

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
ANSON B. HERRICK
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, 1979.

DECISION

Petitioner, Anson B. Herrick, 52A Maple Avenue, Bayshore, New York 11706, 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, 1979 (File No. 44108).

A hearing was held before Jean Corigliano, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 7, 1985 at 2:45 P.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Joseph W. Pinto, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly estimated sales tax due from the petitioner.

II. Whether the Audit Division failed to properly credit petitioner for taxes paid.

FINDINGS OF FACT

1. On December 20, 1982, the Audit Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due asserting taxes of \$13,361.79, plus penalty of \$3,340.44 and interest of \$6,306.76, for a

total of \$23,008.99 for the period September 1, 1978 through May 31, 1979. The notice included the following explanation:

"You are personally liable as officer of Herrick-Nickerson Marine Sales Inc. under sections 1131(1) and 1133 of the Tax Law for the following taxes determined to be due in accordance with section 1138(a) of the Tax Law."

2. Upon initiating an audit of Herrick-Nickerson Marine Sales, Inc. (the "corporation") in July of 1980, the Audit Division discovered that the corporation had ceased doing business as of August 15, 1979. No sales tax returns had been filed by it for the periods in issue. Consequently, the Audit Division estimated taxes due on the basis of prior returns filed.

3. At a pre-hearing conference, petitioner submitted sales tax returns on behalf of the corporation for the three sales tax quarters in issue showing a sales tax due of \$8,525.65. The Audit Division agreed to accept this amount plus statutory penalty and interest as the total amount due.

4. The petitioner has conceded his personal liability as officer of the corporation. However, he contends that the notice in issue duplicated previous assessments issued against the corporation and satisfied. In support of his contention, petitioner submitted three cancelled checks paid to the order of the State Tax Commission as follows:

<u>Check No.</u>	<u>Amount</u>	<u>Date</u>
1590	\$5,304.69	April 23, 1979
1044	\$5,233.79	January 3, 1980
1114	\$4,955.20	July 11, 1980

5. Before it ceased to do business, a number of tax assessments were issued against the corporation. The three checks shown above were all applied to these assessments. The Department of Taxation and Finance, Accounts Receivable System shows the following:

a) Check number 1590 in the amount of \$5,304.69 was applied to assessment number D7901249150 for the period March 1, 1978 through May 31, 1978, asserting tax plus penalty and interest of \$5,304.69.

b) Check number 1044 in the amount of \$5,233.79 was applied to assessment number D7904080948 for the period June 1, 1978 through August 31, 1978, asserting tax plus penalty and interest of \$5,233.79.

c) Check number 1114 in the amount of \$4,955.20 was applied to assessment number D7912301462 for the period June 1, 1979 through August 31, 1979, asserting tax plus penalty and interest of \$4,955.20. No payments were applied to the periods in issue.

CONCLUSIONS OF LAW

A. That where, as here, a person fails to keep adequate books and records as mandated by section 1135 of the Tax Law, the Audit Division is justified in determining the amount of tax due by estimating on the basis of external indices in accordance with section 1138(a) of the Tax Law.

B. That petitioner was a person required to collect tax as provided by section 1133(a) of the Tax Law and, as such, is personally liable for tax determined to be due from the corporation.

C. That there is absolutely no foundation for petitioner's contention that taxes determined to be due for the period in issue have been partially or completely satisfied.

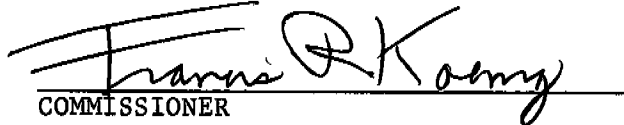
D. That the petition of Anson B. Herrick is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, as modified by the Audit Division (Finding of Fact "3"), is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

JAN 28 1986


PRESIDENT


COMMISSIONER


COMMISSIONER