STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions of QUEENS DISCOUNT APPLIANCES, INC. AND MOHINDER SINGH, AS OFFICER for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1984 through May 31, 1987.	:	DETERMINATION DTA NO. 807403

Petitioners, Queens Discount Appliances, Inc. and Mohinder Singh, as officer, 10 Stirup Lane, Glen Cove, New York 11542, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1984 through May 31, 1987.

On July 29, 1991, petitioners, by their duly authorized representative John R. Serpico, Esq., and the Division of Taxation, by William F. Collins, Esq. (Andrew S. Haber, Esq., of counsel), executed a written consent to have the instant matter determined on submission without a hearing, with all briefs to be submitted by February 10, 1992. Petitioners' opening brief was submitted on October 28, 1991, the Division of Taxation submitted a letter brief in response on January 27, 1992, and petitioner submitted a letter brief in reply on February 10, 1992. After due consideration of the record on submission, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly determined that petitioners owed additional sales and/or use taxes for the period June 1, 1984 through May 31, 1987.

FINDINGS OF FACT

Petitioner Queens Discount Appliances, Inc. ("Queens Discount") was engaged in the business of selling electrical appliances, at wholesale and retail, from premises located at 40-16

82nd Street, Jackson Heights, New York. Petitioner Mohinder Singh was president of Queens Discount.

On or about May 21, 1987, the Division of Taxation assigned an auditor to conduct an audit of the corporate petitioner's business. On May 22, 1987, an appointment letter was issued to Queens Discount scheduling an audit to commence on June 19, 1987 at 9:30 A.M. The audit period was specified to be "from inception of business to 2/28/87". This letter specified the following:

> "[a]ll books and records pertinent to your Sales Tax liability for the period under audit should be available. This would include journals, ledgers, Sales invoices, purchase invoices, cash register tapes, exemption certificates, and all Sales Tax records. Additional information may be required during the course of the audit."

A checklist of records required also accompanied this appointment letter, adding bank statements for the audit period to the list of records specified as necessary.

The first field audit appointment with Queens Discount's accountant, scheduled for June 19, 1987, was postponed until July 20, 1987. During this period of postponement, the Division of Taxation received a Notification of Sale, Transfer or Assignment in Bulk indicating that Queens Discount's business was being sold. This notification, which indicated a scheduled selling date of May 18, 1987, was not received until June 24, 1987. The notification listed the seller as the corporate petitioner herein, and the purchaser as Queens Discount Electronics, Inc.

The auditor's "log of contacts and comments of all audit actions" ("auditor's log") includes an entry for July 20, 1987 as follows:

> "Field App't; it should be noted that only a very minimal amount of records arrived at approximately 12:00. Received copies of FIT's; ...left list with accountant...."[1]

The audit report also notes "records could not be obtained prior to expiration of purchaser's due date of 9/24/87."

On September 17, 1987, the Division of Taxation issued to the corporate petitioner two

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[1] "FIT's" presumably refers to Federal income tax returns.

notices of determination and demands for payment of sales and use taxes due for the period June 1, 1984 through May 31, 1987. The first of these notices assessed tax due in the amount of $822,449.13, plus penalty and interest, while the second such notice assessed omnibus penalty (only) for the period June 1, 1985 through May 31, 1987. On the same date, the Division of Taxation issued to petitioner Mohinder Singh two additional notices, identical in amounts assessed and periods covered to those described above, holding said petitioner individually liable for the taxes and penalties assessed against the corporate petitioner, pursuant to the provisions of Tax Law §§ 1131(1) and 1133(a).

The Division's documents reveal that the above assessments were "estimated" due to the fact that the corporate petitioner's books and records were not made available for audit, as requested, within the time constraints imposed in light of petitioners' bulk sale of the business (i.e., by September 24, 1987; see, Finding of Fact "3"). The initial

assessment method involved subtracting taxable sales reported per sales tax returns from total bank deposits (excluding sales tax) to arrive at nontaxable sales. In turn, tax was assessed on such resulting balance presumably upon the claim that substantiation of nontaxability was not available as of the date of assessment. It is noted that the period covered by the assessments (6/1/84 - 5/31/87) extends for one quarterly period beyond the period specified in the audit appointment letter as "under audit" (inception of business - 2/28/87). However, a June 22, 1987 entry in the auditor's log provides: "Told accountant records will be needed for the period 6/1/84 through May 15, 1987, the date of sale [of the business]." It is further noted that petitioners raised no issue or objection to the extension of the audit period to include such later quarterly period, nor have petitioners challenged the accuracy of the comment with respect thereto in the auditor's log.

Notwithstanding issuance of the assessments as described, audit work continued. On July 22, 1988, some 10 months after such issuance and following an audit conference between petitioners and the Division, four notices of assessment review were issued to petitioners,

revising and reducing the assessments from $822,449.13 to $81,856.67 in tax due, plus penalty and interest, and $4,514.43 in omnibus penalty.

As gleaned from the field audit report and accompanying workpapers, those records ultimately made available by the corporate petitioner included the following: Federal income tax returns and sales tax returns for the period under audit, cash receipts journals, cash disbursements journals, general ledger, purchase invoices, sales invoices, bank statements, and resale and exempt organization certificates. It was noted that the corporate petitioner did not provide a general ledger for its fiscal year ended August 31, 1984, and that sales invoices were not sequentially numbered.

The Division argues that the corporate petitioner's books and records, as provided post-assessment, were inadequate for purposes of conducting a complete and detailed audit thereof. More specifically, the Division alleges that because the general ledger was not available for the fiscal year ended August 31, 1984, and because sales invoices were not numbered in sequential order, the corporate petitioner's records were "unauditable" and lacking in "internal controls". This position in regard to sales invoices stems from the auditor's detailed review of sales invoices for the quarterly period ended November 30, 1986, specifically with respect to claimed nontaxable sales. As described hereinafter, the results of such examination, as projected, formed the basis for reducing the initial assessments to the dollar amount of tax set forth on the notices of assessment review.

As to the specific method of audit resulting in the reduction, the auditor reviewed sales invoices and accompanying substantiation relating to claimed nontaxable sales for the quarterly period ended November 30, 1986. The auditor's review revealed that nontaxable sales for such quarter per invoices ($422,926.67) exceeded nontaxable sales reported for such quarter per sales tax returns ($407,887.00) by $15,039.67, or 3.687%. In turn, the auditor applied such percentage to claimed nontaxable sales per quarter for the entire audit period thus increasing total claimed nontaxable sales by $212,361.02. The auditor also reviewed substantiation presented for the 62 customers to whom claimed nontaxable sales were made during the

quarterly period ended November 30, 1986. Of such 62 customers, the auditor disallowed sales to the following five individual customers for lack of adequate verification of nontaxability:

Customer	Amount
Wheels Electronics[2]	$19,454.24
ATIF Enterprises, Inc.	1,851.50
A & F TV Service	529.00
ABC Video	6,018.00
Juan Jose Villanueva	42,415.00
	~~$70,267.74~~

Sales to the first four customers were disallowed as nontaxable for lack of adequate verification of resale, while for the last customer exemption was disallowed for failure to supply sufficient documentation to support claimed export out of the United States. The auditor compared the total dollar amount of these disallowed sales ($70,267.74) to total nontaxable sales during the quarterly period ($422,926.67 [which amount includes the 3.687% increase described]), thereby arriving at a nontaxable sales error rate of 16.614%. In turn, the auditor applied such percentage to claimed nontaxable sales (as increased by 3.687%) for the audit period ($5,972,085.02) resulting in disallowed claimed nontaxable sales of $992,202.21 and tax due thereon in the amount of $81,856.67. Such amount, in turn, appears on the notices of assessment review described heretofore.

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[2] The sales to Wheels Electronics involved dates and amounts as follows:

Date		Amount
9/5/86		$ 2,120.00
9/11/86		1,880.00
9/29/86		3,383.24
10/7/86	1,365.00	
10/12/86		2,875.50
10/24/86		3,356.00
11/4/86		1,599.00
11/18/86		2,875.50
~~Total~~		~~$19,454.24~~

Petitions were filed and a conciliation conference was requested and held. Following the conference, conciliation orders were issued to petitioners on June 23, 1989, further reducing the assessment of tax from $81,856.67 to $72,076.64, plus interest. All penalties, including the omnibus penalties, were cancelled. While not discussed in any of the pleadings or specifically mentioned in the conciliation orders, and while both parties devote considerable time in their briefs to discussing the sales to ATIF Enterprises, A & F TV Service and ABC Video, it is apparent that the reduction in the assessment set forth in the conciliation orders involves acceptance of nontaxability with respect to these three customers. Specifically, a schedule of additional taxes due included with the Division's submitted documents herein provides that the only remaining "errors" involve the initially disallowed sales to Wheels Electronics ($19,454.24) and to Juan Jose Villanueva ($42,415.00), and makes no mention of the other sales. This schedule computes a revised error percentage of 14.629%, and is set forth in its entirety as Appendix "A".

In turn, petitioners filed petitions protesting the remaining amount of tax assessed as due ($72,076.64), arguing that the method of audit was arbitrary and involved an insufficient test period, that the corporate petitioner's records were good and sufficient, and that the Division had failed to make adequate inquiry as to the adequacy thereof. Finally, petitioners claim that sufficient proof has been submitted to support nontaxability with respect to sales made to Wheels Electronics and Juan Jose Villanueva.

Documentation in the file indicates the auditor made certain additional requests for records during the course of his examination post-assessment. The first such request, a list of "[i]tems needed for next appointment", was dated October 20, 1987 and included a request for exemption certificates for a number of named customers including, inter alia, Wheels Electronics. A second similar list, dated October 30, 1987, requested additional shipping documents for, inter alia, Juan Jose Villanueva ("Villanueva") for specific dates and amounts. This latter request specified four

separate sales transactions (on four separate dates) between petitioner and Villanueva in the amounts of $11,775.00 (September 10, 1986), $8,700.00 (September 18, 1986), $8,170.00 (October 17, 1986), and $13,770.00 (October 17, 1986)[3], together totalling the $42,415.00 amount disallowed for lack of proof of export. On each of these requests for additional records, other customers listed thereon are either marked "OK" or are "checked off", presumably meaning the documents requested by the auditor were furnished and exemption as claimed was allowed. A third additional request, dated January 15, 1988, specified a certificate of exemption for Wheels Electronics as among the records sought.

Among the Division's reasons for maintaining the corporate petitioner's records were inadequate (post-assessment) was the claim that gross sales per sales tax returns were greater than gross sales per books over the audit period (based on a comparison of sales tax returns to the general ledger). The Division calculates such overage on page 40 of the

auditor's workpapers. However, page 41 of such workpapers, in turn, reconciles such difference (via year-end adjusting entries), and there is no claim that the Division did not accept the amount of petitioners' gross sales per sales tax returns.

In response to the Division's claim of a missing certificate with respect to Wheels Electronics, petitioners submitted a blanket resale certificate dated December 17, 1986 for Wheels Electronics. This certificate reveals Wheels Electronics' identification number to be 11-2788231, and is otherwise fully completed, save for a description of the nature of the customer's (Wheels Electronics) business (i.e., the area on the resale certificate for such description is left blank). In addition, the certificate includes a checkmark at box "C" thereof, indicating claimed exemption based on "service for resale", as opposed to exemption per checkmark at box "A" thereof, indicating "tangible

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[3]The actual invoice submitted by petitioners for this amount was dated October 9, 1986.

personal property is for resale in its present form or as a component part of tangible personal property." The Division continues to disallow nontaxability on the sales to Wheels Electronics because no exemption certificate was presented to the auditor or (later) at conciliation conference, because "[n]o certificate was presented; customer created 12/86; sales tested Q/E 11/30/86",[4] and because of the noted failure to complete on the certificate the nature of the purchaser's business coupled with the apparent error in checking box "C" instead of box "A". It is noted that while the Division sent verification

letters to some of the corporate petitioner's customers vis-a-vis nontaxable purchases, no such verification was sent to Wheels Electronics.

The sales to Villanueva were disallowed by the Division because "customer [Villanueva] made his own arrangements to take the goods to the shipper", and because there was "no evidence that the customer [Villanueva] or his designee took delivery at any place other than Queens Discount." To support its argument, the Division points to a letter from petitioner Mohinder Singh describing the transactions with Villanueva as follows:

> "If you notice the documents we did charge him [Villanueva] the sales taxbut [sic] upon presentation of Airway bill I had to refund him the sales tax. How stupid can a Broker or middleman would [sic] be to buy all items at one place /dealer if his prices are not insane. To fill up his container or to complete his order he goes from place to place makes his best deals, pays advance to confirm his orders & collects goods as they become available, makes his own arrangement to take it to shipper & collects his shipping documents, which he presented to us as proof that goods have gone out of country, therefore I refunded him the sales tax. Obviously no one is buying so many TV's, VCR's etc for his personal use. From the very beginning we were told that he is looking to buy so many things for export to such & such country. Took quotatios [sic] from us. On repeated bargaining of prices final price was settled and agreed upon that I would refund him the sales tax upon presentation of export documentation" (emphasis added).

The merchandise purchased by Villanueva included televisions, VCRs and camcorders

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[4]The thrust of the Division's argument is that because the certificate was dated after the sales in question were made and was not presented to the auditor or conciliation conferee, such certificate may have been only "recently created".

with an ultimate destination, as revealed by Varig Brazilian Airways air waybills, of Montevideo, Uruguay. Documents submitted herein include Queens Discount's invoices to Villanueva, each of which consistently states (on its face) that sales tax will be refunded upon presentation of export documents, as well as later invoices showing the refunding to Villanueva of sales tax initially collected on the four transactions. Petitioners also submitted a Uniform Straight Bill of Lading for each of the Villanueva transactions, showing that the merchandise was picked up at Queens Discount's premises in New York by "Lucky Trucking, N.Y." with the destination listed as Villanueva's premises in North Bergen, New Jersey. The "ship to" areas on the Queens Discount invoices to Villanueva are left blank and two of such invoices, those dated October 9, 1986 and October 17, 1986, are stamped "picked up". In addition, the Lucky Trucking bills of lading do not specify or reflect any charges for transport.

Petitioner Mohinder Singh does not raise any dispute against the claim that he is a person responsible to collect and remit sales and use taxes on behalf of the corporate petitioner, but rather argues only for reduction or cancellation of the assessments matching any such reduction or cancellation afforded the corporate petitioner.

CONCLUSIONS OF LAW

A. It is well established that every person required to collect tax must maintain and make available for audit upon request records sufficient to verify all transactions in a manner suitable to determine the correct amount of tax due (Tax Law § 1135[a]; 20 NYCRR 533.2[a]). Failure to maintain and make available such records, or the maintenance of inadequate records, will result in the Division of Taxation estimating tax due (Tax Law § 1138[a]). To determine the adequacy of a taxpayer's records, the Division of Taxation must first request and thoroughly examine the taxpayer's books and records for the entire period of the proposed assessment (Matter of Adamides v. Chu, 134 AD2d 776, 521 NYS2d 826, lv denied 71 NY2d 806; Matter of King Crab Rest. v. State Tax Commn., 134 AD2d 51, 522 NYS2d 978). The purpose of such an examination is to determine whether the records are so insufficient as to make it virtually impossible for the Division to verify taxable sales receipts and conduct a complete audit. When

estimating sales tax due, the Division must adopt an audit method that will reasonably calculate the amount of taxes due (see, Matter of W. T. Grant Co. v. Joseph, 2 NY2d 196, 159 NYS2d 150, cert denied 355 US 869). The burden is then on the taxpayer to demonstrate, by clear and convincing evidence, that the audit method employed or the tax assessed was unreasonable (Matter of Meskouris Bros. v. Chu, 139 AD2d 813, 526 NYS2d 679).

B. In this case, the Division made a clear written request for the corporate petitioner's records, as described (see Finding of Fact "2"). Almost immediately thereafter, the Division received notification advising of the sale of the business and, as a consequence thereof, causing imposition of a shortened time limitation (90 days from notice of sale) within which to notify the purchaser and seller (the corporate petitioner) of any liability (see Tax Law § 1141[c]). The record on submission reveals the Division's position that complete records were not provided for audit, as requested, within this shortened time period. Petitioners argue that complete records were maintained. The question, however, is when such records were made available to the auditor. If complete and adequate records are available, assessment based on testing and projection (absent taxpayer permission) is prohibited. In the same vein, the Division may on audit rightfully challenge all claimed nontaxable sales (Tax Law § 1132[c]); but if all records in substantiation are available as requested, the Division must review the same for adequacy and completeness prior to testing, computing an error rate and projecting an assessment based thereon.

The matter at hand, having been submitted without hearing, makes the task of pinpointing when full records were available to the auditor difficult. The audit workpapers and audit report and log reveal that only a few records were available in July 1987, that some invoices (at least those pertaining to nontaxable sales for the quarterly period ended November 30, 1986) were available for review on or about September 10, 1987, and that other records were analyzed through February 1988. At best, it appears records were available and reviewed over an ongoing period of time. It is unknown if petitioners provided only those records specifically asked for by the auditor, or if there were simply delays or availability problems in providing

records. In any event, the appointment letter requests all records to be made available. In turn, the Division's submitted documents reveal allegations that full records were not available for review within the 90-day bulk sale notification window period (imposed as the result of petitioners' decision to sell the business), and also show the Division's ongoing requests for additional records. Petitioners, for their part, do not claim that full records were made available within the time period described, nor do petitioners particularly challenge the methodology employed in calculating the initial assessment based on disallowance of nontaxable sales. Furthermore, in that records were properly requested, but there is no claim that they were produced or available for review in full within 90 days, it cannot be said that the Division's initial assessment was issued simply to circumvent the statute of limitations. Rather, apparently lacking access to complete books and records, and facing an expiring notification period, the Division premised its assessment upon disallowance of nontaxable sales.[5] While the continuing audit work, petitioners'

subsequent presentation of records, and the petitions filed challenging the tax assessed make it clear that petitioners do not agree with the assessment as reduced, it cannot be said that the Division's initial assessment fails the rational basis test (Matter of M & B Appliance, Inc., Tax Appeals Tribunal, April 9, 1992), or that petitioners in fact have challenged same. In sum, the

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[5]In that invoices for nontaxable sales for the quarterly period ended November 30, 1986 were examined by the auditor on or about September 10, 1987, one could draw an inference that all invoices for the audit period were available on such date, but that the auditor only requested and reviewed the nontaxable sales invoices for such one quarter (intending all along to project an assessment based on such test). However, there remains the claim that all records were not available, the fact that all records were requested in writing and, interestingly, that the initial assessment was based on a disallowance of all nontaxable sales. On this latter point, if the auditor intended only to test and project an assessment, and since the test invoices were available and reviewed prior to issuance of the assessment, the initial assessment could simply have been based on such test and not (inconsistent therewith) on a complete nontaxable sales disallowance. The fact that the initial assessment was not based on the described test in some measure refutes the claim (as argued by petitioners) that the auditor's intent was simply to generate an assessment based on an "inadequate" test.

apparent initial unavailability of records allowed the issuance of a valid estimated assessment. In turn, while the Division has some obligation to review later produced records aimed toward reducing such an assessment (see, Matter of Continental Arms v. State Tax Commn., 72 NY2d 976, 534 NYS2d 362), it is not precluded from doing so via tests of such records with projection therefrom. To conclude otherwise could only serve to encourage (though presumably not the case here) recalcitrance on the part of taxpayers in providing records.

C. In light of the foregoing, the issue of the adequacy of books and records as specified by the Division (e.g., lack of sequentially-numbered sales invoices, internal controls, etc.), and as argued by petitioners, is largely academic. Rather, the assessment as issued was premised upon disallowance of claimed nontaxable sales, leaving petitioner in the position of proving the proper nontaxable status of such sales. The Division's

auditor performed the described test of nontaxable sales for the quarterly period ended November 30, 1986, and application of the results of such review caused reduction of the assessments as described. Petitioners then were faced with two options, to wit, (a) providing substantiation for transactions with the five customers in the test quarter to whom claimed nontaxable sales were disallowed, or (b) providing substantiation for every claimed nontaxable sale for the entire audit period. Perhaps in view of the difficulty and/or impracticability of the latter option, petitioners have attempted to establish the proper nontaxability of the five customers' transactions disallowed during the test quarter. If such substantiation is adequate, petitioners will have established full compliance for the tested sales thereby resulting in a zero error rate and no tax due via projection. In fact, as the result of the conciliation conference substantiation was accepted for three of such tested customers, the error rate was recalculated, and the assessment amounts were further reduced. Remaining for consideration, therefore, are two customers' transactions, namely Wheels Electronics (resale) and Villanueva (export).

D. The Tax Law imposes sales tax on receipts from all "retail sales" of tangible personal property, unless exempt or excluded from tax by provision of law (Tax Law § 1105[a]). The

sales tax is a "transaction" tax imposed at the time the transaction occurs, and is imposed if the delivery of goods is made or possession is transferred from the vendor to the purchaser in New York State (see, Matter of David Hazan, Inc. v. Tax Appeals Tribunal, 152 AD2d 765, 543 NYS2d 545, affd 75 NY2d 989, 557 NYS2d 306; Matter of Continental Arms Corp. v. State Tax Commn., 130 AD2d 929, 516 NYS2d 338, revd on other grounds 72 NY2d 976, 534 NYS2d 362). So-called "sales for resale" are excluded from the definition of "retail sales" and are not taxable (Tax Law § 1101[b][4]).

E. For the purpose of the proper administration of the sales tax and to prevent evasion of the tax, the law presumes that all receipts from the retail sale of tangible personal property are subject to tax until the contrary is established. The burden of proving that any receipt is not taxable is upon the person required to collect tax or the customer (Tax Law § 1132[c]).

Tax Law § 1132(c) (as amended by L 1985, ch 65 § 78, effective September 1, 1985) provides for a 90-day period, beginning from the date of purchase, within which the vendor must secure from the purchaser a certificate of resale, thereby relieving the vendor of its duty to collect sales tax on the transaction (Tax Law § 1132[c][1]). Receipt of the resale certificate beyond the 90-day period will cause the sale to be deemed taxable (see, Tax Law § 1105). In addition, the vendor was not relieved of the burden of proof when no exemption certificate or an improper certificate was furnished, or when the vendor had actual knowledge that a certificate furnished was false or fraudulent. A certificate was considered to be properly completed when it contained the (i) date prepared, (ii) name and address of the purchaser, (iii) name and address of the vendor, (iv) identification number of the purchaser as shown on the certificate of authority or exempt organization number as shown on the exempt organization certificate, (v) signature of the purchaser or the purchaser's authorized representative, and (vi) any other information required to be completed on the particular form (20 NYCRR former 532.4[c][2]).

The Division's regulations, in effect for the period at issue here, provided for the use of a "blanket resale certificate," stating that such a certificate:

> "may be filed with the vendor by a purchaser to cover additional purchases of the same general type of property or service. Each vendor accepting a resale certificate must, for verification purposes, maintain a method of associating a sale made for resale with the resale certificate on file" (20 NYCRR former 532.4[d][4]).

F. The Wheels Electronics' blanket resale certificate submitted by petitioners is dated December 17, 1986. Such date does fall within 90 days of all but two of the sales to Wheels Electronics (see Finding of Fact "10", footnote 2). The Division's position with respect to Wheels Electronics is that the exemption certificate proffered is inadequate for failure to describe the nature of the business of the purchaser and to have the "correct" box checked. Also argued is that since the certificate in question is dated later than the period during which the sales at issue were made, and was not provided to the auditor or at conference, the same was created only recently (i.e., for hearing). While each of these points might have been refuted by petitioners, the record simply does not contain evidence sufficient to do so. Only the blanket resale certificate itself has been submitted. Such certificate is dated after the sales in question occurred and, as noted, lacks a description of the customer's business. The record on submission does not include invoices for the Wheels Electronics' transactions, nor an affidavit or other evidence explaining or describing such transactions, explaining the nature of Wheels Electronics' business, or clarifying the issue with regard to the check box. There is no evidence as to when such certificate was obtained by Queens Discount or specifying whether the same was presented to the Division of Taxation at any time prior to petitioners' September 4, 1991 submission of documents in connection herewith. In short, presented only with the resale certificate, itself lacking in certain respects as described, and absent further clarification with respect thereto, properly results in disallowance of exemption with respect to the Wheels Electronics' sales.

G. The Division of Taxation also properly disallowed nontaxability on the transactions with Villanueva. Simply stated, the documents submitted clearly reveal that possession of the merchandise in question was transferred to Villanueva's designee (Lucky Trucking), per Villanueva's shipping arrangements, at Queens Discount's premises in New York. Hence, exemption was properly denied (Matter of Savemart, Inc. v. State Tax Commn., 105 AD2d

1001, 482 NYS2d 150, appeal dismissed 64 NY2d 1039, 489 NYS2d 1009; see Matter of David Hazan, Inc. v. Tax Appeals Tribunal, supra; 20 NYCRR 525.2[a][3]).

H. Petitioners also argue, by brief, that projection of the error rate, derived in largest part from disallowance of the Villanueva sales, is unreasonable, maintaining that such sales are non-recurring and aberrant. However, it is not possible to determine from the evidence if such sales were non-recurring over the period of audit or whether, in contrast, Villanueva was a regular customer. No evidence was presented to show that Queens Discount made no other sales to Villanueva. It could be argued that four such sales over the quarter tested gives indication that sales to Villanueva were ongoing. In any event, the record on submission does not enable a conclusion that including and projecting from such sales gives rise to unreasonably inaccurate results or an aberrant rate of disallowance. Thus, elimination of the Villanueva transactions from the audit results is not warranted.

I. The petition of Queens Discount Electronics, Inc. and Mohinder Singh, as officer, is hereby denied, and the notices of determination and demands for payment of sales and use taxes due dated September 17, 1989, as revised prior to hearing, are sustained.

DATED: Troy, New York
August 13, 1992

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE

APPENDIX "A"

"SCHEDULE OF ADDITIONAL TAXES DUE

PER	Q/E	NON-TAXABLE SALES REPORTED	ADD'L NON-TAXABLES DISALLOWED NON-TAXABLES	SALES TAXES COL. 1 x 3.687% DUE
		COL. 1	COL. 2	COL. 1 + COL. 2
ADJUSTED NON-TAXABLES		COL. 3 x 14.629%	COL. 4 x 8.25%	COL. 3
COL. 4	COL. 5			
185	8/31/84	738,090.00	27,213.38	765,303.38
111,956.23		9,236.39		
285	11/30/84	731,167.00	26,958.13	758,125.13
110,906.12		9,149.76		
385	2/28/85	605,081.00	22,309.34	627,390.34
91,780.93		7,571.93		
485	5/31/85	508,886.00	18,762.63	527,648.63
77,189.72		6,368.15		
186	8/31/85	580,775.00	21,413.17	602,188.17

88,094.11		7,267.76		
286	11/30/85	480,258.00	17,707.11	497,965.11
72,847.32		6,009.90		
386	2/28/86	439,425.00	16,201.60	455,626.60
66,653.62		5,498.92		
486	5/31/86	416,435.00	15,353.96	431,788.96
63,166.41		5,211.23		
187	8/31/86	404,777.00	14,924.13	419,701.13
61,398.08		5,065.34		
287	11/30/86	407,887.00	15,038.79	422,925.79
61,869.81		5,104.26		
387	2/28/87	339,163.00	12,504.94	351,667.94
51,445.50		4,244.25		
487	5/31/87	107,780.00	3,973.85	111,753.85
16,348.47		1,348.75		
TOTALS		5,759,724.00		212,361.02
5,972,085.02		873,656.32	72,076.64	

NON-TAXABLE SALES TESTED Q/E 11/30/86 422,926.67

NON-TAXABLE SALES REPORTED Q/E 11/30/86 407,887.00

UNACCOUNTED FOR NON-TAXABLES

15,039.67

PERCENTAGE OF INCREASE = 15.039.67 / 407,887.00 = 3.687%

ERRORS: WHEELS ELECTRONICS 19,454.24

JUAN JOSE VILLANNEVA [sic] 42,415.00

TOTAL ERRORS 61,869.24

ERROR % $\frac{61,869.24}{422,926.67"}$ = 14.629%