As a personal favor, petitioner paid from its own bank account the automobile insurance premiums of an employee with no checking account of his own. The employee reimbursed petitioner in cash and this money, totalling \$453.00, was deposited in petitioner's account.

C. At the hearing, the auditor conceded that the deposit of a check made out to Wheelin & Rockin by Federal Crime Insurance in the amount of \$4,171.08 should not be treated as a taxable sale for the period in question.

14. Petitioner asserted that two deposits made to its account at Republic National Bank, account number 16-007399, in the amounts of \$451.39 and \$11,123.06 represent a transfer of funds from two accounts held at Banker's Trust. Another deposit of \$1,913.70 was said to have its source in the transfer of funds from one Wheelin & Rockin bank account to another. No documents were offered in support of these assertions.

15. Petitioner contended that three deposits totalling \$10,470.38 came from loans rather than sales. The Audit Division verified that the source of these deposits were three checks made out to Wheelin & Rockin by S. Piegari. However, no evidence was offered which would establish that the money in question was given as a loan rather than as a payment for a sale.

CONCLUSIONS OF LAW

A. That under subdivision (a)(1) of section 1147 of the Tax Law the mailing of a notice of determination of sales tax liability "shall be presumptive evidence of the receipt of the same by the person to whom addressed." However, the language of the statute "makes 'receipt' a part of the procedural equation and... establishes the taxpayer's right to rebut the presumption." (Matter of Ruggerite, Inc. v. State Tax Commission, 64 N.Y.2d 688). Uncontroverted evidence established that the petitioner never received the notice of determination which was returned to the Tax Department unclaimed. Consequently, petitioner was entitled to a hearing on the sales tax assessment against it, although it demanded a hearing more than 90 days after the notice was mailed.

B. That subdivision (c) of section 1132 of the Tax Law provides in part, that all receipts for property or services subject to the sales tax shall be deemed taxable sales at retail unless: "(1) A vendor shall have taken from the purchaser a certificate in such form as the tax commission may prescribe...to the effect that the property or service was purchased for resale or for some use by reason of which the sale is exempt from tax." The duty imposed by the statute is an obligation to collect the tax or obtain a resale certificate which to a reasonable person would indicate an intent to resell. A vendor is not required to investigate his or her customers. (Matter of RAC Corp. v. Gallman, 39 A.D.2d 57).

C. That petitioner produced resale certificates accepted in good faith from customers identified in Findings of Fact "8" and "10" thereby sustaining its burden of showing that sales to those customers were not taxable.

D. That petitioner established that certain deposits made during the period in issue were derived from sources other than taxable sales as follows: (1) nontaxable sales to A & N Records in the amount of \$22,219.00; (2) nontaxable sales to K & B Record in the amount of \$93,939.30; (3) additional nontaxable sales to New York State vendors totalling \$5,271.00; (4) monies transferred from a New Jersey bank account totalling \$4,843.92; (5) \$453.00 received as reimbursement for payment of an employee's car insurance. In addition, the Audit Division conceded that \$2,571.00 representing sales to out of state vendors and \$4,171.08 deposited as a check from Federal Crime Insurance should not be treated as taxable sales.


E. That the petition of Wheelin & Rockin, Inc. is granted to the extent indicated in Conclusion of Law "D" and that, except as so granted, the petition is in all other respects denied.

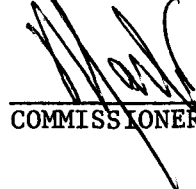
DATED: Albany, New York

STATE TAX COMMISSION

JAN 17 1986


PRESIDENT


COMMISSIONER


COMMISSIONER

