

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
SOL WAHBA, INC.	:	DECISION
AND SOL WAHBA, INDIVIDUALLY AND AS OFFICER	:	
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 May 31, 1980.	:	

Petitioners, Sol Wahba, Inc., and Sol Wahba, individually and as officer, 1145 Broadway, 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 May 31, 1980 (File No. 38232).

A small claims 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 March 12, 1984 at 2:45 P.M. and was continued to conclusion on May 22, 1984 at 9:15 A.M., with all briefs to be submitted by August 15, 1984. Petitioners appeared by Joseph H. Koenig, PA. The Audit Division appeared by John P. Dugan, Esq. (Irving Atkins, Esq., of counsel, on March 12, 1984 and William Fox, Esq., of counsel, on May 22, 1984).

ISSUE

Whether the Audit Division properly determined petitioner's taxable sales based on an examination of available books and records.

FINDINGS OF FACT

1. Petitioner Sol Wahba, Inc. ("the corporation") was engaged primarily in wholesale sales of general merchandise, e.g., electronic equipment, film,

watches and cameras. The corporation operated as S & W Import Co. and was located at 1145 Broadway, New York, New York.

2. On July 25, 1980, Sol Wahba, on behalf of the corporation, executed a consent extending the period of limitation for assessment of sales and use taxes for the period June 1, 1976 through May 31, 1980 to June 20, 1981.

3. On June 19, 1981, as the result of an audit, the Audit Division issued the following notices of determination and demand for payment of sales and use taxes due:

<u>Petitioner</u>	<u>Notice No.</u>	<u>Period</u>	<u>Tax</u>	<u>Penalty & Interest</u>	<u>Total</u>
Sol Wahba, Inc.	S810619379M	06/01/76 - 11/30/79	\$34,089.04	\$21,426.73	\$55,515.77
Sol Wahba, Inc.	S810619380M	12/01/79 - 05/31/80	4,588.48	1,426.72	6,015.20
Sol Wahba	S810619381M	06/01/76 - 11/30/79	31,956.56	19,840.75	51,797.31
Sol Wahba	S810619382M	12/01/79 - 05/31/80	4,536.48	1,410.76	5,947.24

The difference between the amounts assessed against the corporation and Sol Wahba, individually, was that Sol Wahba was not held personally liable for use taxes.

4. After the issuance of the above notices, a conference was held with representatives of the New York District Office and the notices were revised as follows:

<u>Notice No.</u>	<u>Revised Tax Due</u>
S810619379M	\$23,302.40
S810619380M	3,535.92
S810619381M	21,287.92
S810619382M	3,483.92

5. On June 13, 1980, a tax auditor from the New York District Office had made an unannounced visit to the corporation's premises and purchased a flashlight and batteries. The auditor was not charged sales tax and was not given a receipt. The auditor also observed other retail cash sales being made.

6. On December 30, 1980, the Audit Division began an audit of the corporation's books and records. The books and records did not indicate any retail

sales nor did petitioner report any taxable sales on sales tax returns filed for the periods at issue.

In order to determine the amount of retail sales, the Audit Division computed gross sales for the audit period of \$3,717,250.00. This amount was adjusted to \$3,672,339.00 to reflect freight charges that were included in gross receipts. A markup test was performed for all sales over \$20,000.00. Sales over \$20,000 for the audit period amounted to \$1,377,603.00. The cost of such sales was determined to be \$737,031.00, leaving a gross profit of \$640,572.00. The markup was 86.91 percent. Sales over \$20,000.00 were deducted from gross sales to arrive at sales under \$20,000.00 of \$2,294,736.00. The Audit Division disallowed nontaxable sales of \$52,043.00 which left wholesale sales under \$20,000.00 of \$2,242,693.00. Based on a publication by Dun & Bradstreet, the Audit Division found that the wholesale markup for the corporation's business operation was 19.1 percent and the retail markup was 38.81 percent. Using the wholesale markup, the Audit Division computed that the cost of the sales under \$20,000.00 was \$1,883,034.00 (\$2,242,693.00 divided by 119.1%). Total purchases of merchandise available for sale were \$2,843,081.00. Therefore, the Audit Division concluded that purchases sold at retail amounted to \$223,016.00 (\$2,843,081.00 - \$737,031.00 and \$1,883,034.00). The retail markup of 38.81 percent from Dun & Bradstreet was applied to said purchases to determine taxable sales of \$309,569.00 and tax due thereon of \$24,771.84.

The audit also disclosed use taxes due of \$2,066.48 on fixed asset purchases.

7. Petitioner argued that the markup of 86.91 percent for sales over \$20,000.00 was excessive and to substantiate its position, petitioner submitted

the sales invoices and the purchase invoices for the items sold to establish the actual costs and markups.

The cost of the sales over \$20,000.00 was \$897,760.00. Using the same audit procedures outlined in Finding of Fact "6", the retail sales are recomputed below:

total purchases of merchandise available for sale	\$2,843,081.00
cost of sales over \$20,000	897,760.00
purchases available for sales under \$20,000	<u>1,945,321.00</u>
cost of sales under \$20,000	<u>1,883,034.00</u>
purchases available for retail sales	62,287.00
markup	38.81
taxable retail sales	<u>\$ 86,460.00</u>

8. Petitioner offered no evidence to show that the use tax assessed was erroneous.

CONCLUSIONS OF LAW

A. That the books and records maintained by petitioner were incomplete and inadequate since there was no record of taxable retail sales. Because of petitioner's insufficient record keeping, the Audit Division properly determined retail sales from such information as was available and external indices in accordance with the provisions of section 1138(a) of the Tax Law.

However, the markup test conducted for sales over \$20,000.00 was based on incorrect purchases and thereby the markup was overstated. Accordingly, the taxable retail sales are reduced to \$86,460.00 as indicated in Finding of Fact "7".

B. That the petition of Sol Wahba, Inc. and Sol Wahba, individually, is granted to the extent indicated in Conclusion of Law "A". The Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment

of Sales and Use Taxes Due issued June 19, 1981; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

MAR 22 1985

STATE TAX COMMISSION

Roderick W. Clem
PRESIDENT

Frank R. Koenig
COMMISSIONER

Mark J. [Signature]
COMMISSIONER