

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
VICTOR INTERNATIONAL CORP.	:	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, 1978	:	
through February 28, 1981.	:	

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Petitioner, Victor International Corp., c/o Leonard M. Simon, 90 Broad Street, New York, New York 10004, 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, 1978 through February 28, 1981 (File No. 36505).

A formal hearing was held before Frank W. Barrie, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 6, 1983 at 11:00 A.M. and continued to conclusion at the same location on February 8, 1984 at 9:15 A.M., with all briefs to be submitted by July 6, 1984. Petitioner appeared on both dates by Leonard M. Simon, Esq. The Audit Division appeared by John P. Dugan, Esq. (Irwin Levy, Esq., of counsel) on December 6, 1983 and by John P. Dugan, Esq. (Deborah Dwyer, Esq., of counsel) on February 8, 1984.

ISSUES

I. Whether clothing items sold by the petitioner were for export to a foreign country or were such items delivered to the purchaser within New York City/State.

II. Whether the audit procedures and tests used by the Audit Division in an examination of petitioner's books and records were proper and whether, as a

result thereof, the Audit Division correctly determined that petitioner had additional taxable sales.

FINDINGS OF FACT

1. Petitioner, Victor International Corp., which has been in business for approximately thirty-five years, is a retailer of sportswear, including T-shirts, sweatshirts and denim jeans. It does business as "Victor Boutique" in its one store located on the second floor of 13 West 46th Street, New York, New York. Petitioner is owned entirely by Victor Schwartz, who is also the president of the corporation. The brother of Victor Schwartz, Sam Schwartz, serves as the corporation's vice president and conducts the day-to-day operation of the business. Victor Schwartz is not involved in the day-to-day running of the store. According to the testimony of Sam Schwartz, his brother Victor provided the finances to keep the business going in order to ensure his (Sam's) income.

2. Petitioner has no sign on the street level of 13 West 46th Street. According to Sam Schwartz, petitioner's customers "came from word of mouth. The advertising that we did was in the Israeli newspapers, Brazilian newspapers. We did not have American customers, to speak of very, very few."

3. On February 19, 1982,<sup>1</sup> the Audit Division, as the result of an audit, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Victor International Corp. asserting sales tax due of \$91,460.64 plus interest which was detailed as follows:

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1 The Notice of Determination and Demand was timely issued because petitioner, by Sam Schwartz, its vice president, executed a consent extending the period of limitation for assessment of sales and use taxes for the period at issue to March 20, 1982.

<u>Period Ended</u>	<u>Sales Tax Alleged Due</u>
August 31, 1978	\$ 9,550.00
November 30, 1978	7,221.36
February 28, 1979	10,469.92
May 31, 1979	8,619.28
August 31, 1979	10,489.68
November 30, 1979	9,501.44
February 28, 1980	6,536.72
May 31, 1980	7,476.48
August 31, 1980	8,615.68
November 30, 1980	7,559.12
February 28, 1981	5,420.96
	<u>\$91,460.64</u>

4. During the period at issue, petitioner filed quarterly sales tax returns and reported gross sales for the period at issue of \$1,093,946, of which it reported taxable sales of \$50,902.00.

5. On October 28, 1981, the Audit Division informed Sam Schwartz that "in order to complete the audit, vendor must either sign the test agreement form or have all sale invoices and exemption certificates available for period 6/1/78-5/31/81." On November 4, 1981, petitioner by its president, Victor Schwartz, signed a Test Period Method Agreement Form which provided that in lieu of "a detailed examination of my Sales and/or Purchase Invoices for the entire period, a test period method may be used to determine any tax liability that may exist." Petitioner asserts that this agreement is invalid because according to its representative, "from talking to Sam and the president, Victor, who is not here, who may be called later as a witness,<sup>2</sup> that it wasn't their understanding they would be agreeing to the percentages that were worked out by Mr. Green (the auditor)...."

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2 Victor Schwartz did not appear and testify at the hearing held herein.

6. As a result of the agreement to use a test period, the Audit Division examined petitioner's sales for the sales tax quarter ending February 28, 1981. Petitioner, during such quarter, claimed that it had a total of \$75,782.00 in sales which were exempt from sales tax. The Audit Division disallowed one hundred percent of such "exempt" sales because petitioner's foreign customers obtained possession of the merchandise purchased from petitioner at the New York City store. In addition, the Audit Division did not allow any of petitioner's alleged sales to diplomats because petitioner did not have any properly completed "New York State and Local Sales Tax Certificates of Diplomatic and Consular Tax Exemption." Such certificates require detailed information including the diplomat's "official title", "country represented" and "ID number on DTF-10 card."<sup>3</sup>

Petitioner alleges that, during the sales tax quarter examined, sales of \$1,682.86 were made to diplomats exempt from sales tax. The Audit Division's exhibit "I" is a listing of the twenty-three sales which petitioner claims are exempt from sales tax as sales to diplomats. Petitioner failed to obtain from such customers all of the information which would be reported on the Certificates of Diplomatic and Consular Tax Exemption. In addition, there is no evidence

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3 The DTF-10 is an identification card which bears the individual's signature and is issued by the Department of Taxation and Finance to a diplomat as evidence that he is a diplomat or consular official entitled to a sales tax exemption. The diplomat is required to show this card to the vendor in order that the vendor may verify the information and signature on the card with that of the certificate.

that petitioner verified the signature of its customers<sup>4</sup> who were allegedly diplomats by comparing them to the signatures on the DTF-10's, the identification cards described supra.

7. The Audit Division, rather than using the amount of gross sales reported by petitioner on its sales tax returns for the period at issue of \$1,093,946.00 as a basis to determine the sales tax that it claims is due herein, used the following markup test to recalculate petitioner's gross sales for the audit period. It first analyzed petitioner's cost and selling price for twenty clothing items and determined that petitioner's total selling price was \$248.40 for items that cost \$170.02. It added freight charges of \$3.61 to determine "total cost" for such goods of \$173.63. It calculated petitioner's gross profit to be \$74.77 (\$248.40 minus \$173.63). It then determined a markup percentage of forty-three percent by use of a fraction, the numerator of which was gross profit and the denominator of which was total cost. Petitioner's purchases per its records for the entire audit period was \$860,995.00. The Audit Division, "based upon observation and knowledge of business," estimated that ten percent of such purchases were sold at cost. As a result, it applied the markup percentage of forty-three percent against \$774,895.00 [\$860,995.00 minus \$86,100.00 (ten percent of such purchases)] and redetermined petitioner's gross sales for the audit period as follows:

Purchases subject to forty-three percent markup	\$ 774,895.00
Markup	333,205.00
	<u>\$1,108,100.00</u>
Merchandise sold at cost	86,100.00
Gross Sales For Audit Period	<u>\$1,194,200.00</u>

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4 Petitioner's form described in Finding of Fact "9", infra, requires the signature of the customer.

The Audit Division then subtracted from such redetermined gross sales the taxable sales reported by petitioner of \$50,902.00 to determine additional taxable sales of \$1,143,298.00 and tax due of \$91,463.84.

8. Petitioner has all of its sales invoices for the period at issue. However, it does not appear that the sales invoices have a date stamped or noted on them.

9. For sales to foreigners, petitioner completed a form which it devised. The form is as follows:

"This is to certify that all purchases made at Victor Boutique are for personal use and will leave the USA within 10 days.

Name \_\_\_\_\_  
Address \_\_\_\_\_  
\_\_\_\_\_  
Passport No. \_\_\_\_\_  
Airline ID No. \_\_\_\_\_  
Diplomatic Exemption No. \_\_\_\_\_  
Signed: \_\_\_\_\_"

10. Petitioner's accountant testified that approximately \$20,000.00 to \$30,000.00 of petitioner's gross sales during the period at issue included hard goods such as "hi-fi equipment, motors, Ampex Tape Recorder type equipment which was shipped overseas." However, petitioner failed to introduce any sales invoices or other documentation in support of this claim.

#### CONCLUSIONS OF LAW

A. That "(t)he sales tax is a 'destination tax', that is, the point of delivery or point at which possession is transferred by the vendor to the purchaser or designee controls both the tax incident and the tax rate." 20 NYCRR 525.2(a)(3).

B. That the Audit Division properly imposed sales tax on the merchandise sold by petitioner to its foreign customers because possession was transferred

by petitioner to its customers at its New York City store. See Matter of Jacques Francais Rare Violins, Inc., State Tax Commission, October 5, 1984.

C. That the audit procedure set forth in Finding of Fact "7", supra, did not disclose a significant variance with the gross sales reported by petitioner. Petitioner reported gross sales of \$1,093,946.00 while the Audit Division estimated gross sales of \$1,194,200.00. Therefore, the Audit Division is directed to recalculate the deficiency herein by using petitioner's reported gross sales from which it should subtract the taxable sales reported by petitioner of \$50,902.00. This results in additional taxable sales of \$1,043,044.00 instead of \$1,143,298.00 noted in Finding of Fact "7", supra.

D. That there is no merit to petitioner's argument that the Test Period Method Agreement Form was invalid. As noted in Finding of Fact "5", supra, the Audit Division gave petitioner the option of having an audit of "all sale invoices and exemption certificates" for the entire period at issue.

E. That pursuant to Finding of Fact "6", supra, the Audit Division properly disallowed petitioner's alleged sales to diplomats.

F. That, in addition, pursuant to Finding of Fact "10", supra, petitioner failed to sustain its burden of proof to show that it sold "hard goods" for export to a foreign country and the amount of such sales.

G. That the petition of Victor International Corp. is granted to the extent noted in Conclusion of Law "C", but, in all other respects, is denied.

DATED: Albany, New York

STATE TAX COMMISSION

MAR 22 1985

Rodriguez  
PRESIDENT

Francis Q. Koenig  
COMMISSIONER

W. J. J. J.  
COMMISSIONER