

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
FABIOLA GIFTS AND ARTS, INC.	:	DETERMINATION
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 September 1, 1981	:	
through November 30, 1982.	:	

Petitioner, Fabiola Gifts and Arts, Inc., 120-01 Rockaway Blvd., South Ozone Park, New York 11420, 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 September 1, 1981 through November 30, 1982 (File No. 801779).

A hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 11, 1987 at 9:15 A.M. Petitioner appeared by Carmine C. Guida, president. The Audit Division appeared by John P. Dugan, Esq. (Gary Palmer, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined additional sales and use tax due based on a difference between gross sales as set forth on petitioner's Federal income tax return and gross sales as set forth on petitioner's sales tax returns.

FINDINGS OF FACT

1. On December 14, 1984, following an audit, the Audit Division issued to petitioner, Fabiola Gifts and Arts, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period September 1, 1981 through November 30, 1982, asserting \$5,268.32 in tax due, plus penalty and interest.

2. During the period at issue, petitioner was primarily engaged in the retail sale of pet foods and supplies, along with some sales of small pets. Also during the period at issue,

petitioner, by its president and sole shareholder, Carmine Guida, attempted to start a chinchilla breeding and exporting enterprise. Petitioner ceased all retail operations in November 1982.

3. On audit, petitioner provided the Audit Division with only a cash receipts journal and Federal and State tax returns. No sales invoices or bank statements were provided. A comparison of gross sales per the corporation's Federal income tax return for the fiscal year ended October 31, 1982 and gross sales per sales tax returns for the same period revealed a difference of 320% of sales reported on the Federal income tax return over sales reported on the sales tax returns.

4. The Audit Division therefore determined that petitioner's records were inadequate for the purpose of verifying taxable sales and determined the deficiency at issue herein by increasing gross sales as reported on the sales tax returns by the 320% difference per the Federal returns. This calculation resulted in an audited taxable sales figure. The Audit Division then applied the prevailing sales tax rate to audited taxable sales which resulted in total tax due per audit. From this amount, the Audit Division subtracted sales tax paid to reach the deficiency at issue herein.

5. Petitioner reported some nontaxable sales on its sales tax returns. On audit, the Audit Division made no allowance for nontaxable sales.

SUMMARY OF PETITIONER'S POSITION

6. Petitioner contended that the difference between gross sales as set forth on its Federal returns and gross sales per its sales tax returns was explained by loans made to the corporation in relation to the chinchilla enterprise. Such loans had been included in the Federal gross sales figure. Petitioner further contended that all taxable sales had been properly reported and that the corporation had been deceived by its accountant.

CONCLUSIONS OF LAW

A. Tax Law § 1138(a) provides that "if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available" and authorizes, where necessary, an estimate of tax due "on the basis of external indices".

B. Tax Law § 1135(a) provides that every person required to collect tax shall keep records of every sale and all amounts paid, charged or due thereon. Such records should include a true copy of each sales slip, invoice, receipt or statement. Under the circumstances presented herein (see ___ Finding of Fact "3"), the records provided by petitioner were incomplete and inadequate for the purpose of verifying taxable sales. Accordingly, the Audit Division's use of the audit methodology employed herein was a reasonable means to determine petitioner's taxable sales pursuant to Tax Law § 1138(a). Petitioner has failed to show wherein such methodology was unreasonable.

C. Petitioner had the burden of proving that the amount of tax assessed was erroneous (see ___ Matter of Sol Wahba, Inc., v. State Tax Commission, 127 AD2d 943). Petitioner has failed to sustain its burden. Specifically, petitioner failed to establish any basis whatsoever for the very large difference between gross sales as reported for Federal income tax purposes and gross sales as reported for sales tax purposes. Petitioner failed to establish the existence of any nontaxable sales made by the corporation. Additionally, even assuming that petitioner had established its contention that loans were made to the corporation, petitioner failed to even allege a rationale whereby such loans would have been included as part of the corporation's gross sales for Federal income tax purposes.

D. The petition of Fabiola Gifts and Arts, Inc. is in all respects denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated December 14, 1984 is sustained.

DATED: Albany, New York
January 28, 1988

ADMINISTRATIVE LAW JUDGE