

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition

of

HARRY SHAFRAN

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, :
1974 through May 31, 1978.

Petitioner, Harry Shafran, 780 Pelham Parkway South, Bronx, New York 10452, 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 No. 29814).

A hearing was held at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 11, 1983 at 9:15 A.M., with additional evidence to be submitted by May 26, 1983. Petitioner appeared by Harry Bienenstock, P.A. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUE

Whether the Audit Division properly estimated petitioner's taxable sales due to the lack of any purchase records to support the volume of sales reported on sales and use tax returns filed.

FINDINGS OF FACT

1. On December 18, 1978, the Audit Division issued two notices of determination and demands for payment of sales and use taxes due against petitioner, Harry Shafran, covering the period September 1, 1974 through May 31, 1978. The notices, issued as a result of a field audit, asserted total tax due of \$8,118.40 plus penalty and interest of \$3,807.19 for a total due of \$11,925.59.

2. Petitioner executed a consent to extend the period of limitation for the issuance of an assessment for the period September 1, 1974 through August 31, 1977 to December 20, 1978.

3. Petitioner is a "street peddler" selling dry goods to factory employees and others in the South Bronx area. Business was conducted only on a cash basis for both receipts and disbursements.

4. Petitioner presented his daily cash receipts journal, copies of sales tax returns and Federal income tax returns filed for 1974, 1975 and 1976 for audit. Petitioner did not maintain any other records. Petitioner's accountant estimated purchases on Federal tax returns filed. On audit, the Audit Division reconciled sales as recorded in the cash receipts journal with sales reported on sales and use tax returns and Federal income tax returns filed, a summary of which follows:

<u>Period</u>	<u>Cash Receipts Journal</u>	<u>Reported</u>	<u>Difference</u>
9/74 - 8/77	\$39,076.00	\$38,730.00	\$ 346.00
Annual - 1975	14,738.00	14,150.00	588.00
1976	12,872.00	14,000.00	(\$1,128.00)

No further action was taken by the Audit Division from November 17, 1977 to October 10, 1978, when petitioner's case file was reassigned to another auditor. Petitioner's accountant was again contacted; however, no additional records or information could be supplied.

5. It was determined that petitioner's sales and use tax returns filed did not properly reflect sales made since petitioner operated on a cash basis with several savings accounts which yielded interest income of \$3,060.00 in 1975 and \$2,962.00 in 1976. Petitioner showed an average of \$5,900.00 as net taxable income on Federal tax returns filed. Based on the auditor's prior audit experience and current cost of living standards in the New York metropolitan

area¹, the Audit Division determined that petitioner was reporting only one-third of his sales. Petitioner's taxable sales were thereby determined to be 200 percent higher than those reported on sales and use tax returns filed. The Audit Division updated its audit findings to include the period September 1, 1977 to May 31, 1978 and determined the total sales tax due of \$8,118.40.

6. Petitioner did not maintain any purchase records since all purchases were made by cash from factories selling close-out goods. The suppliers would not extend any credit to petitioner or accept any checks. Petitioner bought goods as money was available and any sales made were recorded in the daily cash receipts journal. Petitioner did not work every day. Petitioner was hospitalized several times during the audit period due to muggings and illnesses. Petitioner also argued that his income was never questioned for income tax purposes, and that his returns were accepted as filed.

7. Petitioner's living expenses were low due to the fact that he and his family (two dependents) took their meals with his mother-in-law. Rent expense varied during the audit period between \$135.00 to \$180.00 per month.

8. Petitioner came to the United States from Cuba in 1949 and brought savings with him to this country. Petitioner's mother-in-law turned her savings over to his savings account so that if anything unforeseen occurred, petitioner and his wife would have access to the money.

9. Petitioner was a registered vendor for sales and use tax reporting purposes for the entire audit period and filed all returns on a timely basis.

1 The audit workpapers contained no computation of a cost of living analysis nor did they indicate what the cost of living standards were.

CONCLUSIONS OF LAW

A. That section 1135 of the Tax Law provides that every person required to collect tax shall keep records of every sale and of all amounts paid and of the tax payable thereon. Such records shall include a true copy of each sales slip, invoice, receipt, statement or memorandum upon which section 1132(a) of the Tax Law requires that the tax be stated separately.

B. That section 1138(a) of the Tax Law provides that if a return required to be filed is incorrect or insufficient, the amount of tax due shall be determined from such information as may be available. If necessary, the tax may be estimated on the basis of external indices such as purchases or other factors.

C. That petitioner did not maintain any source documents to support his sales recorded. Neither did he maintain purchase documents with which to verify the volume of sales made. The Audit Division, therefore, properly resorted to other external indices to determine if the sales recorded were correct. The Audit Division, however, in using other external indices, failed to reasonably calculate the purported sales made. The computation of sales by tripling those reported by petitioner without any basis was improper. The fact that petitioner earned interest income on savings during certain years was not sufficient in and of itself to prove that sales as recorded were not sufficient. In fact, petitioner's interest earned decreased from 1975 to 1976 which would tend to indicate withdrawals from savings. Moreover, petitioner's credible testimony indicated that much of the interest income was derived from deposits to his account made by his mother-in-law.

D. That the petition of Harry Shafran is granted, and the notices of determination and demands for payment of sales and use taxes due issued December 18, 1978 are cancelled.

DATED: Albany, New York

OCT 01 1987


ADMINISTRATIVE LAW JUDGE