

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter	of the Petition	:	
	of	:	
	MXC, 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, 1980		:	
through February 28, 1982.		:	

Petitioner, MXC, Inc., 1455 State Street, Schenectady, New York 12303, 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, 1980 through February 28, 1982 (File No. 45615).

A hearing was held before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Office Campus, Albany, New York, on October 9, 1985 at 10:45 A.M. Petitioner appeared by Anthony Pisano, Esq. The Audit Division appeared by John P. Dugan, Esq. (Thomas Sacca, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined additional sales taxes due from petitioner based on an examination of available books and records.

FINDINGS OF FACTS

1. On April 29, 1983, as the result of an audit, the Audit Division issued to MXC, Inc. (hereinafter "petitioner") a Notice of Determination and Demand for Payment of Sales and Use Taxes Due covering the period March 1, 1980 through February 28, 1982 for taxes due of \$13,500.00, plus interest of \$3,225.43,

for a total due of \$16,725.43. The said Notice provided the following explanation for the issuance of the assessment:

"Since you have not submitted your records for audit as required by Section 1142 of the Tax Law, the following taxes are determined to be due in accordance with Section 1138 of the Tax Law, and are based upon available records and information."

2. Petitioner is a Delaware corporation which operates a retail store at 1455 State Street, Schenectady, New York engaged in the business of selling adult books and materials. In addition, petitioner had on premises, coin-operated machines which displayed X-rated films.

3. For the period at issue, petitioner reported the following as taxable sales and paid the following amounts of sales tax:

<u>Period Ending</u>	<u>Taxable Sales</u>	<u>Sales Tax Paid</u>
5/31/80	3,501.00	140.05
8/31/80	5,767.00	230.72
11/30/80	6,246.00	249.84
2/28/81	5,970.00	238.00
5/31/81	5,139.00	205.56
8/31/81	5,306.00	212.24
11/30/81	6,240.00	249.60
2/28/82	5,120.00	204.80
	Total	<u>\$1,730.81</u>

4. Prior to visiting petitioner's place of business, Andre T. Nadeau, Tax Auditor I, was directed to the offices of Attorney Anthony Pisano, petitioner's representative, who presented Mr. Nadeau with a sales journal. Mr. Nadeau requested additional records such as purchase journals, purchase and sales invoices, Federal corporation tax returns, cash register tapes and bank statements, but none of these additional records were made available to him at that time.

5. In or about January, 1982, Mr. Nadeau visited petitioner's place of business. He testified that, prior to the audit herein, he had performed many audits of similar businesses, both in and out of the area. Taking into account

the products sold and the square footage of petitioner's business premises, Mr. Nadeau estimated, for the period at issue, additional taxable sales both from products sold and from coin-operated machines displaying X-rated films. Mr. Nadeau estimated, for the period at issue, the following additional taxable sales and resulting sales tax due from petitioner:

<u>Period Ending</u>	<u>Additional Taxable Sales</u>	<u>Machines</u>	<u>Total Additional Taxable Sales</u>	<u>Tax Due</u>
5/31/80	\$37,500.00	\$1,500.00	\$39,000.00	\$ 1,560.00
8/31/80	37,500.00	1,500.00	39,000.00	1,560.00
11/30/80	37,500.00	1,500.00	39,000.00	1,560.00
2/28/81	41,750.00	1,650.00	43,400.00	1,736.00
5/31/81	41,750.00	1,650.00	43,400.00	1,736.00
8/31/81	41,750.00	1,650.00	43,400.00	1,736.00
11/30/81	41,750.00	1,650.00	43,400.00	1,736.00
2/28/82	45,000.00	1,900.00	46,900.00	1,876.00
			Total	\$13,500.00

6. Subsequent to the audit held herein, petitioner presented, in addition to a monthly sales journal previously submitted to the auditor, weekly sales reports, a Consignment Agreement entered into between petitioner and New England News and monthly consignment sheets from New England News listing goods sold on consignment by New England News to petitioner.

7. It is the contention of petitioner that, during the period in issue, New England News was petitioner's sole supplier of merchandise and that said merchandise was acquired by means of a representative of New England News coming to petitioner's place of business on a monthly basis, taking inventory and replacing whatever had been sold by petitioner since the last inventory. The said New England News representative would then be paid in cash by petitioner's store clerk for whatever merchandise had been replaced in petitioner's inventory. It should be noted herein that there were no consignment sheets presented for the months of March and April, 1980 and that the consignment sheets presented for the period May, 1980 through February, 1982 were consecutively numbered.

8. Petitioner contends that it neither owns nor receives income from the coin-operated machines which display X-rated movies, but no credible evidence was introduced regarding ownership of said machines by anyone other than petitioner.

9. Petitioner's sole witness at the hearing held herein was Edward A. Nicholas, a clerk who began working for petitioner in 1983, after the period at issue. No credible evidence was, therefore, produced regarding the methods of keeping the weekly sales reports and posting the sales figures from the weekly sales reports into the monthly sales journal. It should also be noted that no weekly sales reports were produced by petitioner for weeks ending before May 3, 1980 and for certain of five weeks in 1980, seven weeks in 1981 and one week in 1982 during the period in issue. It should further be noted that, although petitioner is a calendar year taxpayer, the monthly sales journal presented begins with the month of May, 1980 which coincides with the first of the weekly sales reports produced by petitioner.

10. Petitioner's books and records for the period at issue were incomplete and inadequate for purposes of verifying purchases and substantiating taxable sales.

11. For the periods ending May 31, 1980, August 31, 1980 and November 30, 1980, petitioner's total taxable sales for each said period was \$37,500.00. Petitioner's total taxable sales for each of the periods ending February 28, 1981, May 31, 1981, August 31, 1981 and November 30, 1981 was \$41,750.00. For the period ending February 28, 1982, petitioner's total taxable sales was \$45,000.00. As indicated in Finding of Fact "3", supra, petitioner reported taxable sales and paid sales for each of these periods. Petitioner must, therefore, be credited with the amounts of tax paid for each period.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides that 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,..." Section 1132(c) of the Tax Law specifically provides, in pertinent part, that it shall be presumed that all receipts for property or services are subject to tax until the contrary is established and the burden of proving that any receipt is not taxable shall be upon the person required to collect tax.

B. That petitioner's books and records were inadequate and incomplete for purposes of verifying taxable sales or substantiating nontaxable sales. When books and records are incomplete, as here, the use of external indices is permissible (Matter of Korba v. N.Y.S. Tax Commission, 84 A.D.2d 655). Accordingly, the Audit Division's determination of taxable sales and sales taxes due was proper pursuant to section 1138(a) of the Tax Law. Exactness is not required where it is the taxpayer's own failure to maintain proper records which prevents exactness in the determination of sales tax liability (Matter of Markowitz v. State Tax Commission, 54 A.D.2d 1023). In accordance with Finding of Fact "11", petitioner must be credited with amounts of sales tax reported and paid for each of the periods which are the subject of the audit herein.

C. That in Bathrick Enterprises v. Murphy, 27 A.D.2d 215, aff'd. no opn. 23 N.Y.2d 664, the Appellate Division, Third Department held that receipts from coin-operated amusement devices are not subject to section 1105(a) of the Tax Law which imposes a sales tax on retail sales of tangible personal property, since neither title nor possession is transferred. Therefore, that portion of additional taxable sales asserted by the Audit Division which is attributable


to receipts from coin-operated machines displaying X-rated films (\$13,000.00) is hereby cancelled.

D. That the petition of MXC, Inc. is granted to the extent indicated in Conclusions of Law "B" and "C"; that the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on April 29, 1983 is to be modified accordingly; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

JUN 17 1986


PRESIDENT


COMMISSIONER


COMMISSIONER