

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
of	:	
NICHOLAS L. JAHN d/b/a JAHN'S SUPER DELI,	:	
NICHOLAS JAHN'S SUPER DELI, INC.	:	DECISION
AND NICHOLAS JAHN, PRESIDENT	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 & 29	:	
of the Tax Law for the Period June 1, 1978	:	
through April 20, 1981.	:	

Petitioners, Nicholas L. Jahn d/b/a Jahn's Super Deli, Nicholas Jahn's Super Deli, Inc. and Nicholas Jahn, President, 374 Sharon Avenue, Staten Island, New York, 10301 filed petitions for revision of a determination or for refund of sales and use taxes under Articles 28 & 29 of the Tax Law for the period June 1, 1978 through April 20, 1981. (File Nos. 38258, 38259, 38626 and 38627).

A 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 May 20, 1985 at 1:30 P.M., with the matter scheduled for continuation at the same offices on August 5, 1985 at 1:15 P.M. Petitioners appeared by Harold Dobson, P.A. The Audit Division appeared by John P. Dugan, Esq. (Kevin A. Cahill, Esq., of counsel). Prior to continuation of the hearing the parties agreed that the matter be submitted for decision by the State Tax Commission without need of further oral proceedings. Accordingly, based on the entire file, including the proceedings held on May 20, 1985, the Commission renders the following decision.

ISSUE

Whether penalties imposed against petitioners should be reduced or abated.

FINDINGS OF FACT

1. On July 30, 1981, the Audit Division issued several notices of determination and demand for payment of sales and use taxes due, as follows:

<u>Notice Number</u>	<u>Issued to</u>	<u>Tax Assessed</u>	<u>Period at Issue</u>
S810730463M	Nicholas L. Jahn d/b/a	\$22,470.40	6/1/78 - 8/8/79
S810730466M	Nicholas Jahn, President Nicholas Jahn Super Deli, Inc.	32,235.42	8/9/79 - 4/20/81
S810730464M	Nicholas Jahn Super Deli, Inc.	14,637.62	6/1/78 - 8/8/79
S810730465M	Nicholas Jahn Super Deli, Inc.	25,228.74	6/1/79 - 4/20/81

2. The above assessments were based on available records and information and were issued following petitioners' failure to submit records as requested by the Audit Division.

3. On May 6, 1982, as the result of additional audit work, the above assessments were revised downward, as follows:

<u>Notice Number</u>	<u>Revised Amount Assessed</u>
S810730463M	\$ 2,861.50
S810730466M	5,842.58
S810730464M	2,861.50
S810730465M	5,842.58

4. On each of the assessments as originally issued, as well as on each of the assessments as revised, the Audit Division included assessments for penalty and interest.

5. Petitioners operated a retail grocery store and delicatessen business during the period in question. More specifically, Nicholas Jahn operated Jahn's Super Deli as a sole proprietorship until, on or about July 31, 1979, Nicholas Jahn transferred his business assets to Nicholas Jahn's Super Deli, Inc. Notice of the July 31, 1979 transfer, as required pursuant to Tax Law

section 1141 (c) (Bulk Sale Provisions) was not provided to the Tax Commission by either the transferror (Nicholas Jahn) or the transferee (Nicholas Jahn's Super Deli, Inc.).

6. Petitioners timely filed petitions protesting the previously noted assessments. At the May 20, 1985 hearing, petitioners did not dispute the (May 6, 1982) revised audit results, except for the amount of tax assessed on take out sales of sandwiches. After extensive discussions, the parties reached agreement based on additional information supplied and petitioners, on August 30, 1985, executed a stipulation and waiver of further oral proceedings which provided as follows:

"The underlying taxes herein have been stipulated by the parties to be \$7,168.42 plus appropriate interest charges. This document is being filed for the purpose of submitting to the State Tax Commission, without formal appearances, the issue of penalties waiver in the above matters."

7. An Audit Division memorandum dated June 7, 1985 gives specific details of the component breakdown of the \$7,168.42 in tax stipulated to be due, as follows:

Additional Sales Tax Due on Audit Period Taxable Sales	\$6,768.18
Use Tax Due on Purchases of Fixed Assets	240.00
Additional Sales Tax Due on Bulk Sale	160.24*
Total Tax Due (Excluding Interest and Penalties)	<u>\$7,168.42</u>

Furthermore, the major portion of the additional sales tax due on taxable sales (\$6,768.18) consists of \$5,304.56 due on cigarette sales, with the

* Of the \$7,168.42 due and agreed, \$2,750.77 was allocated to the sole proprietorship (Nicholas Jahn d/b/a Jahn's Super Deli) period and \$4,417.65 was allocated to the corporate (Nicholas Jahn's Super Deli, Inc.) period.

balance of \$1,463.62 due on sales of candy, gum and other items including (taxable) prepared food sales.

8. It is not disputed that petitioners did not maintain complete and adequate books and records, specifically with regard to taxable purchases and sales, during the period in question. Rather, sales tax due was reported via Mr. Jahn's best estimate of the percentage of gross sales which were taxable sales.

9. In support of the assertion that penalties should be reduced or abated, petitioners point out that sales and use tax returns were timely filed during the period in question and maintain that there was no intent to evade taxes. Furthermore, petitioners note that when the business pattern changed such that lunch sales increased as the result of closings of other luncheon businesses in the area, petitioners voluntarily made a large increase in the estimated percentage of gross sales which were taxable which increase is reflected in sales and use tax returns as filed.

CONCLUSIONS OF LAW

A. That Tax Law Article 28, section 1145(a)(1)(i) authorizes the imposition of a penalty (at the rate specified therein) for failure to file a return or to pay or pay over any tax under such Article in a timely manner. Tax Law section 1145(a)(1)(ii) further provides as follows:

"If the tax commission determines that such failure or delay was due to reasonable cause and not due to willful neglect, it shall remit all of such penalty and that portion of such interest that exceeds the interest that would be payable if such interest were computed at the rate set by the tax commission pursuant to section eleven hundred forty-two. The tax commission shall promulgate rules and regulations as to what constitutes reasonable cause."

B. That 20 NYCRR 536.1(b) provides:

"Reasonable Cause. In determining whether reasonable cause exists, either as a basis for remitting assessed interest or penalties

or as grounds for remitting interest or penalties upon the late filing of a return or payment, the taxpayer's previous compliance record may be taken into account. Reasonable cause for failure to file a return on time must be affirmatively shown by the taxpayer in a written statement. Grounds for reasonable cause, where clearly established, may include the following:

(1) death or serious illness of the taxpayer, a responsible officer or employee of the taxpayer, or his unavoidable absence from his usual place of business;

(2) destruction of the taxpayer's place of business or business records by fire or other casualty;

(3) timely prepared returns misplaced by the taxpayer or a responsible employee of the taxpayer and discovered after the due date;

(4) inability to obtain and assemble essential information required for the preparation of a complete return despite reasonable efforts;

(5) pending petition to Tax Commission or formal hearing proceedings involving a question or issue affecting the computation of tax for the year, quarter, month or other period of delinquency; or

(6) Any other cause for delinquency which appears to a person of ordinary prudence and intelligence as a reasonable cause for delay in filing a return and which clearly indicates an absence of gross negligence or willful intent to disobey the taxing statutes. Past performance will be taken into account. Ignorance of the law, however, will not be considered reasonable cause." (Emphasis as in original).

C. That the underpayment of tax herein appears to have been the result of petitioners' decision to use estimates of taxable percentages rather than to maintain adequate and accurate books and records as required pursuant to Tax Law sections 1135 and 1142.5. Given such decision, petitioners in effect chose to run the risk of probable innaccurate estimates, resultant underreporting and underremittance of tax due and ultimately an assessment including penalties. Accordingly, under the facts presented, petitioners' underreporting and underpayment of taxes was not the result of reasonable cause and penalties were properly imposed and remain due and owing.

D. That the petitions of Nicholas L. Jahn, d/b/a Jahn's Super Deli, Nicholas Jahn's Super Deli, Inc. and Nicholas Jahn, President are hereby denied and the notices of determination dated July 30, 1981, as modified, together with penalties and interest, are sustained.

DATED: Albany, New York

OCT 16 1985

STATE TAX COMMISSION

Roderick A. Allen
PRESIDENT

Francis R. Koehn
COMMISSIONER

[Signature]
COMMISSIONER