

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
of	:	
JERICO COLLISION REPAIRS, INC.	:	DECISION
AND MARTIN OKUN AS OFFICER	:	
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.	:	

Petitioners, Jericho Collision Repairs, Inc. and Martin Okun as officer, 250 Jericho Turnpike, Mineola, New York 11501, filed petitions 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 Nos. 46071 and 46072).

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 June 4, 1985 at 1:15 P.M. Petitioners appeared by Isaac Sternheim, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Joseph Pinto, Esq., of counsel).

ISSUE

Whether the Audit Division, utilizing an observation test, properly determined petitioners' additional sales tax due.

FINDINGS OF FACT

1. On June 20, 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 Jericho Collision Repairs, Inc. ("Jericho") in the amount of \$266,360.50 plus penalty of \$63,181.26 and interest of \$83,874.28 for

a total due of \$413,416.04 for the period March 1, 1979 through May 31, 1982. On the same date, the Audit Division issued a Notice of Determination and Demand for payment of Sales and Use taxes Due for the same period against petitioner Martin Okun, President of Jericho Collision Repairs, Inc., in the amount of \$262,280.33 plus penalty of \$63,207.26 and interest of \$82,570.46 for a total due of \$408,058.05.¹ On January 26, 1982, Jericho, by its representative, executed a consent extending the period of limitation for assessment of sales and use taxes for the period March 1, 1979 through February 29, 1980 to June 20, 1983.

2. Jericho operates an automobile body repair shop and towing service. On audit, the auditor found that petitioner maintained a general ledger, a cash disbursements journal and a cash receipts journal but no original source documents such as sales and purchase invoices or written estimates. The auditor asked Mr. Okun to retain current sales and purchase invoices as of August 26, 1982. The auditor then decided to perform an observation test in November, 1982. The observation test was conducted over five days by 3 or 4 auditors who counted the number of cars entering Jericho's premises between 7:00 A.M. and 5:00 P.M. daily. Cars which remained for brief periods of less than two hours were not counted. During the observed week, 37 cars were counted entering Jericho's premises for service or estimates.

3. Petitioner supplied the auditor with 17 sales invoices and 26 written estimates for the month of November, 1982. These documents were not sequentially numbered so that it could not be determined if they represented all the work done by Jericho during the month. Based on the ratio of sales invoices to

1 The discrepancy between the amount assessed against Jericho and the amount assessed against Martin Okun results from a use tax assessment which was assessed against Jericho but not Mr. Okun. The use tax is not in issue.

written estimates supplied, the auditor determined that 40 percent of the cars visiting the premises had repairs done and 60 percent received written estimates only. The auditor applied the ratio to the 37 cars observed entering the premises during the observation test and calculated that 15 cars per week received repair service. The weekly figure was multiplied by 4 to arrive at a monthly figure of 60 cars serviced. The 17 cars reported on sales invoices for the month were subtracted from 60 leaving 43 cars unreported for service. Dividing the 43 unreported cars by the 17 reported cars resulted in a margin of error of 253 percent which was applied to reported taxable sales to determine additional sales and additional sales tax due.

4. Petitioners made allegations to the effect that the observation test resulted in numerous errors and inaccurate audit findings and that complete records for Jericho were available for the entire audit period; however, petitioners offered no evidence in any form to refute the audit findings. Moreover, petitioners' representative was advised by letter at the commencement of the audit to make all books and records available for audit, specifically including sales invoices and purchase invoices. At no time during the audit, at a pre-hearing conference, or at the hearing did petitioners present any evidence that such complete records were available.

CONCLUSIONS OF LAW

A. That a "...vendor is obligated to maintain records of his sales for audit purposes (Tax Law, §1135), and the State, when conducting an audit, must determine the amount of tax due 'from such information as may be available,' but 'if necessary, the tax may be estimated on the basis of external indices' (Tax Law, §1138, subd. [a])." Korba v. New York State Tax Commission, 84 A.D.2d 655. Exactness in determining the amount of sales tax liability is not

required where it is the petitioner's own failure to maintain proper records which necessitates the use of external indices. Markowitz v. State Tax Commission, 54 A.D.2d 1023, aff'd 44 N.Y.2d 684.

B. That petitioners had neither sales invoices nor purchase invoices from which the Audit Division could verify amounts entered on Jericho's books and records and ultimately reported on its sales tax returns. Accordingly, the Audit Division's use of an observation test to determine petitioners' tax liability was proper. Matter of 265 City Island Sea Food Market, Inc., State Tax Commission, May 6, 1983. Moreover, petitioners produced no evidence, either in the form of testimony or documentation, to refute the audit findings and, therefore, they have not met their burden of proving wherein the audit was erroneous.


C. That the petitions of Jericho Collision Repairs, Inc. and Martin Okun, as Officer, are denied and the notices of determination and demand for payment of sales and use taxes due issued June 20, 1983 are sustained.


DATED: Albany, New York

NOV 07 1985

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER