

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
	:	
of	:	
	:	
SOMERSET GROUP, INC.	:	DECISION
and JOHN L. SYMS	:	DTA No. 80083 & 800084
for Revision of Determinations or for Refunds of	:	
Sales and Use Taxes under Articles 28 and 29 of	:	
the Tax Law for the Period September 1, 1974	:	
through February 28, 1978.	:	

Petitioners, Somerset Group, Inc., Lewport Industrial Park, Balmer Road, Youngstown, New York 14174, and John L. Syms, 4818 East River Road, Grand Island, New York 14072, filed exceptions to the determination of the Administrative Law Judge issued on January 28, 1988 with respect to their 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 September 1, 1974 through February 28, 1978 (File Nos. 800083 and 800084). Petitioners appeared by Edward F. Messing, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

Petitioners did not file a brief on exception. The Division filed a letter in opposition. Petitioners' request for oral argument was granted. Petitioners subsequently withdrew such request and oral argument was not heard.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the Division of Taxation properly asserted sales and use tax liability on certain sales and purchases made by petitioner Somerset Group, Inc.

FINDINGS OF FACT

We find the facts as stated in the Administrative Law Judge's determination and such facts are incorporated herein by this reference.

On September 20, 1979, following an audit, the Division of Taxation issued to petitioner Somerset Group, Inc. a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period September 1, 1974 through February 28, 1978 asserting \$4,686.99 in tax due, plus penalty and interest. The Division categorized the deficiency of petitioner Somerset Group, Inc. as comprising a sales tax component of \$832.23 and a use tax component of \$3,854.76.

Also on September 20, 1979, following the same audit, the Division issued to petitioner John L. Syms, as President of Somerset Group, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, also for the period September 1, 1974 through February 28, 1978 asserting \$832.23 in tax due, plus penalty and interest. Mr. Syms was found to be personally liable as an officer pursuant to the provisions of Tax Law sections 1131(l) and 1133. The amount of the deficiency against Mr. Syms was based upon the sales tax component of the audit of petitioner Somerset Group, Inc.

Petitioner Somerset Group, Inc. was at all times relevant herein a real estate holding and management company. During the period at issue, it owned and operated Lewport Industrial Park in Youngstown, New York.

Petitioner John L. Syms was at all times relevant herein the president and sole shareholder of Somerset Group, Inc. He did not dispute that he was personally liable as an officer for the sales tax required to be collected by Somerset Group, Inc.

On audit, the Division examined Somerset Group, Inc.'s ledger, disbursements journal and invoices, The Division examined the purchase invoices provided to determine whether sales tax had been paid and asserted tax due on the expenditures for which the invoices provided did not indicate payment of sales tax. These purchases generally were related to building maintenance, repairs and improvements.

Petitioners failed to produce invoices in respect of many of the expenditures set forth in both the disbursements journal and ledger. The descriptions of these expenditures as set forth in the ledger or journal were broad, general descriptions such as “supplies”, “auto expenses”, “equipment” and “maintenance”.

On audit, the Division determined that, in the absence of invoices, such purchases were subject to sales tax. The Division therefore asserted tax due on the total amount of such expenditures.

Included among the disbursements for which petitioner produced no invoices were regular and frequent cash disbursements described as “maintenance”. The majority of the cash disbursements were in the amounts of \$25.00 and \$150.00. There were also several disbursements less than \$25.00 and several in varying amounts between \$25.00 and \$100.00

With respect to the disbursements in amounts of \$25.00 or less, petitioner utilized these funds to purchase office supplies, coffee and dog food for guard dogs on the premises. These

funds were also used, at times, for reimbursement of personal funds spent on such supplies. All of these small purchases were made at retail and sales tax was paid at the time of purchase.

Also included among the disbursements for which petitioner produced no invoices on audit were payments to oil companies; specifically, the Mobil, Shell, Sun, Atlantic Richfield and Amoco oil companies. These expenditures were credit card payments to the respective companies for retail purchases of gasoline.

The sales tax component of the deficiency was premised upon entries in the disbursements journal indicating receipts for “equipment”, “paint”, “topsoil” and “garbage”. No further clarification of these receipts was provided and petitioners presented no evidence to refute the sales tax component of the audit.

OPINION

The Administrative Law Judge determined that petitioners sustained their burden of proving that tax had been paid on the disbursements made in respect of the gasoline credit cards and on the cash disbursements in the amount of \$25.00 or less, but had failed to sustain their burden of proof with respect to the remaining expenditures which comprised the use tax component of the deficiency. The Administrative Law Judge also determined that petitioners had failed to prove that receipts for “equipment”, “paint” and “garbage” were not subject to sales tax and sustained the entire sales tax component of the deficiency with respect to petitioner Somerset Group, Inc. and the entire deficiency with respect to petitioner John L. Syms.

On exception, the petitioner Somerset Group, Inc. contends that it proved that it paid tax on \$13,441 of disbursements and that the Administrative Law Judge erred in not modifying the use tax portion of the deficiency accordingly. Petitioners Somerset Group, Inc. and John L.

Syms contend that the sales tax deficiency should be reduced by the amount of \$6,592.27 which represented a receipt for a capital improvement made by the corporate petitioner.

We affirm the Administrative Law Judge's determination in all respects.

Our review of the record indicates no documentary evidence was submitted by the corporate petitioner to prove that it had paid tax on more purchases than allowed by the Administrative Law Judge. Further, we find no documentary evidence, particularly a properly completed certificate of capital improvement, to support the petitioners' contention that the receipt of \$6,592.27 represented payment for performing a capital improvement. We conclude, therefore, that petitioners have failed to sustain their burden of proof.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exceptions of petitioners Somerset Group, Inc. And John L. Syms are denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Somerset Group, Inc. is granted to the extent indicated in the conclusions of law "B" and "E" of the Administrative Law Judge's determination and the Division of Taxation is directed to modify the Notice of Determination dated September 20, 1979 accordingly but except as so granted the petition is in all other respects denied; and

4. The petition of John L. Syms is in all respects denied and the Notice of Determination dated September 20, 1979 is sustained.

Dated: Albany, New York
December 15, 1988

/s/ John P. Dugan
President

/s/ Francis R. Koenig
Commissioner