

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
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 of :  
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 JERKENS TRUCK & EQUIPMENT, 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, 1977 :  
 through November 30, 1980. :

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In the Matter of the Petition :  
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 of :  
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 CHARLES JERKENS :  
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 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, 1977 :  
 through November 30, 1980. :

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DECISION

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In the Matter of the Petition :  
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 of :  
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 MARIE JERKENS :  
 :  
 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, 1977 :  
 through November 30, 1980. :

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Petitioner Jerkens Truck & Equipment, Inc., 1231 East Jericho Turnpike, Huntington, New York 11743, 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, 1977 through November 30, 1980 (File No. 34543).

Petitioner Charles Jerkens, 21 Harned Road, Commack, New York 11725, 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, 1977 through November 30, 1980 (File No. 35224).

Petitioner Marie Jerkens, 21 Harned Road, Commack, New York 11725, 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, 1977 through November 30, 1980 (File No. 35223).

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 April 23, 1984 at 1:15 P.M., continued on June 4, 1984 at 1:15 P.M. and continued to conclusion on June 5, 1984 at 9:15 A.M., with all briefs submitted by September 4, 1984. Petitioners appeared by Samuels & Grossman, Esqs. (Michael F. Grossman, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

#### ISSUE

Whether petitioner Jerkens Truck & Equipment, Inc. properly debited its sales tax accrual account for a portion of the sales tax collected on sales of equipment, which equipment was subsequently repossessed and the customers' obligations to the lending institutions paid by Jerkens Truck & Equipment, Inc.

#### FINDINGS OF FACT

1. On April 1, 1981, the Audit Division issued to petitioner Jerkens Truck & Equipment, Inc. (hereafter referred to as the corporation) two notices of determination and demands for payment of sales and use taxes due under Articles 28 and 29 of the Tax Law for the period September 1, 1977 through November 30, 1980 in the total amount of \$180,511.33, plus interest thereon and the penalty for fraud under section 1145(a)(2).

On April 1, 1981, the Audit Division issued to petitioner Charles Jerkens, as president of the corporation, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, assessing sales tax for the period September 1, 1977 through August 31, 1979 in the amount of \$178,564.67, plus interest and the penalty for fraud.

On April 1, 1981, the Audit Division issued to petitioner Marie Jerkens, as vice president of the corporation, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due,<sup>1</sup> assessing sales tax for the period September 1, 1977 through August 31, 1979 in the amount of \$178,564.67, plus interest and the penalty for fraud.

In its written arguments submitted after the hearing, the Audit Division conceded that the evidence did not support the imposition of the civil fraud penalty against petitioners and requested that penalties pursuant to section 1145(a)(1) be imposed in lieu thereof.

2. The corporation is engaged in the sale and servicing of heavy-duty trucks and equipment, including cement mixers, tractor trailers and chassis for refuse trucks.

3. The assessments were issued subsequent to an examination of the corporation's transactions and records in three principal areas, summarized below.

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<sup>1</sup> Four warrants based on the four assessments referred to above were issued by the Tax Compliance Bureau and served on the corporation and Charles Jerkens on April 1, 1981. The Tax Compliance Bureau then levied against funds which its agents believed to be owing to the corporation by the City of New York, arising out of the sale by the corporation to the City of certain vehicles. A prompt hearing for review of the warrants was requested by the corporation and Charles and Marie Jerkens, and held on April 30 and May 7, 1981. By decision dated June 12, 1981, this Commission determined that the issuance of the warrants was not reasonable under the circumstances, removed the levies and vacated the warrants.

(a) Nontaxable sales. Based on an analysis of sales of parts and repair services for the test month of April 1980 and of sales of trucks and equipment for the year 1980, the nontaxable sales claimed by the corporation were verified and accepted.

(b) Recurring purchases and purchases of fixed assets. An analysis of purchases of welding supplies, tool rentals, shop expenses and building maintenance for a one-month test period was performed, revealing additional use tax due on welding supplies and shop expenses in the amount of \$990.67. The corporation's purchases of fixed assets were examined for the entire audit period, resulting in additional use tax on such purchases in the sum of \$955.99.

(c) Sales tax accruals. (i) Opening balance. The opening balance of \$73,465.23 shown in the sales tax accrual account as of September 1, 1977 was assessed; however, in its post-hearing written argument, the Audit Division conceded that such opening balance should not have been the subject of assessment for the period ended November 30, 1977. (ii) Discrepancies between accruals and filings. All discrepancies between the amount shown in the sales tax accrual account and the amount the corporation reported on its sales and use tax returns filed for the quarterly periods under consideration were assessed. (iii) Debits to the sales tax accrual account. Four debits posted to the corporation's sales tax accrual account in December 1977, January 1978, May 1979 and November 1979 in the respective amounts of \$2,921.46, \$3,783.92, \$82,122.09 and \$1,279.95 were assessed. The debits in December 1977 and November 1979 were disallowed as unexplained by petitioners. With respect to the debits in January 1978 and May 1979, the sales tax examiner concluded that these did not constitute valid bad debt write-offs as claimed; her conclusion

was founded on conversations with the corporation's general manager and its independent certified public accountant.

The corporation apparently does not contest the assessment of use tax, nor the assessment of sales tax for differences between tax accrued in the accrual account and tax paid. Further, petitioners Charles and Marie Jerkens apparently do not object to the assessments against them as persons required to collect tax on behalf of the corporation. Thus, the only adjustment remaining in dispute is the disallowance of debits to the accrual account.

4. Petitioners maintain that the debits in question were posted to take account of transactions wherein the corporation sold equipment to a customer and in addition acted as "guarantor" of the customer's obligation to a bank or lending institution. Due to the nature of the equipment sold, it is nearly always necessary for the corporation's customer to secure financing. In order to ensure that it makes the sale, the corporation assists the customer in obtaining a loan, e.g., by completing the credit application and contacting the customer's bank or a finance company. The corporation arranges financing for the entire vehicle even in instances where the customer purchases the truck body from another vendor. In the event satisfactory financing is obtained, a purchase order and what petitioners refer to as a "conditional sales contract" are prepared. Petitioners describe the conditional sales contract as "a financing document between the customer and Jerkens Truck & Equipment, Inc." on "a full recourse basis to the finance company." Banks and finance companies generally do not have the facilities to repossess heavy equipment. Petitioners state that the sales and financing documents are drawn in such a manner that if a customer defaults on his debt, the corporation repossesses the equipment and pays the balance due under the customer's obligation to the bank or lending

institution. The corporation performs whatever repairs are required to restore the equipment to salable condition and subsequently resells it to a new customer, charging and collecting sales tax on the selling price. From time to time, at irregular intervals, the corporation's manager reviewed the repossessions; computed the amounts the corporation paid to the various lending institutions on its customers' debts; extracted from such amounts the sales tax; and debited the sales tax accrual account for the sales tax on the principal debt amounts the corporation paid (thereby reducing the corporation's sales tax liability for the period for which the debit was posted).

5. Petitioners offered in evidence various documents which they believe exemplify the transactions described above:

(a) a purchase order dated March 29, 1977 and an invoice dated April 13, 1977 pertaining to the sale of a 1970 Ford truck to "Buyer A"; a Security Agreement - Retail Installment Contract dated April, 1977 (no day specified) between the corporation and "Buyer A", granting the corporation a security interest in the truck and incorporating an assignment whereby the corporation sold and assigned to the Bank of Suffolk County all its right, title and interest to the agreement; and a billing by Metro-Long Island Service Co. for repossession of the vehicle on November 6, 1978;

(b) an undated and unsigned Retail Installment Contract pertaining to the sale of a 1975 Crane Carrier to "Buyer B", and a notification to the corporation from Associates Discount Corporation of Delaware, Inc. that such vehicle was repossessed on October 20, 1976;

(c) a purchase order dated February 23, 1977 pertaining to the sale of a 1974 tractor to "Buyer C"; a Conditional Sale Contract Note under date March 12, 1977 between the corporation and "Buyer C", reflecting the contract

price of the tractor (less the cash down payment) as \$33,356.40, and a second Conditional Sale Contract Note under date June 22, 1977, reflecting the contract price of the (replacement) diesel engine mounted on the tractor as \$5,103.84; an Assignment dated March 12, 1977 whereby the corporation sold and assigned to Credit Alliance Corporation ("Credit Alliance") the conditional sales contract of March 12, 1977; Uniform Commercial Code Financing Statements relating to the sale and indicating the corporation as the secured party and Credit Alliance as the assignee of the secured party; a Guaranty to Credit Alliance signed by "Buyer C" on March 12, 1977 "[t]o induce [Credit Alliance] to enter into one or more security agreements, including but not limited to conditional sale agreements...with ["Buyer C"]..., ...and/or to induce [Credit Alliance] to purchase and/or accept one or more assignments from any party or parties of one or more Security Obligations having ["Buyer C"] as obligor thereon, and/or in consideration of [Credit Alliance's] having heretofore done any or all of the foregoing...", and obligating "Buyer C" directly to Credit Alliance for the performance of all security obligations; and a letter to the corporation from Credit Alliance dated July 21, 1978 regarding the repossession from "Buyer C" and forwarding the coupon books for the corporation's payment of "Buyer C's" obligations.

6. The "bad debt write-offs" of \$3,783.92 in January 1978 and \$82,122.09 in May 1979 were credits taken by the corporation for sales tax charged and collected on sales of equipment, which equipment was repossessed and then resold after the corporation satisfied its customer's obligation to the bank or lending institution involved. The two journal entries were posted to take account of such situations which had occurred over many years, some prior to 1974. The corporation's manager accumulated the payments made by the corporation to the various lenders using close-out figures furnished by the lenders.

Petitioners offered in evidence three worksheets, indicating 34 repossession transactions with respect to which the corporation claimed a credit of sales tax in the amount of \$74,436.17; that amount was debited to the sales tax accrual account on or about May 30, 1979. The worksheets do not reflect the dates of the original sales, the dates of the repossessions nor the dates the corporation commenced payment of the customers' debts.

7. Petitioners did not offer any evidence regarding the debits posted to the sales tax accrual account in December 1977 and November 1979.

#### CONCLUSIONS OF LAW

A. That subsection (e) of section 1132 of the Tax Law provides, in pertinent part:

"The tax commission may provide, by regulation, for the exclusion from taxable receipts, amusement charges or rents of amounts representing sales where the contract of sale has been cancelled, the property returned or the receipt, charge or rent has been ascertained to be uncollectible or, in case the tax has been paid upon such receipt, charge or rent, for refund of or credit for the tax so paid. Where the tax commission provides for a credit for the tax so paid, it shall require an application for credit to be filed, but it may also allow the applicant to immediately take the credit on the return which is due coincident with or immediately subsequent to the time the applicant files his application for credit."

Subsection (a) of section 1139, which provision addresses refunds of sales and use taxes, provides, in relevant part:

"In the manner provided in this section the tax commission shall refund or credit any tax, penalty or interest erroneously, illegally or unconstitutionally collected or paid if application therefor shall be filed with the tax commission...in the case of a tax, penalty or interest paid by the applicant to the tax commission, within three years after the date when such amount was payable under this article..."

(See also 20 NYCRR 525.5[a]).) Where the circumstances warrant, refund or credit of tax previously paid may be granted. A taxpayer seeking such refund or credit, however, must comply with the two statutory mandates: he must file



an application for refund or credit, and he must submit such application within three years after the prescribed date for payment of the tax.

B. That petitioners presented no evidence that the corporation filed an application for credit of a portion of the sales tax collected in transactions which subsequently resulted in repossessions. Moreover, some of the transactions for which a debit was posted to the sales tax accrual account appear to have occurred prior to 1974. Accordingly, petitioners were not entitled to debit the account in January 1978 for \$3,783.92 and in May 1979 for \$82,122.09.

C. That petitioners presented no evidence demonstrating their entitlement to the debits posted in December 1977 and November 1979.

D. That the petitions of Jerkens Truck & Equipment, Inc., Charles Jerkens and Marie Jerkens are denied, except that the assessments issued on April 1, 1981 are to be reduced in accordance with the concessions of the Audit Division (Findings of Fact "1" and "3[c][1]").

DATED: Albany, New York

STATE TAX COMMISSION

**FEB 15 1985**

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER