

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

ALLISON AYRES, INC. :

DECISION

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, 1976
through August 31, 1980. :

Petitioner, Allison Ayres, Inc., c/o New York Credit Adjustment Bureau, 71 West 23rd Street, New York, New York 10001, 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 June 1, 1976 through August 31, 1980 (File No. 33458).

A formal hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 20, 1984 at 9:30 A.M. Petitioner appeared by Hahn & Hessen, Esqs. (William R. Fabrizio, Esq. and Eileen Blake, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUE

Whether the Audit Division properly disallowed petitioner's claimed nontaxable sales for petitioner's failure to produce documentation establishing that such sales were for resale.

FINDINGS OF FACT

1. For approximately 22 years, petitioner, Allison Ayres, Inc., was engaged in the manufacture of dresses for sale to retailers. Its approximately

4,000 customers ranged from Bloomingdale's and I. Magnin to small boutiques. Petitioner's principal offices were situated at 1400 Broadway, New York, New York. Its other facilities consisted of a shipping department located at 214 West 39th Street, New York City; a cutting room at 234 West 39th Street, New York City; and regional showrooms scattered throughout the United States.

2. For the quarter ended August 31, 1976 through the quarter ended May 31, 1980, petitioner filed sales and use tax returns, reporting gross and taxable sales in the amounts shown below.

<u>PERIOD ENDED</u>	<u>GROSS SALES</u>	<u>TAXABLE SALES</u>
8/31/76	\$4,088,631	\$ 5,887
11/30/76	4,734,874	10,690
2/28/77	2,318,682	3,688
5/31/77	3,245,717	8,263
8/31/77	3,040,335	4,997
11/30/77	3,553,420	6,521
2/28/78	2,418,181	1,823
5/31/78	3,036,958	3,888
8/31/78	3,753,394	3,606
11/30/78	4,383,348	4,707
2/28/79	3,037,727	4,984
5/31/79	3,100,245	11,814
8/31/79	2,346,478	4,866
11/30/79	2,810,174	4,351
2/29/80	1,619,583	2,016
5/31/80	1,239,100	1,834

(The record does not reveal whether petitioner failed to file a return for the period ended August 31, 1980, or whether a return was filed but is now unavailable.)

3. Commencing October, 1979, the Audit Division conducted an examination of petitioner's books and records in order to verify taxable sales as reported. Petitioner's accountant, Mr. Arthur Gordon of the firm Kalow & Bass, orally agreed to the Audit Division's use of the test period method.

(a) The sales tax examiner reviewed in detail petitioner's "computer-generated" sales for the quarter ended November 30, 1978. Sales within this category were to major department stores, made on regular credit terms and

processed via computer. The examiner accepted the amount of computer-generated sales reflected in petitioner's records as not subject to tax.

(b) For the same quarterly period, the examiner analyzed petitioner's cash sales. All cash sales treated by petitioner as nontaxable sales for resale were disallowed and considered taxable for petitioner's failure to produce resale certificates or other documentation establishing the nontaxability of such sales. The examiner calculated a margin of error which she utilized to arrive at additional taxable sales of \$1,248,362.15 upon which sales tax of \$99,868.97 was assessed.

(c) The examiner computed use tax due on expense purchases and on acquisitions of fixed assets in the respective amounts of \$726.56 and \$200.80. Petitioner does not dispute the assessment of use tax.

4. On May 20, 1981, the Audit Division issued to petitioner two notices of determination and demands 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 June 1, 1976 through August 31, 1980 in the total amount of \$100,796.33, plus interest thereon.

On August 17, 1979 and subsequently on October 29, 1980, petitioner's president, Seymour Stern, had executed consents extending the period of limitations on assessment to December 20, 1981.

5. Petitioner sold goods for cash from its shipping department to: (a) unrated accounts (retailers lacking a credit rating or with an insufficient credit rating); (b) retailers who possessed a sufficient credit rating but needed goods immediately; and (c) from time to time, friends and relatives of the corporation's principals and customers, as a courtesy to them. For each cash sale, petitioner's experienced shipping clerk prepared a memorandum

indicating the firm or person to whom the goods were sold, the number of units, and the amount of the sale. In the event of a cash sale to a friend or relative, sales tax was charged and collected and a notation to that effect made on the memorandum. Once or twice weekly, the memoranda were accumulated and turned over to the vice president in charge of sales. Using these memoranda, the vice president prepared one master invoice for cash sales made to retailers and a separate invoice for each taxable sale, again noting the tax collected. These invoices for taxable sales constituted the basis upon which taxable sales were reported on petitioner's returns. At the end of each month, to ensure that every sale had been accounted for, petitioner's shipping department personnel conducted an inventory of goods on hand. The inventory was reviewed by the vice president in charge of sales and verified by petitioner's outside accountants.

6. As above-stated, the sales tax examiner analyzed petitioner's cash sales for the quarterly test period. She prepared a schedule of such sales, stating the date of the transaction, the name of the purchaser, the purchaser's address if located outside New York State, and the invoice number and amount. Sales denominated in petitioner's books as "cash sales" were recorded by the examiner as follows:

<u>DATE</u>	<u>SOLD TO</u>	<u>INVOICE NUMBER</u>	<u>INVOICE AMOUNT</u>	<u>TAX ON INVOICE AMOUNT</u>
9/29/78	cash sales	4223	\$14,126.68	
9/19/78	"	4224	669.60	49.60
9/30/78	"	4230	5,980.02	
9/30/78	"	4231	757.08	56.08
10/20/78	"	4239	9,092.72	
10/28/78	"	4240	758.16	56.16
10/31/78	"	4253	19,181.91	
10/31/78	"	4254	1,112.40	82.40
11/20/78	"	4275	19,533.84	
11/20/78	"	4276	866.16	64.16
11/30/78	"	4294	9,976.90	
11/30/78	"	4295	920.16	68.16
			<u>\$82,975.63</u>	<u>\$376.56</u>

Of the cash sales to named purchasers, some appear to have been made to retailers (e.g., Fashions by Sylvia, Inc., Fashions with Flair, and Inter-Island Department Store); in other instances, the purchaser's name alone does not clearly indicate whether the sale was made to a retailer or to an individual customer (e.g., Ruth Petersen, Betty Adams and Yastremski).

7. (a) On January 29, 1981, during the course of the sales tax examination and before issuance of the assessment, petitioner executed a general assignment for the benefit of creditors. The assignment was delivered to and accepted by the New York Credit Adjustment Bureau (hereinafter "the assignee") and filed with the Clerk of the County of New York on January 30, 1981. The firm of Hahn & Hessen was retained as the assignee's attorney and the firm of Richard A. Eisner & Company as its accountant.

(b) For the purpose of locating and preserving petitioner's assets, the assignee's accountants visited petitioner's business premises to take possession of the books and records. After review of the records they were able to find, they concluded that some records were missing.

(c) On February 6, 1981, the assignee notified all petitioner's creditors, including the Audit Division, that they were required to file verified claims against petitioner on or before April 10, 1981. On or about March 23, 1981, the Audit Division filed with the assignee a priority claim for sales and use taxes due from petitioner in the following amounts:

<u>PERIOD</u>	<u>ASSESSMENT NUMBER</u>	<u>TAX</u>	<u>INTEREST</u>	<u>TOTAL</u>
6/1-8/31/80	D-8012147434	\$ 41.00	\$1.87	\$ 42.87
9/1/80-2/6/81	S-810318450-C	200.00	1.87	201.87
		<u>\$241.00</u>	<u>\$3.74</u>	<u>\$244.74</u>

Neither the Audit Division nor petitioner advised the assignee that a sales tax audit was in progress. Consequently, the assignee's accountants did not

attempt to secure resale certificates, invoices or other source documents relevant to petitioner's taxable and nontaxable sales during the period June 1, 1976 through August 31, 1980.

8. As above-stated, the sales tax examiner disallowed all petitioner's claimed nontaxable sales for cash. After she prepared her schedule of cash sales (see Finding of Fact "6"), she requested access to the source documents, e.g., invoices and memoranda. By the time of her request, the assignment had been made, petitioner's offices closed, and the records either taken by the assignee's accountants or misplaced. For petitioner's failure to produce documentation establishing that the cash sales were for resale, the examiner considered them subject to sales tax.

9. The assignee's attorneys first became aware of the sales tax audit of and assessment against petitioner in June, 1982. By reference to the examiner's workpapers, the attorneys ascertained the names and addresses of 20 of petitioner's 43 customers who purchased goods for cash during the test period. (The addresses of the remaining 23 customers were unavailable or illegible.) They contacted these 20 customers by letter, requesting that the customers provide a resale certificate or proof of delivery outside New York State. Six of the attorneys' letters were returned because the customer was no longer at the address or the address was inaccurate. The attorneys did not receive responses from another 7 of the customers. Four customers completed New York State and Local Sales and Use Tax Resale Certificates and provided them to the attorneys.¹ One customer completed and forwarded a Florida Department of Revenue, Sales Tax Division

¹ Cash sales to the four customers who provided New York resale certificates (LaBonet Distributors, Piri Lowinger, Stanton Fashions and The Attic) totalled \$3,468.40 during the test period.

Blanket Certificate of Resale. One customer replied that since there is no sales tax on clothing in New Jersey, no resale certificate is necessary.

10. In 1976, the Audit Division had conducted an examination of petitioner's books and records which resulted in an assessment of sales and use taxes for the period September 1, 1972 through February 29, 1976. Sales tax was similarly assessed on all sales for cash (totalling \$190,008.00), presumably because of petitioner's failure to produce documents establishing the nontaxability of such sales. Petitioner consented to and paid the assessment.

CONCLUSIONS OF LAW

A. That subdivision (c) of section 1132 of the Tax Law creates a presumption that all receipts for tangible personal property are subject to tax until the contrary is established and imposes the burden of proving that any receipt is not taxable on the person required to collect tax or the customer. Unless "a vendor shall have taken from the purchaser a certificate in such form as the tax commission may prescribe, signed by the purchaser and setting forth his name and address and, except as otherwise provided by regulation of the tax commission, the number of his registration certificate..." to the effect that the property was purchased for resale or for some use by reason of which the sale is exempt from tax, the sale is considered a taxable sale at retail.

B. That recognizing that petitioner's primary business was the manufacture of dresses and not the retail sale thereof, and further that the sales tax examiner's analysis of cash sales appears to indicate some sales made to retail establishments, we are nonetheless constrained to conclude that petitioner's cash sales were taxable (with the exceptions stated in Conclusion of Law "C", infra). With the exception of the four New York resale certificates obtained by the assignee's attorneys, petitioner has failed to come forth with the

invoices and memoranda it maintains were prepared in the regular course of its business or any other documents establishing that its cash sales were not taxable. This failure weighs heavily against a finding in petitioner's favor where an earlier assessment was based, in part, upon a similar absence of source documents.

C. That the Audit Division is directed to recompute the margin of error for the test period, giving effect to the New York resale certificates, and to reduce the assessment accordingly. No consideration is to be given to the fact that one customer had a New Jersey address (since it is unknown where delivery of the goods occurred) or to the Florida blanket resale certificate.

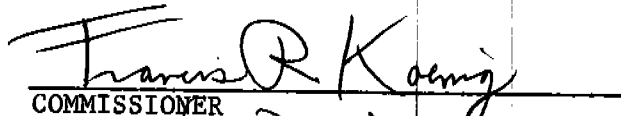
D. That the petition of Allison Ayres, Inc. is granted in part and the assessment issued on May 20, 1981 is reduced to the extent indicated in Conclusion of Law "C".

DATED: Albany, New York

OCT 05 1984

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER