

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
 :
 of :
 :
 FRESH POND DAIRIES, INC. :
 :
 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 March 1, 1975 :
 through May 31, 1977. :

In the Matter of the Petition :
 :
 of :
 :
 DEERFIELD DAIRIES, INC. :
 :
 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 March 1, 1975 :
 through May 31, 1977. :

DECISION

In the Matter of the Petition :
 :
 of :
 :
 LA GRANGE CONVENIENCE STORES, INC. :
 :
 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 March 1, 1975 :
 through February 28, 1977. :

Petitioner Fresh Pond Dairies, Inc., 6699 Fresh Pond Road, Ridgewood, New York 11385, 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 March 1, 1975 through May 31, 1977 (File No. 25674).

Petitioner Deerfield Dairies, Inc., 711 Manhattan Avenue, Brooklyn, New York 11222, 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 March 1, 1975 through May 31, 1977 (File No. 25676).

Petitioner La Grange Convenience Stores, Inc., 205-11 35th Avenue, Bayside, New York 11361, 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 March 1, 1975 through February 28, 1977 (File No. 27322).

A consolidated formal hearing was commenced before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 18, 1982 at 9:30 A.M. and continued to conclusion on November 3, 1983 at 9:15 A.M., with all briefs to be submitted by April 4, 1984. Petitioners appeared by Andrew L. Sokol, Esq. The Audit Division appeared at the November 18, 1982 hearing by Paul B. Coburn, Esq. (Alexander Weiss, Esq., of counsel) and at the November 3, 1983 hearing by John P. Dugan, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly computed the assessment against each petitioner in reliance on an external index, specifically, purchase invoices for the months of August, 1976 and October, 1976.

II. Whether the hearing officer's receipt in evidence of the field audit report sua sponte was improper.

FINDINGS OF FACT

1.(a) On January 23, 1979, the Audit Division issued to petitioner Fresh Pond Dairies, Inc. ("Fresh Pond"), as purchaser in a bulk sale, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, assessing sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1975 through May 31, 1977 in the amount of \$78,729.85, plus interest

of \$23,816.93 and penalty of \$19,479.86. On April 17, 1977, Fresh Pond purchased a convenience grocery store from Mini Mart International Corp. ("Mini Mart"). The taxes assessed represented amounts which the Audit Division determined to be due from Mini Mart, as well as amounts determined to be due on the bulk sale.

(b) On January 23, 1979, the Audit Division issued to petitioner Deerfield Dairies, Inc. ("Deerfield"), as purchaser in a bulk sale, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, assessing sales and use taxes for the period March 1, 1975 through May 31, 1977 in the amount of \$78,729.85, plus interest of \$23,816.93 and penalty of \$19,479.86. On April 24, 1977, Deerfield purchased a convenience grocery store from Mini Mart. The taxes assessed represented amounts which the Audit Division determined to be due from Mini Mart, as well as amounts determined to be due on the bulk sale.

(c) On January 23, 1979, the Audit Division issued to petitioner La Grange Convenience Stores, Inc. ("La Grange"), as purchaser in a bulk sale, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, assessing sales and use taxes for the period March 1, 1975 through February 28, 1977 in the amount of \$68,601.53, plus interest of \$21,882.63 and penalty of \$17,150.35. On February 13, 1977, La Grange purchased a convenience grocery store from Mini Mart. The taxes assessed represented amounts which the Audit Division determined to be due from Mini Mart, as well as amounts determined to be due on the bulk sale.

(d) On or about May 22, 1978, Mr. Harold McCambridge, sole officer of Mini Mart, executed on its behalf a consent, extending the period of limitations for assessment of sales and use taxes for the period March 1, 1975 through February 28, 1978, to and including May 20, 1979.

2. Commencing in May, 1978, the Audit Division conducted an examination of the books and records of Mini Mart, a corporation which owned and operated five convenience-type grocery stores in the New York City metropolitan area. The records for Mini Mart's five stores were maintained on a consolidated basis and were stored in an office above one of the stores. During the course of the audit, three of the stores were purchased by petitioners herein. In their perfected petitions, petitioners contested their responsibility, as purchasers in the bulk sales, for taxes allegedly due from Mini Mart but by their representative, they withdrew this issue at the formal hearing.

3.(a) The sales tax examiner compared Mini Mart's gross sales as reported in its sales tax returns filed and as reflected in the general ledger, and found these amounts to be in agreement.

(b) Mini Mart reported taxable sales and sales tax collected as rung up on the cash registers at the stores. Reported taxable sales represented an average of 9.88 percent of gross sales for the period March 1, 1975 through November 30, 1978.

(c) The examiner requested Mr. McCambridge to compile and to provide him with invoices for purchases made by each store for two complete months, preferably one winter month and one summer month. Because Mr. McCambridge was in the process of selling the stores, many invoices had been misplaced or discarded, or were otherwise unavailable. The only months for which Mr. McCambridge could produce complete purchase invoices, including purchases made by cash and by check, were August and October, 1976.

(d) The examiner analyzed Mini Mart's purchases by store for the two above-mentioned months to ascertain the percentage of taxable purchases.

August, 1976	<u>TOTAL PURCHASES</u>	<u>TAXABLE PURCHASES</u>	<u>TAXABLE PURCHASES AS PERCENTAGE OF TOTAL PURCHASES</u>
Store 1 (Deerfield)	\$ 27,457.61	\$ 6,500.78	23.676
Store 2 (Fresh Pond)	22,029.17	6,880.26	31.232
Store 4 (La Grange)	48,488.98	13,083.37	26.982
Store 7	18,785.27	5,975.10	31.807
Store 10	30,338.26	9,885.49	32.584
October, 1976			
Store 1 (Deerfield)	21,682.28	5,143.84	23.724
Store 2 (Fresh Pond)	15,880.03	4,449.77	28.021
Store 4 (La Grange)	46,334.12	10,783.15	23.273
Store 7	17,773.71	3,470.05	19.523
Store 10	30,088.80	7,719.43	25.655
	<u>\$278,858.23</u>	<u>\$73,891.24</u>	
AVERAGE PERCENTAGE OF TAXABLE PURCHASES			26.498

(e) Due to the discrepancy between the average percentage of taxable purchases computed by the examiner (26.498%) and the average percentage of taxable sales reported by Mini Mart (9.88%), the examiner concluded that taxable sales had been understated. He calculated the total sales tax due by multiplying the gross sales for each quarterly period by the average percentage of taxable purchases. He then applied the appropriate sales tax rate and reduced the totals by tax remitted with the returns. (The assessments also encompass taxes due on each bulk sale, but these amounts are apparently not contested by petitioners.)

3. The examiner testified that Mr. McCambridge orally consented to the use of August and October, 1976 as a test period; petitioners allege in their post-hearing memorandum of law, however, that "the taxpayer [Mini Mart] did not recognize and was not advised that two particular months would be used to substitute for several years' records."

4. The examiner never visited any of the grocery stores to observe their operations.

5. The examiner was not furnished with copies of the contracts for sale of the stores.

6. At the hearing on November 18, 1982, the Audit Division presented the testimony of the sales tax examiner but did not make an offer of his report. By letter dated April 28, 1983, the hearing officer requested petitioners' representative and the Audit Division's representative to consider entering into a stipulation for the admission of the report in evidence. By letter dated May 4, 1983, petitioners' representative refused to "stipulate to any informal or formal agreement whereby the auditor's report will be submitted" and characterized the hearing officer's request as "highly unusual" and "highly irregular". In a letter dated May 19, 1983, the hearing officer informed petitioners' representative that (a) to ensure a full and complete record, it was her intention to receive the audit report in evidence; and (b) petitioners had the right to re-open the hearing with regard to the receipt of additional evidence. Petitioners' representative requested that the hearing be re-opened, by letter dated June 6, 1983. At the reconvened hearing on November 3, 1983, the audit report was admitted in evidence, and the examiner was available for further cross-examination by petitioners' representative. In their memorandum of law, petitioners maintain that the hearing officer's admission of the audit report sua sponte was improper and prejudicial to the conduct of a fair hearing, and in addition, that to permit decision of the instant matter with the audit report as part of the record "would alone permit the Petitioners to reopen the case based upon their records, which are now intact and available for inspection". Petitioners have offered no proof whatsoever that records are now "intact" and "available".

CONCLUSIONS OF LAW

A. That briefly stated, the audit method herein employed consisted of the computation of the average percentage of taxable purchases and the application of this percentage to gross sales for each quarterly period. Resort to such an indirect method of determining taxable sales was authorized by Tax Law section 1138(a)(1) and justified under the circumstances. Sales for all the stores were recorded on a consolidated basis, taxable sales were reported in accordance with register tapes which may have contained errors (e.g., treatment of taxable sales as nontaxable), complete purchase invoices were available for only two months, and the audited taxable ratio of purchases (26.498%) was two and one-half times the reported taxable ratio of sales (9.88%).

B. That the Audit Division is hereby directed to recompute the assessment against each petitioner, using a taxable ratio of 24.039. This ratio represents the average percentage of taxable purchases made by Mini Mart during October, 1976 $[(23.724 + 28.021 + 23.273 + 19.523 + 25.655) \text{ divided by } 5]$. Taxable purchases (and sales) made during August can reasonably be anticipated to have been elevated, and the taxable ratio for that month, therefore, above the norm.

C. That the hearing officer's receipt of the field audit report in evidence sua sponte was in accordance with the provisions of the State Administrative Procedure Act (section 306, subdivisions 2 and 4; section 307, subdivision 2) and was thus not improper. Such report, which contained the calculations underlying the assessments against petitioners, was certainly relevant to a determination of the issues at hand. Petitioners requested and were granted leave to reconvene the hearing, and on the reconvened date, the sales tax examiner was present and available for cross-examination; petitioners were

thereby afforded an opportunity to refute the materiality, accuracy and reliability of the calculations in the audit report.¹

D. That all penalties and interest in excess of the minimum amount of interest prescribed by statute are cancelled.

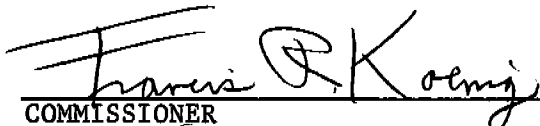
E. That the petitions of Fresh Pond Dairies, Inc., Deerfield Dairies, Inc. and La Grange Convenience Stores, Inc. are granted to the extent indicated in Conclusions of Law "B" and "D", and the assessments issued on January 23, 1979 are to be modified accordingly.

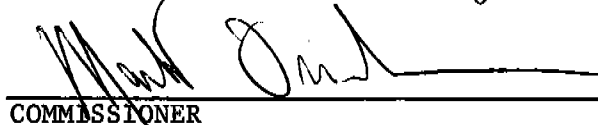
DATED: Albany, New York

STATE TAX COMMISSION

NOV 09 1984


PRESIDENT


COMMISSIONER


COMMISSIONER

¹ It should be noted that admission of the report in evidence was not prejudicial to petitioners but indeed, worked to their advantage, inasmuch as it resulted in a reduction of the assessments.