

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
ELLEN CUBBIN	:	DECISION
D/B/A JERICHO SANDWICH SHOP	:	
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 March 1, 1977	:	
through February 29, 1980.	:	

Petitioner, Ellen Cubbin d/b/a Jericho Sandwich Shop, 117 West Jericho Turnpike, Huntington Station, New York 11746, 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 March 1, 1977 through February 29, 1980 (File No. 37948).

A hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 8, 1985 at 1:30 P.M. Petitioner appeared by Pincus & Solomon (Michael D. Solomon, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether the Audit Division correctly determined the amount of sales and use taxes due from the petitioner.

II. Whether the Tax Commission is bound by misinformation given by employees of the Department of Taxation and Finance.

FINDINGS OF FACT

1. From 1976 until its sale in March, 1980, petitioner, Ellen Cubbin, was the sole owner and proprietor of Jericho Sandwich Shop, 117 West Jericho Turnpike, Huntington Station, New York 11746.

2. On March 20, 1980, Ms. Cubbin sold the sandwich shop to another party who continued to operate the business under the same name. The Department of Taxation and Finance was properly notified of the sale and consequently issued to Ms. Cubbin a Notice to Seller, dated March 20, 1980, instructing her to submit certain information including a bulk sale questionnaire.

3. On May 14, 1980, the Audit Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period March 1, 1977 through February 29, 1980 in the amount of \$9,957.94, plus penalty of \$1,852.93 and statutory interest. The notice stated that because of petitioner's failure to submit the information requested, the Audit Division had estimated taxes due by treating 95 percent of the business's reported sales as taxable. It also stated:

"This notice is in addition to notice #94599541, 08/31/76; 94749601, 02/28/77; 94927436, 08/31/77; 95005510, 11/30/78; D7808294897, 02/28/78; D7901238187, 05/31/78; D7904072620, 08/31/78; S7908030707, 02/28/79; D7910238676; 05/31/79."

4. On June 12, 1980, the Audit Division received from Ms. Cubbin a petition for revision of the above determination which asserted that she had never received the proper forms with which to provide the requested information. She also contested the Audit Division's use of an estimate to determine taxes due. As a result of correspondence between the Audit Division and Ms. Cubbin, a bulk sale questionnaire was sent to her on July 20, 1981. It was never returned. Based on additional information received after the issuance of the above notice, the Audit Division issued to petitioner a Notice of Assessment Review dated December 17, 1981 which showed an adjusted tax due of \$8,931.10, plus penalty

and interest of \$5,606.57, for a total of \$14,537.67. This notice also indicated that the taxes due were in addition to any taxes previously reported and paid. Enclosed was another bulk questionnaire with instructions for its completion and return. This questionnaire was returned stating that the business owned by Ms. Cubbin was operated as a sandwich shop selling only food and soda.

5. The questionnaire was sent to the Suffolk District Office in order to make a determination as to the accuracy of the assessment. An auditor visited the premises of Jericho Sandwich Shop. Based on her observations of the business as it was operated by the subsequent owner and the information contained in the bulk sale questionnaire, the Audit Division determined that 95 percent of petitioner's reported gross sales were properly treated as taxable.

6. Although the two businesses may not have been operated in an identical fashion, Ms. Cubbin ran the Jericho Sandwich Shop in a manner very similar to that of the subsequent owner.

7. Prior to the opening of the sandwich shop, Ms. Cubbin was a housewife with no previous business experience. Her husband handled all financial matters including the filing of tax returns. Before the business was sold, she became aware that not all sales taxes reported had been paid. Three subpoenas were issued against Ms. Cubbin on May 16, 1980; however, by November 23, 1981, she had paid all of the delinquent taxes and obtained satisfactions as evidence of this. Despite clear statements on the instant notice that the tax assessed was in addition to that reported, Ms. Cubbin, purportedly as a result of conversations with Tax Department employees, formed the belief that all of her outstanding tax liabilities were satisfied.

8. Approximately one year after the business was sold, all of its financial records were destroyed by Ms. Cubbin's husband. Ms. Cubbin believed the records were no longer necessary because at the time she paid the delinquent taxes she

was allegedly told by Tax Department employees, "You paid everything. You are settled with the State."

9. Ms. Cubbin contended that at the conclusion of a pre-hearing conference held on March 16, 1983, the Tax Appeals Bureau conferee stated that this assessment would be cancelled. However, the written report of the conference indicated that petitioner was advised that the matter would be forwarded to hearing.

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, charged or due thereon in such form as the Tax Commission may by regulation require. The Tax Commission requires that all records be preserved for a period of three years and "longer than three years, if their contents are material...in any action or proceeding pending before the Tax Commission." (20 NYCRR 533.2[3]).

B. That where no records are provided by the taxpayer, the State Tax Commission is authorized to select a method reasonably calculated to determine the sales and use taxes due (Carmin Restaurant, Inc. v. State Tax Commission, 99 A.D.2d 581). Exactness is not required where the taxpayer's own failure to maintain the proper records prevents it (Markowitz v. State Tax Commission, 54 A.D.2d 1023).

C. That Ms. Cubbin failed to preserve business records as required by statute or to present any credible evidence to demonstrate that the method of audit or amount of tax assessed was erroneous. Under the circumstances, the Audit Division's estimate of taxes due based on its observation of Jericho Sandwich Shop as it is now operated and the statements made by petitioner on the bulk sale questionnaire was reasonable.

D. That the Tax Commission is not bound by alleged misinformation given by employees of the Department of Taxation and Finance. It is unfortunate if Ms. Cubbin's conversations with employees of the Department led her to believe that her tax liabilities were entirely satisfied when that was not the case. In this instance, petitioner has not adduced written proof or any other substantiation of the purported erroneous information she claims to have relied on. Thus, even if receipt of misinformation could be a basis for relief, petitioner has failed to sustain her burden of proof as to such misguidance. The written notices and correspondence sent to petitioner unambiguously stated that the tax due was in addition to other taxes reported and paid by Ms. Cubbin. Furthermore, the conferee did not propose a resolution of the controversy in writing as provided in 20 NYCRR 601.4(c)(3), but rather forwarded the case for a hearing as indicated in his report.

E. That the petition of Ellen Cubbin d/b/a Jericho Sandwich Shop is hereby denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 14, 1980, as modified by the Notice of Assessment Review dated December 17, 1981, is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 10 1986

Roderich W. Clue
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark J. [Signature]
COMMISSIONER