STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

PENN STATION BOOKSTORE, INC.

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 May 31, 1982.

In the Matter of the Petition

of

STEVE KAPLAN,
PRESIDENT OF PENN STATION BOOKSTORE, INC.

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, 1981 through May 31, 1982.

In the Matter of the Petition

of

GEORGE KAPLAN,
OFFICER OF PENN STATION BOOKSTORE, INC.

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 18, 1981 through May 31, 1982.

DECISION

Petitioner, Penn Station Bookstore, Inc., 1 Penn Plaza, Lower Level, 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 March 1, 1979 through May 31, 1982 (File No. 45035).

Petitioner, Steve Kaplan, President of Penn Station Bookstore, Inc., 60-10 47th Avenue, Woodside, New York 11377, 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, 1981 through May 31, 1982 (File No. 45034).

Petitioner, George Kaplan, Officer of Penn Station Bookstore, Inc., 60-10 47th Avenue, Woodside, New York 11377, 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 18, 1981 through May 31, 1982 (File No. 45033).

A consolidated hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 2, 1985 at 1:15 P.M., with all briefs to be submitted by March 28, 1986. Petitioner appeared by Valdas C. Duoba, Esq. The Audit Division appeared by John P. Dugan, Esq. (Kevin A. Cahill, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined petitioners' sales tax liabilities for the periods under consideration.

II. Whether penalties asserted against petitioners for failure to report a tax when due should be abated.

FINDINGS OF FACT

1. On March 18, 1983, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Penn Station Bookstore, Inc. (the "Corporation"), in the amount of $40,448.06, plus penalty and statutory interest for the period

March 1, 1979 through May 31, 1982. On the same date, the Audit Division issued a notice against Steve Kaplan in the amount of $18,036.55, plus penalty and statutory interest for the period September 1, 1981 through May 31, 1982. This notice represented Mr. Kaplan's liability as a corporate officer of Penn Station Bookstore, Inc. during the stated period. A third notice was issued on the same date against George Kaplan as officer of the Corporation in the amount of $18,036.55, plus penalty and statutory interest for the period September 18, 1981 through May 31, 1982.

2. On June 17, 1982, George Kaplan executed a consent extending the period of limitation for assessment of sales and use taxes from the period March 1, 1979 through August 31, 1979 to December 20, 1982. On November 19, 1982, Mr. Kaplan executed a second consent extending the period for assessment of sales and use taxes from the period March 1, 1979 through November 30, 1979 to March 20, 1983.

3. Penn Station Bookstore, Inc. operated a newsstand selling newspapers, magazines, cigarettes, cigars, candy, greeting cards and other sundries from a booth in New York City's Pennsylvania Station. On or about September 18, 1981, Steve Kaplan purchased all of the existing shares of the Corporation and also assumed the office of president of the Corporation. Mr. Kaplan managed the newsstand, conducted sales and signed the Corporation's sales tax returns. His father, George Kaplan, was the Corporation's vice-president and also worked in the newsstand.

4. On audit, the following records were made available to the Audit Division: bank statements for the period March 1, 1979 through June 30, 1981; cash receipts and disbursements journals for the period October 1, 1981 through May 31, 1982; purchase invoices for the months of October 1981 through October

1982; and federal tax returns for the fiscal years ended July 31, 1979 and July 31, 1980. The newsstand's cash register did not produce a tape, and sales receipts were not utilized; consequently, a verifiable record of individual sales did not exist. The auditor performed a reconciliation of sales tax returns, federal returns and cash receipts books which showed substantial agreement in the category of gross sales. The auditor also conducted a review of the Corporation's bank statements for the period March 1, 1979 through May 31, 1981 which revealed that total bank deposits in that period exceeded the Corporation's reported gross sales in the same period by the amount of $429,145.00, or by 39.875 percent. These deposits were treated as unreported gross sales. Consequently, the auditor increased reported gross sales for each sales tax quarter by 39.875 percent to calculate adjusted gross sales of $2,116,421.00, and additional gross sales for the audit period of $603,341.00.

5. The Audit Division then conducted a test period and markup audit. Using purchase invoices from the month of October 1982 and actual selling prices, the auditor determined the following markups on taxable items:

Cigarettes	68.546%	
Cigars & tobacco	50.871%	
Candy	100.224%	
Sundries	85.465%	
Greeting cards	100.000%	(estimated by the auditor on the basis of audit experience)

These markup percentages were applied to purchases for the period December 1, 1981 through May 31, 1982, resulting in audited taxable sales for the period of $105,531.00. The auditor then calculated a percentage of taxable sales to gross sales by dividing adjusted gross sales for the test period ($357,366.00 or reported gross sales increased by 39.875 percent) into audited taxable sales and arrived at a figure of 29.53 percent. This percentage was applied to adjusted gross sales for the audit period ($2,116,421.00) to arrive at audited taxable sales of $624,979.00. By subtracting reported taxable sales ($127,404.00) from audited taxable sales, the auditor arrived at additional taxable sales for the audit period of $497,575.00, with a tax due on this amount of $40,448.06.

6. After the notices were issued, petitioners submitted to the Audit Division additional information regarding returned or dishonored checks. These were checks written by the Corporation on its own accounts and returned for insufficient funds; they appeared as a credit on the Corporation's bank statements and were treated as deposits by the auditor. On the basis of this information, the auditor adjusted his analysis of bank deposits, including two sales tax quarters for which information had not been previously available. At the same time, the auditor became aware of a third corporate account (Citibank, account number 026-027-461) which was not included in the original audit. The auditor recomputed the assessment allowing for returned checks and including deposits to the Citibank account. The result was a total reduction in additional gross sales for the audit period from $429,145.00 to $194,052.00. However, utilization of the smaller gross sales figure actually resulted in a slight increase in taxable sales. An error rate of 14.57177 percent was calculated by dividing additional gross sales (i.e., the difference between net deposits and reported gross sales) by reported gross sales. The auditor then repeated the mathematical steps he had used in his first set of calculations. Dividing audited taxable sales for the test period ($105,531.00) by a reduced test period gross sales figure ($292,695.00) yielded an increased taxable sales percentage of 36.0549 percent. This percentage was applied to audited gross sales for the audit period ($1,733,563.00) to determine audited taxable sales of $625,034.00 (or $55.00 more than originally calculated).

7. When Steve Kaplan purchased the shares of the Corporation, he and the former owner entered into an agreement whereby the latter agreed to terminate a corporate bank account (Citibank, account number 026-027-461 referred to above) after the payment of final bills and taxes incurred during his ownership. However, the former owner continued to make deposits to and withdrawals from that account. In June 1982, Mr. Kaplan brought legal suit against the former owner to enforce their contractual agreement. In determining gross sales on the basis of additional information provided by petitioners, the auditor utilized deposits made to that account. Petitioners argue that the former owner's unauthorized use of the corporate account distorted the audited gross sales figure and, as a consequence, inflated audited taxable sales.

8. The auditor's markup did not take into account petitioner's practice of including sales tax in the selling price of cigarettes, cigars, tobacco and candy. A sign to that effect was displayed in the newsstand. The auditor also did not allow an adjustment for pilferage which amounted to approximately two percent of purchases.

9. It is the petitioners' position that they have accurately reported taxable sales since the Corporation was purchased by Mr. Kaplan. They point out that an audit of the Corporation for the period September 1, 1982 through May 31, 1985 revealed no unreported gross sales. Furthermore, they contend that the difference between audited taxable sales for the test period ($105,531.00) and reported taxable sales for the same period ($45,174.00) is explained by a build up of inventory during the test period necessitated by the change in ownership of the Corporation. They allege that the former owner had depleted the stock to almost nothing in contemplation of sale, forcing petitioners to expend an estimated $25,000.00 to $30,000.00 in the first year to build up inventory. A schedule was submitted showing that approximately $22,500.00 of

the Corporation's taxable purchases for the test period ($57,121.17) remained in the Corporation's inventory. The Corporation's federal tax return for the fiscal year ended July 31, 1982 showed an increase in inventory of $13,300.00.

CONCLUSIONS OF LAW

A. That petitioners did not maintain sales slips, cash register tapes or any other documents which would serve as a verifiable record of taxable sales. Furthermore, a comparison of deposits to the Corporation's bank account and reported gross sales revealed significant underreporting of sales. Under these circumstances, the Audit Division was warranted in resorting to external indices to estimate the amount of sales tax due [Matter of Sakran v. State Tax Comm., 73 A.D.2d 989; Tax Law, §1138(a)].

B. That although the Audit Division was justified in relying upon such information as it had available to determine the taxes due, the petitioners have shown several errors in the audit as summarized below:

1) The audit under consideration overstated gross receipts by failing to account for returned checks and by including in gross receipts deposits made to Citibank account number 026-027-461. Gross receipts for the quarter ended May 31, 1979 should be reduced to $153,268; for the quarter ended August 31, 1979, $128,852; for the quarter ended November 30, 1979, $148,527; for the quarter ended February 28, 1980, $102,964; for the quarter ended May 31, 1980, $103,212; for the quarter ended August 31, 1980, $145,267; for the quarter ended November 30, 1980, $155,340; for the quarter ended February 28, 1981, $190,311; for the quarter ended May 31, 1981, $115,745; and for the quarters ended February 28, 1982 and May 31, 1982, zero.

2) Sales tax was included in the selling price of taxable items, thus the markup on taxable purchases was too high (Finding of Fact "8").

3) Petitioners are entitled to an allowance for pilferage of two percent.

The Audit Division is directed to recompute petitioners' tax liability accordingly.

C. That petitioners have not established that unreported taxable sales during the test period are entirely attributable to a build up of inventory. Their claim that they spent $25,000.00 to $30,000.00 in the first year to expand inventory is not reflected on the Corporation's federal tax return for that year. Furthermore, petitioners' claim that approximately $22,500.00 of the Corporation's taxable purchases for the test period remained in inventory is not credible given the nature of the business and the fact that the new owners began operations two and one-half months before the test period began.

D. That both the test period and markup audit and the analysis of bank deposits established that the Corporation substantially underreported its taxable sales throughout the audit period. Since petitioners have not shown that a reasonable cause existed for their failure to report all taxes when due, the penalties must be sustained.

E. That the petitions of Penn Station Bookstore, Inc., Steve Kaplan and George Kaplan are granted to the extent indicated in Conclusion of Law "B"; that the notices of determination and demands for payment of sales and use taxes due issued March 18, 1983 shall be modified accordingly; and that, in all other respects, the petitions are denied.

DATED: Albany, New York

JUN 30 1986

STATE TAX COMMISSION

Roderick G. W. Chu
PRESIDENT

Francis R. Koenig
COMMISSIONER

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COMMISSIONER