STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions

of

JOY LUD ELECTRONICS, INC.,
SAM KISLIN AND TAMIR SAPIR

DECISION

for Revision **of** Determinations or for Refunds of Sales and Use Taxes under Articles 28 and 29 : **of** the Tax Law for the Period June 1, 1979 through February 28, 1983.

Petitioners, Joy Lud Electronics, Inc., Sam Kislin and Tamir Sapir, 200 Fifth Avenue, New York, New York 10010, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1979 through February 28, 1983 (File Nos. 47469, 48977, 48978 and 50950).

A hearing was held before Dennis M. Galliher, Hearing Officer, at the offices **of** the State Tax Commission, Two World Trade Center, New York, New York on February 25, 1987 at 9:15 A.M. Petitioners appeared by Y. Bar Chama. The Audit Division appeared by John P. Dugan, Esq. (Michael Gitter, Esq., **of** counsel).

ISSUES

I. Whether the Audit Division's determination that petitioner Joy Lud Electronics, Inc. owed additional sales taxes during the period in question was proper.

11. Whether petitioners Sam Kislin and Tamir Sapir were persons responsible to collect and remit sales taxes on behalf of petitioner Joy Lud Electronics within the contemplation of Tax Law §§ 1131(1) and 1133(a).

FINDINGS OF FACT

1. Petitioner, Joy Lud Electronics, Inc. ("Joy Lud"), is engaged in wholesale and retail sales of home electronic appliances, including televisions, stereo systems, etc. Joy Lud's business premises are located at 200 Fifth Avenue, New York, New York.

2. In or about October 1983, the Audit Division commenced an audit of Joy Lud's operations. An auditor visited the business premises and, while there, observed a retail store open to the buying public with customers coming in and buying single items as retail transactions. A schedule of sales tax returns filed by Joy Lud for the period in question, when reviewed, showed gross sales of $6,772,758.00, with Joy Lud reporting taxable sales of less than 1 percent of such gross sales total.

3. The auditor observed a cash register in use at Joy Lud's premises, but upon commencement of the audit cash register tapes were not made available to the auditor. The auditor reviewed Joy Lud's sales, per invoices, for the months of June, July and August 1980 and June, July and August of 1981. The auditor's review of such invoices indicated that they were not consecutively numbered, and that there were missing invoices. Many of the sales invoices reviewed did not explain or specify the items sold or the name of the customer, but rather listed simply the amount of the transaction. The sales invoices did not show on their face any sales tax collected from customers.

4. Based upon review of those sales invoices made available, the auditor determined that eight percent of gross sales by Joy Lud (per its books) were taxable retail sales of tangible personal property. This determination resulted in a finding that $279,669.00 in taxable sales were made by Joy Lud. At hearing, petitioners' representative conceded and did not contest the accuracy

of this determination that eight percent of its sales per books were taxable sales (as opposed to the less than 1 percent taxable sales as reported by Joy Lud on its sales tax returns).

5. In addition to the foregoing, the auditor also analyzed Joy Lud's purchases per books for the period September 1980 through August 1981. Third party verification obtained by the Audit Division in connection with an audit of one of Joy Lud's suppliers, Savemart, Inc., revealed cash purchases of items by petitioner from Savemart. These purchases were reflected on Savemart's books, and on its invoices, but were not reflected on the books or included among invoices maintained by Joy Lud. These unrecorded purchases comprised 15.84 percent of Joy Lud's total purchases. The auditor added an additional 10 percent to Joy Lud's cash purchases from Savemart, deemed additional unrecorded purchases from other suppliers, as an estimate based on audit experience.

6. These unrecorded purchases (25.84 percent of recorded cash purchases) were marked up by 27.9 percent, said markup being taken from the "N.C.R. National Operating Performance Statistics and Survey Report", to arrive at audited sales based on unrecorded purchases. These sales were deemed 100 percent taxable, with the resultant dollar amount of such taxable sales being $1,120,701.00.

7. Total taxable sales as determined on audit, based on the 8 percent sales invoice calculation ($279,669.00; see Finding of Fact "4") plus sales as projected based on unrecorded cash purchases ($1,120,701.00), totalled $1,400,370.00. The auditor computed tax due on such amount and, after allowance of credit for sales tax paid per returns, determined audited additional sales tax due.

8. On September 20, 1982, the Audit Division issued to Joy Lud a Notice of Determination and Demand for Payment of Sales and Use Taxes Due in the

amount of $157,800.00, plus penalty and interest, covering the period June 1, 1979 through May 31, 1980. By a Notice of Assessment Review dated November 9, 1983, the Audit Division reduced this assessment to $55,937.96, plus penalty and interest.

9. On September 20, 1983, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Joy Lud for the period June 1, 1980 through February 28, 1983 in the amount of $155,283.34 plus penalty and interest.

10. On November 23, 1983, the Audit Division issued two notices of determination and demands for payment of sales and use taxes due, one to Sam Kislin and the other to Tamir Sapir, each as officers of petitioner Joy Lud. Each notice spanned the period September 1, 1980 through February 28, 1983 and assessed tax due in the amount of $141,775.66, plus penalty and interest. These assessments against the individuals named therein represent the assertion that such individuals were persons responsible for the collection and remittance of tax on behalf of Joy Lud. Petitioner Sam Kislin served as president of Joy Lud while Tamir Sapir served as its secretary-treasurer. At hearing, petitioners' representative stated that both individuals were persons responsible for the collection and remittance of tax on behalf of Joy Lud. Neither Sam Kislin nor Tamir Sapir was present at the hearing.

11. At hearing petitioners offered no documentary evidence to refute the audit findings. Petitioners' representative alleged that a January 2, 1987 fire at his 1122 Avenue J, Brooklyn office destroyed the taxpayers' records.

12. It is asserted that Joy Lud operated predominantly as a wholesale business, and that its worksheets tied into and reconciled with the amounts shown on its Federal income tax returns. Petitioners assert that the third

party information pertaining to Savemart, Inc. may have reflected items (sales by Savemart to Joy Lud) incorrectly or purposely overstated on Savemart's books and records, thus resulting in an erroneous projection of sales by Joy Lud. In this view, petitioners apparently argue that unrecorded cash purchases were in fact never made by petitioner from Savemart. Finally, petitioners allege that at most, only 8 percent of any unrecorded purchases were turned into taxable retail sales and that the determination of projected sales per unrecorded purchases as being 100 percent taxable is inaccurate. No resale certificates or other evidence to support this position was provided at hearing or at the time of the audit. Finally, petitioners maintain that all cash sales were recorded on Joy Lud's cash register. Petitioners explained that a part of the cash sales receipts were deposited in the bank, with the balance thereof used to make purchases of inventory or pay expenses such as payroll. As noted, no cash register tapes were made available either during or after the audit.

CONCLUSIONS OF LAW

A. That Tax Law section 1138(a)(1) provides that where a return required to be filed is incorrect or insufficient, the Audit Division may determine the amount of tax due from such evidence as may be available including, where necessary, external indices. That here, a comparison of Joy Lud's tax returns with the Audit Division's physical observation of the operation of the premises, its information as gathered from an audit of one of Joy Lud's suppliers, and its review of those books and records made available by petitioner led to a determination that the returns as filed were incorrect. Further, petitioner did not maintain complete, adequate and accurate records, including source documents, from which the Audit Division could, upon audit, determine the total volume of Joy Lud's sales or verify that tax was charged, collected and remitted on all taxable sales made by Joy Lud. Accordingly, the Audit Division properly resorted to estimation audit techniques in determining the amount of tax due from Joy Lud.

B. That the Audit Division's method of determining tax due by Joy Lud was reasonable under the circumstances. In turn, petitioners have failed to sustain their burden of proving errors in any aspect of the audit. Accordingly, the notices of determination as issued to Joy Lud (less the reduction allowed with respect to the September 20, 1982 notice [see Finding of Fact "8"]) must be sustained.

C. That petitioners Sam Kislin and Tamir Sapir are, as admitted, persons responsible for the collection and remittance of sales taxes due and owing by Joy Lud. Accordingly, the notices of determination issued against each of such individuals are sustained.

D. That the petitions of Joy Lud Electronics, Inc., and Sam Kislin and Tamir Sapir as officers of Joy Lud Electronics, Inc., are hereby denied and the notices of determination dated September 20, 1982 (as reduced by Notice of Assessment Review), September 20, 1983 and November 23, 1983 are sustained.

DATED: Albany, New York

JUN 25 1987

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER