STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
THE TJX COMPANIES, INC.	:	ORDER DTA NO. 812048
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 June 1, 1987 through November 30, 1988.	:	

Petitioner, The TJX Companies, Inc., by its representative, S. Michael Finn, Esq., brought a motion, dated March 30, 1994, pursuant to 20 NYCRR 3000.5(a) and (c) (Rules of Practice and Procedure of the Tax Appeals Tribunal) requesting that the Division of Tax Appeals grant summary determination in petitioner's favor for the relief requested in the petition. Specifically, petitioner seeks a reduction in the amount of tax assessed pursuant to a Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued to it on June 15, 1992 in the sum of $483,951.04 on the grounds that the Division of Taxation ("Division") erroneously treated a sale of stock as a taxable bulk sale; petitioner seeks a further reduction with respect to all tax periods set forth in said notice due to the Division's failure to credit TJX for alleged overpayments of sales tax on discount sales; and petitioner seeks a cancellation of all penalties assessed in said notice because any late payments of sales or use taxes for the period in issue were due to reasonable cause.

On May 27, 1994, the Division, by its representative,

William F. Collins, Esq. (John O. Michaelson, Esq., of counsel), brought a cross motion for summary determination pursuant to 20 NYCRR 3000.5(c), specificallyrequesting that the Division of Tax Appeals sustain the notice of determination in issue.

Based upon the affidavit of Alfred Appel in support of petitioner's motion for summary determination and the exhibits attached thereto, sworn to March 29, 1994, a copy of the petition filed in this matter and the exhibits attached thereto, petitioner's brief in support of the motion for summary determination, the affirmation of John O. Michaelson in opposition to petitioner's motion for summary determination and in support of the Division's cross motion for summary determination, the Division's memorandum of law in opposition to petitioner's motion for summary determination and in support of the Division's cross motion for summary determination, and petitioner's opposition to the Division's cross motion for summary determination and the affirmation of S. Michael Finn, Esq., in opposition to the Division's cross motion for summary determination, and all the other pleadings and proceedings had herein, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following order.

FINDINGS OF FACT

Petitioner, The TJX Companies, Inc. ("TJX"), was a publicly-held Delaware corporation with its principal place of business in Framingham, Massachusetts. Until October of 1988, TJX and 28 wholly-owned subsidiaries of TJX operated the Zayre chain of retail stores, including more than 350 stores in more

than 20 states (the "Zayre Division").

On or about October 28, 1988, pursuant to an "Amendment No. 2 to Acquisition Agreement" between Zayre Corp. and Ames Department Stores, Inc. ("Ames"), the parties provided for the following in paragraph 5 on page 2:

> "5. Paper Chase, etc.. Pursuant to the Acquisition Agreement, the Seller and the Buyer have agreed that, in lieu of transferring certain Assets and Liabilities to Fixtron, Inc., such Assets and Liabilities are to be transferred (or heretofore have been transferred) to one of Zayre Central Corp., Zayre Florida Corp., Zayre New England Corp. or Zayre Illinois Corp., each a Delaware corporation (such corporations being hereinafter referred to as the 'Specified Subsidiaries'). Except as the context otherwise requires to avoid manifest error, the term 'Newco' as used in the Acquisition Agreement shall be deemed to refer to each of the Specified Subsidiaries; provided, however, that no Specified Subsidiary shall be liable for any Liability other than (i) Liabilities in respect of Leases assumed in writing by such Specified Subsidiary or (ii) other Liabilities pertaining to other specified Assets transferred to such Specified Subsidiary (and the Buyer hereby agrees that in connection with the Closing each Specified Subsidiary shall execute and deliver to the Seller an instrument of assumption in order to effectuate this clause (ii))."

The Acquisition Agreement, dated September 15, 1988, containing the definitions of terms used in both the Acquisition Agreement and Amendment No. 2 was not submitted in evidence with petitioner's moving papers. Additionally, in paragraph 3 of Amendment No. 2 to the Acquisition Agreement it was stated that a true and complete copy of the estimated closing statement was attached as Exhibit "B" to said amendment; however, it was omitted from the attachments to the moving papers.

Pursuant to paragraph "16" of Amendment No. 2 to the Acquisition Agreement, all provisions of the Acquisition

Agreement and the "Investment Agreement" were to remain unmodified and the Acquisition Agreement, as amended by the Amendment No. 2, was confirmed as being in full force and effect.

The terms and conditions of the acquisition of the Zayre Division subsidiaries by Ames allegedly were set forth in the Acquisition Agreement, dated as of September 15, 1988.

No books or records of TJX or Zayre Central Corp. (the subsidiary to which petitioner alleges it transferred the assets of 119 Zayre store locations in 14 states) were submitted with this motion.

For the period ended November 30, 1988, the Division assessed petitioner $497,460.81 in tax by Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated June 15, 1992. Of this figure, it is alleged that $483,951.04, plus penalty and interest, was attributable to the transfer of assets between petitioner and Zayre Central Corp.

Petitioner alleged that even if the transfer was taxable, its preliminary estimate of the value of tangible personal property at the 17 New York Zayre store locations included in the transfer was overestimated and, therefore, requires a reduction in the amount of tax assessed for the period ended November 30, 1988. Additionally, petitioner alleged that additional reduction in tax was necessary because tax was assessed on furniture, fixtures and equipment owned by two other Zayre Division subsidiaries, i.e., Gaylords National Corp. and Netco, Inc., which allegedly were not transferred. No

documentation substantiating either of these requested reductions was provided with the moving papers.

The second issue on which petitioner moves for summary determination is with respect to an adjustment made by petitioner on its sales tax return filed for the period January 1, 1988 through January 31, 1988, purportedly to correct an overstated tax liability attributable to discount sales made to employees. Petitioner alleges that it had a policy in effect during the audit period pursuant to which it granted its employees a 10% discount on purchases of items from its inventory.

Petitioner's affiant, Alfred Appel, stated that a discount sale typically set forth the sales price, the sales tax and a subtotal, then the 10% discount, and then the ultimate amount collected. No invoices were submitted to substantiate this policy or the written policy itself, if it existed. However, the general ledger indicated the original sales price accorded to the sales account, the original sales tax collected on the original sales price posted to the sales tax accrual account, while the discounted amount was posted to the discount account. According to the Appel affidavit, the sales tax reported and remitted by petitioner to the State of New York was the amount recorded in the sales tax accrual account. None of the accounts were submitted with the moving papers.

By letter dated May 3, 1991 to petitioner from the Division's Albany District Office, the Division expressed its position that:

> "even if tapes were available verifying your method of discounting, the fact is that an erroneous collection took place and the customer would have a right to a refund, not Zayre. I am, therefore, disallowing the tax credit that was taken."

Petitioner alleged that it utilized its discounted sales procedure for all months in the audit period and, as a result, made overpayments of sales tax in the sum of $90,448.22.

The Division did not submit the audit report for the period in issue or other underlying substantiation for the issuance of the notice of determination referred to above.

CONCLUSIONS OF LAW

A. A party may move for summary determination pursuant to 20 NYCRR 3000.5(c)(1) after issue has been joined. The regulation provides, in pertinent part, that:

> "Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all the material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor. The motion shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any issue of fact."

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegrad v. New York University Medical Center, 64 NY2d 851, 487 NYS2d 316, 317, on remand 111 AD2d 138, 49 NYS2d 970, citing Zuckerman v. City of New York, 49

NY2d 557, 562, 427 NYS2d 595). Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable" (Glick & Dolleck v. Tri-Pac Export Corp., 22 NY2d 439, 293 NYS2d 93, 94; Museums at Stony Brook v. Village of Patchogue Fire Dept., 146 AD2d 572, 536 NYS2d 177, 179). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (Gerard v. Inglese, 11 AD2d 381, 206 NYS2d 879, 881).

It is clear from all of the material submitted by both parties hereto that material facts are in dispute and that contrary inferences may be drawn reasonably from undisputed facts, or at the very least that doubt exists as to the existence of a triable issue and that a material issue of fact is arguable.

With regard to the issue of whether or not a bulk sale or sale of stock occurred, it would seem critical that the original acquisition agreement and the first amendment be reviewed by the trier of fact in order to determine whether or not any of the allegations set forth in the Appel affidavit are in fact true or represent fair characterizations of the events which transpired. Although petitioner argues that paragraph "5" of the Second Amendment to the Acquisition Agreement sets forth all it needs in order to establish its right to summary determination in this matter, it is determined that one cannot conclude that Zayre

Central Corp. was the subsidiary chosen by petitioner as the company to which certain assets and liabilities were to have been transferred. Further, the assets and liabilities transferred were never disclosed nor was there any evidence of a capital contribution, i.e., books and records of any corporation which support that characterization.

It would also appear that the true and complete copy of the estimated closing statement, which was to have been attached as Exhibit "B" to the Amendment No. 2 to the Acquisition Agreement, would have clarified many of the allegations in the Appel affidavit, but petitioner chose not to submit it on its motion.

Likewise, the introduction of other documentation, like corporation tax returns, both Federal and State, with attached schedules, would have helped to further clarify the structure of the transaction between petitioner and Ames, but without which it is impossible to fully understand the nature of the transaction.

For all of these reasons, it is found that petitioner has not tendered sufficient evidence to eliminate all material issues of fact from the case and the matter must proceed to full hearing.

B. With regard to the issue of petitioner's discount policy on purchases of items from its inventory by employees, the Appel affidavit alone, although giving examples of how such sales were "rung" through its registers, supplied no verification of petitioner's bookkeeping or accounting system. It is not clear from the record whether petitioner ever produced such tapes or

invoices to the Division on audit since the Division's May 3, 1991 letter to petitioner which stated that "even if tapes were available verifying your method of discounting", did not indicate that the tapes were ever available for purposes of verification. Without substantiation with respect to petitioner's general ledger and books of account, specifically its sales account, sales tax accrual account and discount account, and, as mentioned above, verification of how its discount sales were handled, it is impossible for a trier of fact to dispose of these issues. Therefore, with respect to petitioner's discount policy and the adjustment it made because of its purported overpayment or overstatement of tax liability, the matter must proceed to a full hearing.

C. Because the two issues above present material issues of fact which must proceed to trial prior to disposition, the issue of penalties may not be decided until that time.

D. The Division's cross motion for summary determination was not supported by submission of an audit report for the period in issue, which might have provided a rational basis for the notice of determination in issue, or any other facts or evidence which may have eliminated any material issues of fact from the case and, therefore, its cross motion for summary determination must be denied and the issues forwarded to a full hearing.

E. Petitioner's motion for summary determination is denied; the Division's cross motion for summary determination is denied; and a full hearing on all issues with regard to the petition

filed in this matter will be scheduled in due course.

DATED: Troy, New York
September 22, 1994

/s/ Joseph W. Pinto, Jr.

ADMINISTRATIVE LAW JUDGE