

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
PARK ROW ELECTRONICS & CAMERA, 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 December 1, 1980 :
through November 30, 1983 :

Petitioner Park Row Electronics & Camera, Inc., c/o Isaac Sternheim & Co., 5612 18th Avenue, Brooklyn, New York 11204 filed an exception to the determination of the Administrative Law Judge issued on February 28, 1991 with respect to its 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 December 1, 1980 through November 30, 1983 (File No. 801360). Petitioner appeared by Isaac Sternheim, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Michael Gitter, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation filed a letter in lieu of a brief in opposition to the exception. Oral argument was not requested.

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

ISSUE

Whether the Division of Taxation properly determined petitioner's sales and use tax liability.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner, Park Row Electronics & Camera, Inc., operated a retail store and mail order business selling cameras and electronic equipment during most of the period at issue. The

business closed on September 19, 1983, when petitioner made an assignment for the benefit of creditors. Leopold Lefkovits was president of petitioner.

THE AUDIT

An examination of petitioner's business was commenced on November 17, 1983, when the auditor mailed a letter scheduling an audit appointment for November 29, 1983. The letter was mailed to petitioner's last known address, 1 Park Row, New York, New York 10038, and was returned by the Postal Service as undeliverable.

The auditor checked the Manhattan telephone directory and found that petitioner's address was listed as 30 Ann Street. He called the telephone number shown in the directory and learned that the telephone had been disconnected.

On November 29, 1983, the auditor went to the 30 Ann Street location and was told by the building manager that petitioner had recently moved out. The auditor found that the space which petitioner had been occupying was vacant.

Also on November 29, 1983, the auditor went to petitioner's former business premises at 1 Park Row and was told by the new tenant that petitioner's attorney was Israel Weinstock. The auditor called Mr. Weinstock the same day and was told that petitioner's accountant, Henry Hirsch, had all of the records of the corporation.

The auditor called the accountant and scheduled an appointment for December 8, 1983, at the accountant's office. The auditor kept the appointment and was told by Mr. Hirsch that the records were not available. A new appointment was scheduled for December 12, 1983, at the accountant's office. On December 9, 1983, the accountant called and cancelled the appointment. A new appointment was scheduled for December 21, 1983. On that date, the auditor went to the accountant's office and waited from about 9:30 A.M. to about 11:00 A.M. but the accountant failed to keep the appointment.

On January 31, 1984, the auditor's supervisor spoke to an accountant named Harry Bram, who was Mr. Hirsch's partner. Mr. Bram said that all records were with the firm of Richard A.

Eisner & Co., accountants for petitioner's creditors, and would not be available for months. It appears that it was at this point that the Division of Taxation learned that petitioner had made an assignment for the benefit of creditors.

On February 1, 1984, petitioner, by S. Lefkovits, as officer, executed a Consent Extending Period of Limitations for Assessment of Sales and Use Taxes extending the period of limitations for the period December 1, 1980 through May 31, 1981 to September 20, 1984.

On April 25, 1984, the auditor called Mr. Hirsch and was told by the accountant that petitioner was no longer his client. Mr. Hirsch suggested that the auditor call Leopold Lefkovits, petitioner's president, at a certain telephone number. On that same day the auditor called the telephone number and spoke to a man who identified himself as the brother of Leopold Lefkovits, whom, the man said, would return the call the next day. The auditor, however, did not receive such call.

When the auditor did not receive a telephone call from Leopold Lefkovits, he prepared an estimated assessment as follows:

(a) First, gross sales for the quarters ending February 28, 1981, May 31, 1981, August 31, 1981 and November 31, 1983 were estimated at \$463,976.00 per quarter, by averaging gross sales reported for the other eight periods.¹ Total audited gross sales were determined to be \$5,567,714.00. The auditor did not have the tax returns or copies thereof, but apparently worked from computer records of data contained on the returns.

(b) Audited gross sales were then increased by 25% to "protect" against the possibility that if books and records were eventually produced, they might show that gross sales were greater than reported.

(c) The above method resulted in audited taxable sales of \$6,959,643.00 and tax due of \$569,820.78. As tax paid was \$51,117.98, additional tax due was \$518,702.80.

On May 2, 1984, notices of determination and demands for payment of sales and use taxes due dated May 1, 1984 were mailed to petitioner at the 1 Park Row address and to

¹Exhibit H, worksheets, page 8.

Leopold Lefkovits, individually and as officer of petitioner, at 1163 51st Street, Brooklyn, New York 11219, for the following amounts: tax due for the period December 1, 1980 through November 30, 1983 of \$518,702.80, penalty of \$110,389.09, interest of \$129,739.04, for a total due of \$758,830.93.

On May 9, 1984, the auditor received a telephone call from a Mr. Gross who identified himself as petitioner's new accountant and said that he would try to have the books and records available before the 90-day period for protesting the assessment expired.

The auditor examined petitioner's available books and records on August 7, 1984 at the offices of Richard A. Eisner & Co., the creditors' accountants.

The books and records available on that date were the cash receipts journal, the check disbursements journal, and the purchases journal.

Audited gross sales for the period December 1, 1980 through November 30, 1983, were found to be \$6,166,409.00. Gross sales for the quarters ending November 30, 1981, February 28, 1982, August 31, 1982, February 28, 1983 and May 31, 1983 were based on sales per the cash receipts journal. Gross sales for the quarters ending May 31, 1982, November 30, 1982 and August 31, 1983 were taken from the returns filed. Gross sales for the quarters ending February 28, 1981, May 31, 1981, August 31, 1981 and November 30, 1983 were estimated based on petitioner's taxable sales reported. The check disbursements journal showed that petitioner had made payments for shipping charges for goods shipped out of New York, although no shipping documents were produced. Consequently, the auditor reduced audited gross sales by 50% to allow for out-of-state sales. The auditor conceded at the hearing that the reduction was an arbitrary one. He testified that the Division of Taxation was trying to be reasonable, in view of the fact that petitioner was no longer in business and the assessment was large.²

The 50% out-of-state sales factor reduced audited taxable sales to \$3,083,205.00 for the audit period.

²Transcript, page 74.

Sales tax due was computed to be \$252,057.58. Use tax on fixed assets was found to be \$22.72. Expense purchases were found to be negligible, therefore no test of expenses was made.

After allowing for \$51,117.98 in tax paid, the tax due was reduced to \$200,962.32.

On September 27, 1984, the Division of Taxation issued a Notice of Assessment Review to petitioner showing adjusted tax due of \$200,962.32, plus adjusted penalty and/or interest of \$108,554.85 for a total due of \$309,517.17.

BUSINESS OPERATIONS

It is clear, from the documentary evidence introduced by petitioner at the hearing, that petitioner operated a sizeable mail order business in addition to its retail store. Analysis of the evidence shows the following:

(a) The ledgers of mail order transactions for the period January 1, 1982 through July 31, 1983 (Exhibits 1 and 2) show that petitioner made mail order sales to virtually every state and also to Puerto Rico, the Virgin Islands, and Canada. Mail order sales in New York City were negligible.

(b) The United Parcel Service pick-up record and parcel register, covering the period January 14, 1983 to June 1, 1983 (Exhibit 3) appears to confirm the validity of the entries made in the mail order ledgers.

(c) Telephone bills and cancelled checks (Exhibit 4) and the testimony of petitioner's president, show that petitioner had WATS line (800 number) service from the beginning of the audit period until it went out of business in September 1983.

Petitioner advertised with monthly full-page advertisements in the national magazines Modern Photography and Popular Photography. Petitioner also advertised in High Fidelity magazine and sometimes advertised in newspapers such as The New York Times and The Village Voice.

Petitioner's president estimated that 80% to 85% of petitioner's business was from out of state.³

³Transcript, page 141.

The officer listed on petitioner's sales tax certificate of authority was Leopold Lefkovits, president, 1051 55th Street, Brooklyn, New York 11219.⁴

SALES TAX RETURNS FILED

Eight of the sales tax returns are in the record. The type of business shown on each return is as follows:

<u>Quarter Ending</u>	<u>Type of Business</u>
2/21/81	Mail Order - Camera Stores
5/31/81	Mail Order Camera
8/31/81	Mail Order - Cameras
11/30/81	Mail Order - Camera
2/28/82	
5/31/82	Selling retail and wholesale
8/31/82	
11/30/82	

The eight returns in the record show the following breakdown of sales:

<u>Quarter Ending</u>	<u>Gross Sales</u>	<u>NYC Sales</u>	<u>NYC Tax</u>	<u>New York State Sales Outside New York City</u>	<u>NYS Tax Outside NYC</u>
2/28/81		\$67,186.00	\$5,374.88	\$8,937.00	\$585.22
5/31/81		50,492.00	4,039.37	5,743.00	373.92
8/31/81		80,486.00	6,438.89	8,573.00	544.26
11/30/81	\$617,815.00	60,593.00	4,998.92	5,476.00	366.15
2/28/82	586,973.00	61,763.00	5,095.47	6,023.00	373.09
5/31/82	512,404.00	39,040.00	3,220.74	5,879.00	394.16
8/31/82	451,420.00	73,345.00	6,050.92	3,758.00	245.20
11/30/82	453,227.00	40,555.00	3,345.79	4,986.00	330.88

OPINION

The Administrative Law Judge determined that petitioner did not sustain its burden of proof to show that the Division of Taxation (hereinafter the "Division") improperly limited petitioner's out-of-state sales to 50% of gross sales. The Administrative Law Judge reasoned that although it is clear that petitioner had a sizable mail order business, it was impossible to determine from the record what portion of petitioner's sales was made in New York and what portion was made out of state. Moreover, the Administrative Law Judge made three modifications to the Notice of

⁴It is noted that this address is different from that to which the officer assessment was mailed (Finding of Fact "4").

Assessment Review issued to petitioner dated September 27, 1984. These modifications were not contested by either party.

On exception, petitioner requests "[t]hat a much greater portion of gross sales be treated as nontaxable sales (out of state) by using either an external index or any other reasonable, non-arbitrary method" (Petitioner's exception).

In response, the Division states that the request by petitioner in its exception is not specific in that petitioner did not state a percentage or amount to be held non-taxable. Furthermore, the Division states that there is no basis in the evidence presented to allow for a greater portion of petitioner's gross sales to be treated as non-taxable since there were no books and records. Therefore, the Division agrees with the determination made by the Administrative Law Judge.

We uphold the determination of the Administrative Law Judge.

The petitioner merely states on exception that the auditor's treatment of gross sales as being 50% in New York State is unfair and should be modified either by use of an external index or any other reasonable method. We conclude that the Administrative Law Judge adequately dealt with this issue in his determination and, therefore, we sustain the determination based on the opinion rendered below.

Lastly, the modifications made to the Notice of Assessment Review by the Administrative Law Judge were not excepted to by either party and, thus, we decline to address the bases for the modifications.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Park Row Electronics & Camera, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Park Row Electronics & Camera, Inc. is granted to the extent set forth in conclusions of law "F" and "G" of the Administrative Law Judge's determination, but otherwise is denied; and

4. The Division of Taxation is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated May 2, 1984, as modified by the Notice of Assessment Review dated September 27, 1984, in accordance with paragraph "3" above.

DATED: Troy, New York
July 3, 1991

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner