

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

ALLEN PARKER OF ASTORIA, 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 September 1, 1978 :
through May 31, 1982.

Petitioner, Allen Parker of Astoria, Inc., 22-24 31st Street, Astoria, New York 11102, 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 September 1, 1978 through May 31, 1982 (File No. 43304).

A hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on January 29, 1986 at 1:30 P.M. Petitioner appeared by Samuel E. Kezsbom, Esq. The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUE

Whether additional sales tax was properly assessed against petitioner pursuant to a sales tax markup audit.

FINDINGS OF FACT

1. Petitioner, Allen Parker of Astoria, Inc., operates a retail men's clothing business at three locations in Queens, New York.
2. The Audit Division conducted a sales tax field audit of petitioner's books and records for the periods at issue. The records were deemed by the examiner to be incomplete because: a) petitioner did not retain cash register tapes; b) petitioner could not produce credit memoranda to support claimed

returned purchases; c) petitioner's books did not have journal entries showing adjustments for returned merchandise; and d) petitioner did not have police reports for merchandise which was allegedly stolen.

3. Because the records were found to be inadequate, the examiner conducted a weighted markup test of petitioner's purchases of merchandise. After discussion with petitioner's representatives, the examiner calculated a full price markup of 107.66 percent and applied it to sales in the months of September through December and April through June. The examiner then computed a substantially lower markup of 13.15 percent for sales in the months of January through March and July and August to reflect special sales to move out-of-season merchandise. The two markups were applied to purchases as per the books of \$2,108,476.00 and resulted in taxable sales of \$3,785,796.00. Petitioner had reported taxable sales of \$2,383,671.00. Additional taxable sales of \$1,402,125.00 were determined resulting in additional sales tax due of \$112,786.97.

4. Petitioner claimed returned merchandise of approximately \$340,000.00. The examiner, however, found that petitioner did not submit documentation (such as credit memoranda) from suppliers to prove the returns; moreover, petitioner's books and records did not show adjustments made to reduce the purchases by the claimed returns.

5. Based on the audit, on February 18, 1983 the Audit Division issued notices of determination and demands for payment of sales and use taxes due against petitioner for the following periods and in the following amounts: a) September 1, 1978 through February 28, 1982, \$105,991.36 in tax and \$25,143.38 in penalty, plus interest; b) March 1, 1982 through May 31, 1982, \$6,795.61 in tax and \$815.47 in penalty, plus interest.

6. At the hearing, petitioner's president testified in very general terms to the effect that merchandise had been stolen from the stores and that other merchandise had been returned to the manufacturer with deductions made by petitioner on the face of the invoice. The testimony was vague and no details were specified. No documentation was offered to support the testimony.

CONCLUSIONS OF LAW

A. That section 1138(a)(1) of the Tax Law provides, in pertinent part, as follows:

"If a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors...."

B. That where a taxpayer's records are incomplete or insufficient, the Audit Division may select a method reasonably calculated to reflect the sales and use taxes due and the burden then rests upon the taxpayer to demonstrate by clear and convincing evidence that the method of audit or amount of tax assessed was erroneous. Surface Line Operators Fraternal Organization, Inc., v. Tully, 85 AD2d 858.

C. That in the instant case, petitioner's records were incomplete in that there were no cash register tapes or documentation as to returned or stolen merchandise. Accordingly, it was proper for the Audit Division to perform a test period audit resulting in the assessments which were issued on February 18, 1983. Petitioner did not sustain its burden of proof to show that either the method of audit or the amount of tax assessed was erroneous.


D. That the petition of Allen Parker of Astoria, Inc. is denied and the notices of determination and demands for payment of sales and use taxes due issued February 18, 1983 are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

SEP 15 1986


PRESIDENT


COMMISSIONER


COMMISSIONER

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