

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
S & T FAMOUS BAGS, INC.	:	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 March 1, 1979	:	
through February 28, 1982.	:	

Petitioner, S & T Famous Bags, Inc., 1308 Kings Highway, Brooklyn, New York 11229, 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, 1979 through February 28, 1982 (File No. 42283).

A small claims hearing was held before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 4, 1984 at 1:15 P.M., with all briefs to be submitted by December 4, 1984. Petitioner appeared by Philip Trestyn, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Michael Gitter, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined additional sales taxes due from petitioner for the period March 1, 1979 through February 28, 1982.

FINDINGS OF FACT

1. On January 20, 1983, the Audit Division, as the result of a field audit, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against the petitioner, S & T Famous Bags, Inc., for additional taxes due of \$22,491.76, plus interest of \$5,593.65, for a total amount due of \$28,085.41 for the period March 1, 1979 through February 28, 1982.

2. The petitioner, by signature of its president, Stefen Tanner, executed a consent extending the period of limitation for assessment of sales and use taxes for the period March, 1979 through February, 1982 to March 20, 1983.

3. On January 26, 1983, petitioner filed a petition protesting the notice and said petition was timely received on February 11, 1983.

4. During the period under review, petitioner operated a retail business at 1308 Kings Highway, Brooklyn, New York, selling therefrom ladies' handbags and accessories.

5. On audit, petitioner failed to produce the sales and shipping documents required to support the nontaxable sales as reported on the sales and use tax returns filed. In the absence of adequate books and records, the examiner for the Audit Division utilized the federal income tax returns filed by petitioner for the fiscal years ended November 30, 1980 and November 30, 1981 to determine an average markup on purchases of 51.83 percent. He then adjusted the purchases per books (\$930,569.00) to allow for a merchandise inventory and applied the average markup thereto to arrive at audited taxable sales of \$1,362,738.00. Since petitioner reported taxable sales of only \$1,083,285.00 on the returns filed, an additional tax due was computed of \$22,491.76.

6. Petitioner argued that the examiner in the determination of audited taxable sales, utilized the accounts payable ledger account rather than the purchases account. Petitioner offered no substantial evidence as to the discrepancy in the balances in the accounts payable and purchases ledger accounts for the period under review.

7. Petitioner further argued that a major portion (\$267,764.00) of the additional taxable sales figure (\$279,453.00) represented sales of handbags shipped out of state to customers in the States of Florida or California.

Allegedly, 250 letters were mailed to the out of state customers for confirmation of their purchases and some 60 responses were received. At the hearing, a total of 11 said letters were introduced into evidence which account for sales in the amount of \$6,095.63.

CONCLUSIONS OF LAW

A. That petitioner failed to maintain adequate books and records from which the actual amount of tax due could be determined. The Audit Division's resort to the use of external indices in order to determine the tax due was therefore proper (Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44.).

B. That once it is established that the Audit Division's independent determination was permissible, the burden of proof is upon petitioner to show that the Audit Division's determination should be overturned (People ex rel. Kohlman & Co. v. Law, 239 N.Y. 346.).

C. That petitioner submitted proof to show that it made sales which were shipped out of state in the amount of \$6,095.63 in accordance with Finding of Fact "7", supra.

D. That the petition of S & T Famous Bags, Inc. is granted to the extent indicated in Conclusion of Law "C" supra; the Audit Division is hereby directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued January 20, 1983; and that except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

FEB 15 1985

STATE TAX COMMISSION

Roderick A. Allen
PRESIDENT

Francis Q. K. King
COMMISSIONER

Mark J. Smith
COMMISSIONER