

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

A & J GIFT SHOPS -
JOSEPHINE VANNI

:

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 December 1, 1979 :
through August 31, 1982.

Petitioner, A & J Gift Shops - Josephine Vanni, 563 18th Street, West Babylon, New York 11704, 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 December 1, 1979 through August 31, 1982 (File No. 45606).

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 December 20, 1985 at 10:30 A.M. Petitioner appeared by Robert Morse, Esq. The Audit Division appeared by John P. Dugan, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUES

I. Whether the Audit Division, utilizing external indices, properly determined additional sales tax due from petitioner.

11. Whether all taxes were assessed prior to the expiration of the statutory period of limitation.

FINDINGS OF FACT

1. On May 20, 1983, subsequent to an audit, the Audit Division issued to petitioner, A & J Gift Shops - Josephine Vanni, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, assessing sales tax under

Articles 28 and 29 of the Tax Law for the period December 1, 1979 through August 31, 1982 in the amount of \$4,900.11 plus penalty and interest.

2. A & J Gift Shops ("A & J") was a partnership consisting of Josephine Vanni and her husband, Eugene, and Adele Gottron and her husband, Francis. A & J sold brass and copper knickknacks and household items, dividing the responsibilities, profits and losses from the business according to verbal agreements among the parties.

3. A & J conducted sales from two or more locations. Mr. and Mrs. Vanni were primarily responsible for garage sales held in Suffolk County, while Mr. and Mrs. Gottron were primarily responsible for merchandise sold at the Empire State Flea Market in Westchester County (more commonly referred to as the "Portchester Flea Market"). From December 1, 1979 through May 31, 1981, A & J filed sales tax returns which showed sales from these two separate locations.

4. On or about June 1, 1981, the parties involved in A & J obtained a separate certificate of authority to collect sales tax under the name of Helen Vanni¹ (Identification No. NY9914021290) and began to report sales made at the Portchester Flea Market under that number. This was done because Tax Compliance agents observing the flea market operations advised petitioner that it was obligated to display a valid certificate of authority. Petitioner understood this to mean that it needed two different certificates -- one for the garage sales in Suffolk and one for the flea market sales in Portchester -- rather than a duplicate certificate issued by the Department of Taxation and Finance.

¹ Helen Vanni is the mother of Eugene Vanni and Adele Gottron. The record does not explain the reason why a certificate of authorization was obtained under her name.

5. The assessment at issue resulted from a program of auditing flea market vendors. Tax Compliance agents visited the Portchester Flea Market and prepared field sheets showing the names of vendors, merchandise sold and other miscellany. This information was transmitted to the Audit Division. Based on prior experience, the Audit Division determined that a flea market vendor's taxable sales should equal approximately ten times the rent paid to the promoter (in this case, \$300.00 per month). Because A & J's reported sales were substantially less than this, A & J was contacted by letter and asked to appear for an audit. At a meeting with the auditor, Mr. Vanni appeared for A & J and stated that the flea market portion of the business was run by Mr. and Mrs. Gottron and that the latter had begun to report sales from the flea market under a separate identification number. The auditor made a request for books and records to verify sales for A & J. The only records made available to him by petitioner were sales tax returns, a sample of purchase invoices and a sales journal.

6. Because petitioner did not make available complete sales and purchase invoices for the audit period, the auditor deemed its records inadequate to verify taxable sales, consequently, he employed a rental criteria to determine taxable sales. The auditor multiplied A & J's average monthly rent at the flea market times the number of months in the audit period and multiplied the result by ten to estimate taxable sales for the period of \$99,000.00 ($\$300.00 \times 33 = \$9,900.00 \times 10 = \$99,000.00$). He then calculated an error rate of 42.127 by dividing audited sales by total taxable sales reported by A & J (\$2,350.00, which included sales made at both the flea market and garage sale locations). Taxable sales reported by A & J for each quarterly period under consideration were then increased by the error rate. This resulted in total audited sales of

\$98,998.48. Tax due on this amount (\$5,057.35) was decreased by tax paid (\$157.24) by A & J to calculate a total tax due of \$4,900.11.

7. The flea market business was operated on weekends pursuant to an informal agreement among the parties who constituted A & J. On Saturdays, Mr. Vanni purchased merchandise from his suppliers which he delivered to the flea market. At the close of business on Saturday, Mr. and Mrs. Gottron totalled all sales made from this shipment of merchandise and turned over the profits from these sales to Mr. Vanni. The Gottrons then reimbursed Mr. Vanni for the purchases he made that day and added the unsold merchandise to their standing inventory. They retained any profits from the sale of merchandise in this inventory. From December 1, 1979 through May 31, 1981, A & J reported those sales representing Mr. Vanni's share of the business including flea market and garage sales. Because of a misunderstanding among the parties, sales flowing from Mr. and Mrs. Gottron's share of the flea market business were never reported. This resulted in an underreporting of taxable sales. As of June 1, 1981, Mr. and Mrs. Gottron began reporting all flea market sales under the name of Helen Vanni. For the first six quarters of the audit period, A & J reported total sales of \$1,135.00. In contrast, Helen Vanni reported sales of \$7,065.00 in the last four quarters of the audit period with a tax due thereon of \$400.08. It is the petitioner's position that it has no tax liability for any sales made from the Portchester Flea Market after June 1, 1981.

8. Mr. Gottron conceded that he never kept a complete record of individual sales made at the flea market. At the end of each day, Mrs. Gottron listed from memory each item sold and the price it was sold for (prices were negotiable); this list became the basis for determining gross receipts and sales taxes due. While petitioner conceded that there had been some underreporting of sales

during the audit period, it maintained that it kept sufficient and adequate records for New York State sales tax purposes. In the alternative, petitioner argues that even if resort to external indices was warranted, the use of a rental criteria to estimate taxes due was arbitrary and did not result in a reasonable calculation of taxes due.

9. Petitioner performed its own markup test using purchases for the week of December 8, 1980 and an average selling price for each item. This yielded an average markup per item of 30.54 percent. At hearing, petitioner presented this markup test and purchase records covering the 40 week period of March 30, 1980 through December 8, 1980. Purchase records were incomplete in that invoices submitted were from a single wholesale company, although A & J did business with several suppliers. The record does not reveal whether the purchases were for flea market sales only or included purchases for the garage sales also.

10. A portion of petitioner's sales were made for resale. Petitioner estimated wholesale sales of \$8,613.00 for the audit period and submitted three resale certificates for individuals whose purchases allegedly made up the bulk of those sales. Petitioner did not submit any sales receipts, invoices or other documents to verify these sales.

11. Because of vacations, family illness and slack business periods, petitioner did not operate from the Portchester Flea Market during 30 weeks of the 142 week audit period. During most of these periods, petitioner sublet its space to other vendors to use for storage of merchandise.

12. Petitioner's New York State and Local Sales Tax Return for the period December 1, 1979 through February 29, 1980 was late filed on January 22, 1981.

13. There was no distinguishable difference between A & J and Helen Vanni. In effect, they were one business entity which, during the last four quarters of the audit period, reported sales under two separate certificates of authority.

CONCLUSIONS OF LAW

A. That where a filed return is incorrect or insufficient, the amount of tax due shall be determined from such information as may be available, but "[i]f necessary the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid...or other factors" (Tax Law, 51138, subdivision [a]). Petitioner's failure to retain any verifiable record of taxable sales receipts as required by section 1135 of the Tax Law warranted the Audit Division's resort to external indices to verify taxable sales in accordance with section 1138 of the Tax Law (Matter of Korba v. State Tax Commission, 84 A.D. 2d 655).

B. That where, as here, the taxpayer has neglected to keep the requisite records, a method must be devised for ascertaining the actual taxes due. The Audit Division has a duty to choose a method reasonably calculated to reflect the taxes due; however, exactness **is** not required where the party's own failure to maintain the proper records prevents it (Matter of W. T. Grant Co. v. Joseph, 2 N.Y.2d 196; Matter of Markowitz v. State Tax Commission, 54 A.D.2d 1023 aff'd 44 N.Y.2d 684). In light of the fact that petitioner's records were wholly inadequate even for the purpose of conducting a test period and markup audit, the audit methodology employed was reasonable.

C. That petitioner has established that it did no business at the Portchester Flea Market during 30 weeks of the 142 week audit period (Finding of Fact "11"). Accordingly, petitioner's tax liability shall be recomputed by reducing total audited taxable sales and sales tax due thereon by twenty-one percent.

D. That when petitioner decided to extend its operations from garage sales in Suffolk County to the Portchester Flea Market, it should have filed an amendment to its certificate of authority, thus enabling the Registration and Returns Processing Unit to issue a duplicate certificate of authority for the second location (20 NYCRR 533.1[a][3] and [4]). By improperly applying for a new certificate of authority, while failing to make available complete and separate records for each allegedly separate entity, petitioner prevented the Audit Division from accurately apportioning tax liability between A & J and Helen Vanni. Furthermore, petitioners failed to show that two separate entities actually existed. Under the circumstances, the Audit Division correctly assessed liability against petitioner for all flea market and garage sales which occurred during the audit period. To maintain consistency, tax returns filed by Helen Vanni and tax returns filed by petitioner shall be treated as one. The Audit Division shall recompute taxes due from petitioner accordingly, giving an allowance to petitioner for sales taxes paid by Helen Vanni during the audit period.

E. That inasmuch as petitioner had no sales receipts or records whatsoever, it has failed to establish that any of its sales were for resale. The resale certificates provided and the summaries of sales prepared for hearing are worthless for this purpose without some record kept in the normal course of business to verify the actual amount of such sales.

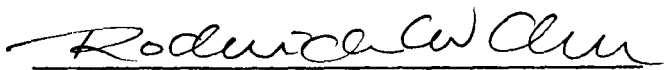
F. That no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return (Tax Law, §1147[b]). Petitioner filed a sales tax return for the period December 1, 1979 through February 29, 1980 on January 22, 1981. The assessment for that time period, issued on May 20, 1983, was made within the statutory period of limitation.

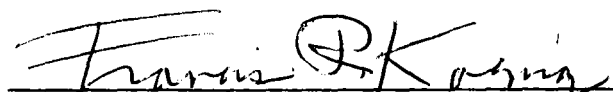
G. That the petition of A & J Gift Shops - Josephine Vanni, is granted to the extent indicated in Conclusions of Law "C" and "D"; that the notice issued on May 20, 1983 shall be modified accordingly; and, in all other respects, the petition is denied.


DATED: Albany, New York

STATE TAX COMMISSION

MAY 28 1986


PRESIDENT


COMMISSIONER


COMMISSIONER

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RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL
(See Reverse)

★ U.S.G.P.O. 1985-480-794

PS Form 3800, June 1985

Sent to	
A + J Gift Shops -	
Street and No. Joseph Vanhi	
563 18th St.	
P.O., State and ZIP Code	
West Babylon, N.Y. 11704	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt showing to whom and Date Delivered	
Return Receipt showing to whom Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

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RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL
(See Reverse)

★ U.S.G.P.O. 1985-480-794

PS Form 3800, June 1985

Sent to	
Robert C. Murse	
Street and No.	
199 Main Street	
P.O., State and ZIP Code	
White Plains, N.Y. 10601	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt showing to whom and Date Delivered	
Return Receipt showing to whom Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	