

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
MORRIS ZELUCK	:	DECISION
AND J. ZELUCK, 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 September 1, 1974	:	
through May 31, 1978.	:	

Petitioners, Morris Zeluck and J. Zeluck, Inc., 2 Preston Court, Brooklyn, New York 11234, 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, 1974 through May 31, 1978 (File Nos. 26744 and 26745).

A formal hearing was commenced before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 14, 1983 at 1:15 P.M. and continued before Frank W. Barrie, Hearing Officer, at the offices of the State Tax Commission, Building 9, State Office Campus, Albany, New York, on January 19, 1984 at 11:00 A.M. and continued to completion before Frank W. Barrie, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 23, 1984 at 10:45 A.M., with all briefs to be submitted by June 25, 1984. Petitioners at all times appeared by Allen M. Schwartz, Esq. The Audit Division appeared by John P. Dugan, Esq. (Arnold M. Glass, Esq., of counsel) on June 14, 1983. On the later dates, the Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUES

I. Whether the Audit Division's answer to the perfected petition was so untimely as to warrant cancellation of the alleged deficiency in sales and use taxes.

II. Whether the Audit Division properly determined the corporate petitioner's taxable sales and sales and use tax due.

III. Whether the Audit Division properly asserted a penalty based upon fraud.

FINDINGS OF FACT

1. J. Zeluck, Inc. is a manufacturer of door and window sashes and shutters. Petitioner Morris Zeluck was president of the corporation during the periods in issue. Although he was present at the hearing held herein, petitioner Morris Zeluck did not testify, and the record does not contain specific evidence concerning his stock ownership and control of the corporation. However, petitioner Morris Zeluck did not contest the fact that he is a person required to collect tax on behalf of the petitioner corporation.

2. On April 10, 1979,¹ the Audit Division issued two notices of determination and demand for payment of sales and use taxes due against petitioner J. Zeluck, Inc. alleging sales and use taxes due of (i) \$62,390.64 plus a fraud penalty and interest for the period September 1, 1974 through February 28, 1978 and (ii) \$6,549.68 plus a fraud penalty and interest for the period March 1, 1978 through May 31, 1978. The amounts alleged due were detailed as follows:

¹ The notices of determination and demand were timely because petitioners executed consents which extended the period of limitation for assessment of the taxes at issue until December 20, 1979.

<u>Period Ended</u>	<u>Tax Due</u>	<u>Penalty Due</u> ²
November 30, 1974	\$3,669.20	\$ 917.30
February 28, 1975	3,545.72	886.43
May 31, 1975	3,215.14	803.79
August 31, 1975	3,318.24	829.56
November 30, 1975	4,548.55	1,137.14
February 29, 1976	3,769.44	942.36
May 31, 1976	9,624.29	4,812.15
August 31, 1976	4,986.57	2,493.29
November 30, 1976	5,473.92	2,736.96
February 28, 1977	3,283.30	1,641.65
May 31, 1977	4,634.07	2,317.04
August 31, 1977	4,596.88	1,149.22

3. The perfected petition of petitioner J. Zeluck, Inc.³ was acknowledged as received (date stamped) by the Tax Appeals Bureau on June 1, 1981. The Audit Division's answer to the perfected petition is dated August 6, 1981. Petitioners argue that the answer was untimely because it was not served within the sixty day period prescribed by 20 NYCRR 601.6(a)(1).

4. According to the sales tax returns⁴ which were introduced into evidence, petitioner J. Zeluck, Inc. reported the following gross sales and taxable sales:

² A fraud penalty was asserted against petitioners pursuant to Tax Law §1145(a)(2) in an amount equal to fifty percent of the total deficiency asserted by the Audit Division. The Audit Division's representative incorrectly stated at the hearing held herein that the fraud penalty was imposed only on the deficiencies during the periods covered by the criminal indictment. (See Finding of Fact "9", infra.)

³ The petitioners, J. Zeluck, Inc. and Morris Zeluck, filed jointly a petition naming the taxpayer as follows: "J. Zeluck, Inc. and/or Morris Zeluck, officer." However, the perfected petition names only petitioner J. Zeluck, Inc. (It was signed by Morris Zeluck in his capacity as president of J. Zeluck, Inc.) The answer to the perfected petition notes that it is an answer to the "perfected petition of the above applicant." The "applicant", as noted in the caption of the answer, includes both Morris Zeluck and J. Zeluck, Inc. It appears that it was merely a technical error that petitioner Morris Zeluck was not specifically named in the perfected petition since he was named in the petition.

⁴ No returns were introduced into evidence for the periods ended November 30, 1976, February 28, 1978 and May 31, 1978.

<u>Period Ended</u>	<u>Gross Sales</u>	<u>Taxable Sales</u>
November 30, 1974	\$107,348.00	\$ 9,269.00
February 28, 1975	134,446.00	17,108.00
May 31, 1975	107,402.00	22,458.00
August 31, 1975	113,750.00	21,287.00
November 30, 1975	149,307.00	16,737.00
February 29, 1976	129,194.00	36,893.00
May 31, 1976	161,760.00	8,051.00
August 31, 1976	111,125.00	19,097.00
February 28, 1977	89,285.32	13,266.00
May 31, 1977	106,913.00	15,816.00
August 31, 1977	142,594.00 ⁵	29,627.00
November 30, 1977	17,357.00	78,781.00

5. The Audit Division redetermined the gross sales of petitioner J. Zeluck, Inc. by comparing the gross sales posted in the corporation's general ledger to the gross sales it reported on its sales tax returns. It utilized the greater of the two amounts to determine a total for gross sales during the period at issue of \$1,947,325.00.

6. The petitioner corporation posted cash sales to its general ledger in a total amount for the period at issue of \$53,617.00. However, out of the fifteen sales tax quarters which are at issue, petitioner corporation posted no cash sales⁶ to its general ledger in eleven sales tax quarters. As a result, the Audit Division estimated cash sales for such quarters as follows:

(i) It determined the accounts receivable sales of petitioner corporation by subtracting the cash sales posted to the general ledger (of \$53,617.00) from the gross sales which it had redetermined for petitioner corporation (of \$1,947,325.00) which results in an amount equal to \$1,893,708.00;

(ii) It determined the accounts receivable sales for quarters in which no cash sales were reported to be \$1,442,420.00;

⁵ This amount is obviously incorrect since it is less than taxable sales.

⁶ Cash sales refer to sales other than accounts receivable sales, and cash sales include both sales by currency and check.

(iii) It determined a fraction by using as a numerator, the total cash sales posted to the corporation's general ledger (of \$53,617.00), and as a denominator, the accounts receivable sales for the sales tax quarters in which cash sales were posted to the general ledger (of \$451,288.00), which expressed as a percentage it determined to be 11.579 percent;⁷

(iv) It determined cash sales for the quarters in which petitioner corporation posted no cash sales to be \$167,017.00 by applying 11.579 percent to accounts receivable sales for quarters in which no cash sales were reported of \$1,442,420.00;

(v) It then determined total cash sales for the entire period at issue to be \$220,634.00 (by adding the cash sales posted of \$53,617.00 and the estimate of cash sales for the periods when no cash sales were posted of \$167,017.00).

7. The Audit Division then determined the gross sales of petitioner corporation for the entire period at issue to be \$2,114,342.00 (by adding accounts receivable sales of \$1,893,708.00 and total cash sales of \$220,634.00, as determined in Finding of Fact "6", supra. It then subtracted the taxable sales of \$386,348.00 reported by petitioner on its sales tax returns from the redetermined gross sales of \$2,114,342.00 to determine the "deductions including cash sales" of petitioner corporation of \$1,727,994.00. It then determined what it termed to be the "net deductions" of petitioner corporation (of \$1,345,051.00) by subtracting "taxable sales per criminal unreported" of \$126,447.00, and "adjusted cash sales" of \$220,634.00. It then disallowed 32.58 percent of such "net deduction" (or \$438,223.00). This percentage was determined according to the testimony of the auditor as follows:

⁷ The percentage should be 11.881 percent (cash sales posted of \$53,617.00 divided by accounts receivable sales for the sales tax quarters in which cash sales were posted of \$451,288.00).

"(T)hese deductions were tested for a three-month period and a percentage was developed, 32.58 percent. I disallowed deductions for which there were no resale certificates, basically."

The auditor tested the months of March, April and May of 1977. There were sales invoices of \$93,146.74 for that period. \$35,862.00 represented a capital improvement job and \$38,420.57 was exempt from the imposition of sales tax as sales to wholesalers or contractors for resale. According to the auditor, sales tax should have been paid on the remaining \$18,664.17 and he determined a percentage for deductions to be disallowed of 32.58 percent by dividing \$18,664.17 into \$57,284.74. The \$18,664.17 was the total amount of the following sales invoices which, according to the Audit Division, were subject to sales tax and were not exempt on the basis of the resale exemption or capital improvement exception:

<u>Month</u>	<u>Invoice Number</u>	<u>Amount</u>
March of 1977	12035	\$ 130.00
	12119	2,397.80
	12120	105.00
	12125	1,340.00
	12133	1,135.00
	12161	300.00
	12171	350.00
	12200	1,260.00
April of 1977	12209	350.00
	245	930.00
	275	884.52
	87	220.00
	304	930.76
	338	3,708.25
	339	490.00
	341	48.00
May of 1977	354	22.50
	355	11.42
	358	585.00
	404	38.60
	425	162.40
	481	880.00
	487	65.00
	per ledger card Irving Kaye	2,319.92
		<u>\$18,664.17</u>

The petitioners argue that the invoice numbered 338 in the amount of \$3,708.25 and the invoice described above as "per ledger card Irving Kaye" in the amount of \$2,319.92 should not be considered in determining the percentage of deductions to be disallowed. However, these Kaye sales invoices are not the same Kaye sales invoices which were the basis for the criminal prosecution described in Finding of Fact "9", infra.

In addition, petitioners introduced into evidence the following certificates of capital improvement or resale which they argue exempts the following sales invoices from tax:

<u>Customer</u>	<u>Date of Certificate</u>	<u>Location Where Work Performed</u>	<u>Nature of Contract</u>	<u>Amount of Sales Invoice</u>
Ermelino	12/18/77	193 Prince St.	"20 doors with hardware"	\$ 105.00
Centennial Restoration	12/29/76	204 W. 78th St.	unspecified	2,397.80
Brusco & Pate	unspecified	302 Columbus Ave.	unspecified	130.00
				1,340.00
				1,135.00
				300.00 ⁸
Brusco & Pate	unspecified	118. W. 78th St.	unspecified	---
Brusco & Pate	unspecified	156 & 158 W. 74th St.	"complete alteration of entire building"	---
Riteway Mechanical Corporation	11/30/77	blanket resale certificate	---	---
Buckbinder & Warren	4/28/77	201 E. 27th St.	unspecified	884.52
Olson ¹⁰	12/10/70	blanket resale certificate	---	585.00
Alperin	5/11/77	blanket resale certificate	---	38.60
Eugene Rooney	3/25/77	345 W. 21st St. 13 Van Dam St.	unspecified	930.76

⁸ Three of the four sales invoices for sales to Brusco & Pate show shipment of goods to 302 Columbus Avenue (in the amounts noted above). The fourth in the amount of \$65.00 was shipped to 65 West 73rd Street.

⁹ Petitioners argue that this certificate provides an exemption for sales tax for four sales made to "Rockaway Fuels" in the amounts of \$220.00, \$1,260.00, \$350.00 and \$350.00. The basis for such argument is unclear.

¹⁰ The sales slip shows the purchaser as J. Olson, 3 West 18th Street, New York, New York. The purchaser's name on the blanket resale certificate, which is dated approximately seven years earlier, is stamped as "Andrew Olson and Son, 347 E. 105th St., New York 29, New York." Below the stamp is handwritten, "Harry Olson (Owner) 3 West 18 St. N.Y.C."

Finally, the Audit Division determined the total taxable sales of petitioner corporation to be \$1,171,652.00 by adding the taxable sales reported by petitioner corporation on its sales tax returns of \$386,348.00, the "taxable sales per criminal unreported" of \$126,447.00, the redetermined total cash sales for the entire period at issue of \$220,634.00 and the "deductions disallowed" of \$438,223.00. It computed a sales tax deficiency of \$64,100.59 by subtracting the sales tax paid by the corporation of \$29,631.57 from the tax due of \$93,732.16 on the redetermined taxable sales of \$1,171,652.00.

8. The Audit Division also determined a use tax deficiency of \$4,839.73 against the petitioner corporation as follows:

(i) It estimated the cost of materials used on the capital improvement job (which was done during the quarter ended May 31, 1977) to be \$21,517.00 (sixty percent of the receipts from the capital improvement job of \$35,862.00) and use tax due of \$1,721.36 on such cost of materials;

(ii) According to the testimony of the auditor, it determined that the petitioner corporation had expense purchases "mixed in with his raw material purchases. And I removed that. And I came up with \$757.36 use tax... Then we had expense purchases found in the cash disbursements book on which there was a (use) tax due of \$2,453.04";¹¹

¹¹ The auditor examined the corporation's purchases during December, 1976 and out of total purchases tested of \$14,030.80, petitioner had expense purchases of \$200.80 or 1.43 percent of such total purchases were expense purchases. He then applied such percentage against petitioner's total purchases for the entire period at issue which was estimated to be \$662,017.00 which resulted in \$9,467.00 in purchases which, according to the Audit Division, represents expense purchases on which petitioner corporation owes use tax of \$757.36. The record does not detail how the Audit Division estimated the corporation's total purchases for the entire period to be \$662,017.00. It appears that it applied a percentage of 34.76 percent against the gross sales posted to the corporation's general ledger of \$1,904,563.00. However, there is no detailed explanation in the record on how the Audit Division calculated this percentage of 34.76 percent. According to the auditor, he developed "a percentage of ratio of the purchases which we had to gross sales."

(iii) The Audit Division estimated that the corporation during the period at issue purchased electricity in the amount of \$22,006.00. It determined that fifty percent of such estimated electricity purchased was used for a non-manufacturing use and imposed use tax at the rate of four percent against \$11,004.00¹², for use tax alleged due of \$440.16. It also gave a credit of \$532.19 on the manufacturing use of electricity.

9. A criminal prosecution was brought against petitioner J. Zeluck, Inc. for filing five willfully false sales and use tax returns in violation of Tax Law §1145(b) for the quarters ending May 31, 1976, August 31, 1976, November 30, 1976, February 28, 1977 and May 31, 1977. The prosecution was based on the following:

(1) The word "tax" was removed from the column in the corporation's sales register showing sales tax accrued in the amount of \$5,060.19 and labeled "doors." According to the auditor, the "sale of doors was really a column of sales tax, sales tax accrual;"

(2) According to the auditor, a false accounts receivable ledger account called the Irving Kaye account and false invoices made out to Irving Kaye were prepared "to enable the company to misappropriate sales tax on checks submitted over the counter;"¹³

¹² \$11,004.00 is one dollar greater than one-half of \$22,006.00.

¹³ According to the credible and undisputed testimony of the auditor, the corporation kept separate records (including special sales invoices which were not shown to him during the audit) for cash sales which it would later credit to the accounts receivable ledger accounts of Arnold Kaye or Irving Kaye. The corporation treated the fictitious sales to Arnold Kaye or Irving Kaye as nontaxable sales on the basis that the Kayes were Florida residents and the sales were made outside of New York. This scheme to misappropriate sales tax monies was carried out for the fifteen month period, March 1, 1976 through May 31, 1977.

(3) Sales tax collected as per sales invoices were not properly posted to the sales column in the sales book. Sales were overstated and sales tax understated.

The Audit Division detailed this misappropriation of sales tax as follows:

<u>Period Ended</u>	<u>Mislabeling of Sales Tax Column in Sales Register</u>	<u>False Accounts Receivable Ledger and False Invoices</u>	<u>Improper Posting of Sales Tax</u>
May 31, 1976	\$5,060.19	\$ 715.93	--
August 31, 1976	--	1,065.62	\$1,029.97
November 30, 1976	--	1,122.86	--
February 28, 1977	--	674.54	--
May 31, 1977	--	446.55	--
Totals	<u>\$5,060.19</u>	<u>\$4,025.50</u>	<u>\$1,029.97</u>

It is noted that accounts receivable sales for the quarters covered by the criminal prosecution total \$739,964.00.

Petitioner J. Zeluck, Inc. pled guilty to criminal misdemeanor charges under Tax Law §1145(b) for filing a willfully false sales tax return for the quarter ended May 31, 1976.

10. Petitioners' accountant, Norman J. Tannenbaum,¹⁴ testified that he had to reconstruct the books and records of J. Zeluck, Inc. for the period of February, 1977 through January, 1982 because there was "no general ledger, no corporate tax returns were filed. The documents that I did have were very sketchy. Several months of original entry were missing. We had to go back and actually rewrite cash receipts sheets, cash disbursement sheets, various accounts receivable schedules, et cetera."

11. Petitioners argue that the Audit Division did not provide them with all relevant audit workpapers and schedules. However, on September 29, 1980,

¹⁴ Petitioners have employed various accountants over the past several years. Mr. Tannenbaum was employed by petitioners in 1982 to review the audit at issue herein.

the Audit Division supplied petitioners' former accountant, Hy Sofer, with all of the significant audit papers, including the workpaper which summarizes the sales and use tax deficiency asserted herein and five backup schedules which explained in detail the main aspects of the audit which are in dispute. Additional schedules and worksheets, which were not provided to petitioners on September 29, 1980 but which have some relevancy, were introduced at the hearing. Petitioners were given an adequate amount of time to review such papers during the hearing held herein.

CONCLUSIONS OF LAW

A. That the State Tax Commission's Rules of Practice and Procedure in pertinent part provide:

"The Law Bureau shall serve an answer on the petitioner or petitioner's representative, if any, within 60 days from the date the Secretary (to the State Tax Commission) acknowledged receipt of an acceptable perfected petition." [20 NYCRR 601.6(a)(1)].

The Rules further provide:

"Where the Law Bureau fails to answer within the prescribed time, petitioner may make a motion to the Commission on notice to the Law Bureau, for a determination on default. Commission shall either grant that motion and issue a default decision or shall determine such other appropriate relief that it deems is warranted." [20 NYCRR 601.6(a)(4)].

The requirement of 20 NYCRR 601.6(a)(1) that the Law Bureau of the Department of Taxation and Finance shall file an answer within sixty days from a specified date should not be regarded as mandatory but is directory only. Matter of John A. Snyder d/b/a Snyder's Grocery, State Tax Commission, January 20, 1984. In addition, there is no evidence that petitioner was prejudiced because the answer was served on petitioner approximately eight days late. Accordingly, cancellation of the assessment at issue because of an untimely answer is not warranted.

B. That the burden of proof is upon petitioners to show that the Audit Division improperly utilized an analysis of the corporation's available records to determine the sales and use taxes due.

C. That, as noted in Finding of Fact "6", supra, the Audit Division determined the cash sales (including currency sales and sales by check) of petitioner corporation by applying the percentage of 11.579 percent to \$1,442,420.00, the accounts receivable sales for quarters in which no cash sales were reported. As noted in Finding of Fact "9", petitioners during the period March 1, 1976 through May 31, 1977 misappropriated sales tax due of \$4,025.50 on over-the-counter sales paid by checks by utilizing fictitious accounts receivable for an allegedly out-of-state customer. At a sales tax rate of eight percent, the misappropriated sales tax of \$4,025.50 extrapolates into taxable sales of \$50,318.75. In computing cash sales for the quarters in which petitioner posted no cash sales, the Audit Division should have taken into consideration such cash sales (by check) which were determined pursuant to the criminal prosecution. (It is noted that cash sales by currency were apparently not credited to the Kaye accounts.) Therefore, the Audit Division is directed to recalculate petitioner's cash sales for the quarters in which no cash sales were reported (i) by applying 11.881 percent rather than 11.579 percent to petitioner's accounts receivable sales for such quarters of \$1,442,420.00 and (ii) then subtracting \$50,318.75, which represents the amount of cash sales by check which were funneled through fictitious accounts receivable during March 1, 1976 through May 31, 1977.

D. That pursuant to Finding of Fact "7", supra, petitioners presented a properly completed capital improvement certificate for two sales invoices made to its customer, Ermolino, of \$105.00 and \$2,397.80. In addition, they presented

a properly completed resale certificate for the sales invoice made to its customer, Alperin, of \$38.60. The other certificates presented, as detailed in Finding of Fact "7", supra, are either incomplete or do not name the same customer as shown on the allegedly related sales slips or sales invoices. Therefore, the Audit Division acted properly in not honoring such certificates. However, the Audit Division is directed to recalculate the percentage it used (which was 32.58 percent) in disallowing the "net deduction" of \$438,223.00 of petitioner corporation as follows:

(i) Add \$36.80 to the \$38,420.57 which it previously determined was exempt from the imposition of sales tax as sales to wholesalers or contractors for resale;

(ii) Add \$105.00 and \$2,397.80 to the \$35,862.00 which it previously determined represented a capital improvement job;¹⁵

(iii) Total the two amounts from (i) and (ii), above, and subtract it from the total sales invoices of \$93,146.74 for the three month period tested; and

(iv) Determine a new percentage of disallowance for petitioner's "net deduction" by dividing the amount determined in (iii) above into \$93,146.74.

E. That a finding of fraud requires the Audit Division to present clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representations, resulting in deliberate nonpayment or underpayment of taxes due and owing. Matter of Cardinal Motors, Inc. and Salvatore Cardinale, as officer, State Tax Commission, July 8, 1983.

¹⁵ The Audit Division is directed to calculate a use tax on the materials used for such capital improvement job by the same method noted in subparagraph "i" of Finding of Fact "8", supra.

F. That a plea of guilty to tax evasion collaterally estops a taxpayer from contesting a civil fraud period for the same period. Plunkett v. Commissioner, 465 F.2d 299 (7th Cir. 1972).

G. That, in addition, the credible and undisputed testimony of the auditor concerning the scheme to misappropriate sales tax monies as noted in footnote "13" of Finding of Fact "9", supra, was sufficient to establish a basis for imposing a fraud penalty on petitioner for the entire period covered by the criminal prosecution, March 1, 1976 through May 31, 1977. However, an insufficient basis was provided to sustain the fraud penalty for the earlier part of the audit period, September 1, 1974 through February 29, 1976.

H. That the petition of Morris Zeluck and J. Zeluck, Inc. is granted to the extent noted in Conclusions of Law "C", "D" and "F" but, in all other respects, is denied.

DATED: Albany, New York

STATE TAX COMMISSION

JUL 10 1985

Roderick W. Allen
PRESIDENT

Francis R. Koelz
COMMISSIONER

[Signature]
COMMISSIONER