

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

HILTON PIANOS, 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 December 1, 1977
through November 30, 1980. :

Petitioner, Hilton Pianos, Inc., Latham Circle Mall, Latham, New York 12110, 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 December 1, 1977 through November 30, 1980 (File No. 33936).

A hearing was held before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Office Campus, Albany, New York, on May 20, 1985 at 1:15 P.M., with all briefs to be submitted by August 15, 1985. Petitioner appeared by Edward P. Ryan, Esq. The Audit Division appeared by John P. Dugan, Esq. (Thomas Sacca, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined petitioner's sales tax liability.

FINDINGS OF FACT

1. On March 20, 1981, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Hilton Pianos, Inc., in the amount of \$19,324.25, plus penalty of \$4,264.52 and interest of \$4,101.41, for a total due of \$27,690.18 for the period December 1, 1977 through November 30, 1980.

2. At a conference held prior to the hearing, the Audit Division reduced the tax due to \$15,485.60, plus penalty and interest, as a result of additional documentation submitted by petitioner.

3. Petitioner is engaged in the retail sale of pianos, organs, sheet music and various musical accessories. During the period in issue, it operated stores in Albany, Utica, Glens Falls, Saratoga, Rensselaer and Rotterdam. All of petitioner's store managers and sales personnel were paid on a straight commission basis.

4. Each time a sales transaction occurred at petitioner's stores, a sales invoice was prepared regardless of whether full payment was made or only a deposit tendered. The sales invoices were forwarded to the central office where the office manager filed them. If a sale involving a deposit was never consummated, the deposit was returned to the customer and another copy of the invoice was marked void or cancelled and forwarded to the central office. Petitioner's accounting system was somewhat erratic at the time and sometimes the duplicate invoice would be associated with the original and sometimes it would be filed separately.

5. Each salesperson maintained his or her own commission sheet which listed monthly consummated sales. Only consummated sales were counted toward commission calculations. Deposits on sales were not counted until the full purchase price was tendered or a check was received from the finance company on financed transactions. If sales were not reported, no commission was earned, therefore, the sales personnel had an incentive to accurately report consummated sales on the commission sheets. However, once the commission sheets were turned in to the central office, neither the store managers nor the sales

personnel had anything to do with preparation of books and records or tax returns.

6. The office manager at the central office posted all consummated sales to a combination cash receipts/sales journal. It is unclear whether the office manager used the invoices, the commission sheets, bank deposits or some other source to obtain the sales figures which she posted to the journal. The office manager prepared sales tax returns from the journal.

7. In August, 1979, all of petitioner's records were moved to a warehouse and left in an extremely disordered state. Upon commencing the audit, the auditor found the sales invoices scattered in no particular order in boxes in the warehouse office. No journals or ledgers were available and, other than the invoices, the only document provided was a Federal tax return. Two of petitioner's employees were able to put the sales invoices into a workable order and the auditor totalled the sales from these invoices, applied the appropriate sales tax rates and compared the result to sales tax reported in order to arrive at additional tax due.

8. Petitioner argued that use of the invoices was not an accurate indicator of its sales tax liability because there were duplicate invoices and invoices representing unconsummated sales. Petitioner did not, however, produce any other documents, either during the audit, at a pre-hearing conference or at the hearing, which would provide a more accurate indication of its sales. The monthly commission sheets and cash receipts/sales journal were never given to the auditor or placed in evidence at the hearing.

9. Some of petitioner's employees attempted to organize the invoices in order to identify unconsummated sales, but it was virtually impossible, given the condition of the invoices, to determine which sales were consummated and

which were deposits only. It should be noted that in 1975 an independent certified public accountant reviewed petitioner's accounting procedures and described petitioner's handling of sales and deposits as "sloppy bookkeeping" and "inexcusable." Petitioner did not change its accounting system until after the audit period.

10. In reviewing the invoices, petitioner's employees found several invoices which appeared to have been deposits only. They made phone calls to the customers named on the suspect invoices to verify whether a consummated sale occurred. Of the invoices checked, five were found to have been cancelled sales. The five sales totalled \$9,500.00 itemized as follows:

<u>Sales Price</u>	<u>Tax Assessed</u>
\$2,195.00	\$131.70
695.00	48.65
935.00	65.45
4,200.00	168.00
1,475.00	59.00
<u>\$9,500.00</u>	<u>\$472.80</u>

CONCLUSIONS OF LAW

A. That a "...vendor is obligated to maintain records of his sales for audit purposes (Tax Law, §1135), and the State, when conducting an audit, must determine the amount of tax due 'from such information as may be available,' but 'if necessary, the tax may be estimated on the basis of external indices' (Tax Law, §1138, subd. [a])." Korba v. New York State Tax Commission, 84 A.D.2d 655. Exactness in determining the amount of sales tax liability is not required where it is the petitioner's own failure to maintain proper records which necessitates the use of external indices. Markowitz v. State Tax Commission, 54 A.D.2d 1023 aff'd 44 N.Y.2d 684.

B. That petitioner's basic source documents, the invoices, were admittedly in such a chaotic state that it was virtually impossible to determine which invoices

represented consummated sales and which represented deposits. None of the other records supposedly maintained by petitioner which would have verified sales were ever provided and, therefore, the auditor was left with no alternative but to determine the tax due using the invoices.

C. That petitioner was able to show through its own investigation, as discussed in Finding of Fact "10", that five of the sales upon which tax was assessed were cancelled and, therefore, the assessment is to be reduced by the \$472.80 in tax due on such sales.


D. That the petition of Hilton Pianos, Inc. is granted to the extent indicated in Finding of Fact "2" and Conclusion of Law "C"; that the Audit Division is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 20, 1981 accordingly; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

DEC 13 1985


PRESIDENT


COMMISSIONER


COMMISSIONER