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STATE OF WISCONSIN
TAX APPEALS COMMISSION

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K MART CORPORATION
3100 West Big Beaver Road
Troy, Michigan 48084

Petitioner,

vs.

WISCONSIN DEPARTMENT OF REVENUE
P.O. Box 8933
Madison, Wisconsin 53708

Respondent.

* * * * *

DOCKET NO. S-9867

RULING AND ORDER

(Drafted by
Commissioner Doyle)

STATE OF WISCONSIN
DEPARTMENT OF REVENUE
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LEGAL DIVISION

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Pursuant to the respondent's Notice of Motion filed with this Commission on May 27, 1983 and the petitioner's Notice of Motion filed with this Commission on June 7, 1983 in the above-entitled matter, this Commission convened on October 26, 1983 for the purpose of hearing said motions. At the time of the hearing respondent moved for an order dismissing the petitioner's petition for review on the grounds that the petition for review was filed beyond the 60 day period and, therefore, the Commission lacks jurisdiction to review the grievances therein. Petitioner moved for an order to effect that the respondent's action on petitioner's petition for redetermination was not acted upon within the time period provided by law and, therefore, respondent's action was null and void.

The petitioner, K Mart Corporation, appeared by its attorneys, Michael, Best & Friedrich, by David J. Hanson and Robert J. Johannes; the respondent, Wisconsin Department of Revenue, appeared by its attorney, Allyn Lepaska; having considered the entire record herein, this Commission hereby finds, decides and

rules as follows:

1. By notice dated August 21, 1980, respondent issued an assessment of additional sales and use tax against the petitioner in the total amount of \$97,246.80 including tax and interest.

2. By letter dated September 3, 1980, petitioner, by W.C. Saad, Manager of sales and use tax, petitioned respondent for redetermination of the above assessment.

3. On February 3, 1981 petitioner by J.B. Ronan, Assistant Controller--Taxes, and respondent, by Clayton E. Seth, Director, Appellate Bureau, entered into a "Stipulation and Agreement" whereby the time for action by respondent with respect to petitioner's petition for redetermination which otherwise would have expired on March 3, 1981, was extended. The Stipulation and Agreement provided, in part,

"That the time for action by the Wisconsin Department of Revenue with respect to the petition for redetermination filed by the above-named taxpayer is hereby extended for a period of six months after the Wisconsin Department of Revenue is notified by the taxpayer of the final decision of the case 'J.C. Penney Co., Inc. vs. Wisconsin Department of Revenue' which is currently pending before the Circuit Court."

4. On July 27, 1982, District IV of the State of Wisconsin Court of Appeals issued a decision in the J.C. Penney case. On August 20, 1982, the parties to the J.C. Penney case entered into a stipulation whereby both parties agreed not to pursue an appeal the Court of Appeals decision and further agreed "that as a result of this stipulation, the above-referenced matter is final."

5. On March 8, 1983, respondent issued a notice denying petitioner's petition for redetermination. Said notice was sent

to petitioner by certified mail, return receipt requested and was received by petitioner on March 10, 1983.

6. Enclosed with respondent's Notice of Denial was a letter from James J. Dix, Conferee, which provided as follows:

"Enclosed with this letter is a notice of action to deny your petition for redetermination of the additional sales and use tax assessment dated August 21, 1980.

In the July 27, 1982 Court of Appeals decision in the J. C. Penney Case, the Department of Revenue was successful in its arguments on the assessment of use tax on newspaper supplements or inserts purchased from out-of-state printers and distributed with Wisconsin newspapers. Since the issue of advertising supplements shipped to newspapers was the only item appealed in your September 3, 1980 letter, enclosed is a notice of action on your appeal and a computation of the additional sales and use taxes and interest due.

Your \$4,459.29 payment of the agreed portion of the sales and use tax assessment, as computed per my March 19, 1981 letter, has been allowed as a credit against the amount due.

Unless you contemplate an appeal to the Wisconsin Tax Appeals Commission, please make your remittance, along with a copy of the enclosed bill, on or before May 15, 1983."

7. On May 10, 1983 petitioner mailed to the Commission by certified mail, return receipt requested, its petition for review which was received and filed by the Commission on May 12, 1983.

8. The 60 day period for filing an appeal to the Commission expired on May 9, 1983.

9. In its petition for redetermination dated September 3, 1980, petitioner specifically requested a hearing in the matter. Petitioner was not contacted until January, 1981 when respondent's conferee, James Dix, contacted Brad Ronan of petitioner's tax department by telephone to discuss the extension agreement. In February 1981 the extension agreement was executed and in March

1981 certain uncontested issues were resolved and the tax due thereon paid.

10. Petitioner was not contacted again by anyone from respondent's appellate bureau until it received respondent's notice of denial on March 10, 1983.

11. Petitioner did not notify respondent of the final decision in the J.C. Penney case.

12. On May 10, 1983 petitioner's tax manager of sales, use and licenses taxes, William C. Saad; had telephone conversations with Clayton Seth, Director, Appellate Bureau relating to petitioner's appeal. Mr. Seth informed Mr. Saad that there would be no conference at the Appellate Bureau level and that petitioner had missed the 60 day period within which to file an appeal with the Commission. Mr. Saad indicated to Mr. Seth that he knew he was one day late.

13. Respondent does not always hold conferences with taxpayers. If the taxpayer requests a telephone conference or if respondent feels a conference would not be productive, respondent does not schedule a conference. There had been telephone conversations between petitioner and Mr. Dix of the Appellate Bureau which might have been construed as a "conference."

14. Respondent has shown good and sufficient grounds for the granting of its motion to dismiss.

15. Because the petition for review herein was filed beyond the 60 day filing period and because the Commission thereby lacks jurisdiction over the grievances presented in petitioner's appeal, the Commission does not have the authority to consider petitioner's motions.

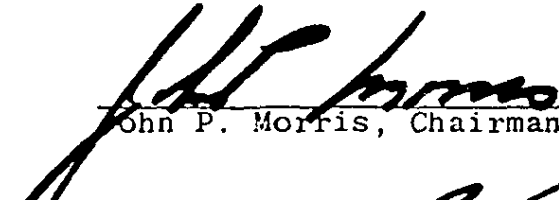
Therefore,

IT IS ORDERED


That respondent's motion to dismiss the petitioner's petition for review is hereby granted.

Dated at Madison, Wisconsin, this 27th day of January, 1984.


WISCONSIN TAX APPEALS COMMISSION




John P. Morris, Chairman



Thomas R. Timken, Commissioner



Catherine M. Doyle, Commissioner



Thomas M. Boykoff, Commissioner



William Bradford Smith, Commissioner

Attachment: "NOTICE OF APPEAL INFORMATION"