

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions

:

of

TRY US DELI, INC.
AND JOHN RAHMING, AS OFFICER

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 June 1, 1979 :
through August 31, 1983.

Petitioners, Try **Us** Deli, Inc. and John Rahming as officer, 731 Bermuda Drive, Forked River, New Jersey 08731, filed petitions for revision of a determination or for refund **of** sales and use taxes under Articles 28 & 29 of the Tax Law for the period June 1, 1979 through August 31, 1983 (File Nos. 50917, 55298 & 58173).

A hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on December 4 1986 at 10:45 A.M. Petitioners appeared by Robert H. Kane, Esq. The Audit Division appeared by John P. Dugan, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUE

Whether the Audit Division, utilizing a standardized rent factor, properly determined petitioners' additional sales tax due.

FINDINGS OF FACT

1. On December 23, 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, Try **Us** Deli, Inc. ("Try **Us** Deli") in the amount of \$8,441.20. plus penalty of \$810.05 and interest of \$101.00.

due of \$9,752.95 for the period December 1, 1982 through August 31, 1983. On December 23, 1983, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Try **Us** Deli in the amount of \$33,190.63, plus penalty **of** \$7,844.86 and interest of \$10,841.67, for a total amount due of \$51,877.16 for the period June 1, 1979 through November 30, 1982. On July 9, 1984, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Try **Us** Deli in the amount of \$4,673.35, plus penalty of \$1,055.57 and interest of \$1,217.58, for a total amount due of \$6,946.50 for the period June 1, 1981 through August 31, 1983. On December 27, 1984, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against John Rahming, as officer of Try **Us** Deli, Inc., in the amount of \$33,190.63, plus penalty of \$8,297.60 and interest **of** \$16,959.97, for a total amount due **of** \$58,448.20 for the period June 1, 1979 through November 30, 1982. On the same date, the Audit Division issued a Notice of Determination and Demand for Payment **of** Sales and Use Taxes Due against John Rahming in the amount of \$4,673.35, plus penalty of \$1,139.03 and interest of \$1,558.20, for a total amount due of \$7,370.58 for the period June 1, 1981 through August 31, 1983. Finally, on December 27, 1984, the Audit Division issued a Notice **of** Determination and Demand for Payment of Sales and Use Taxes Due against John Rahming in the amount of \$8,441.20, plus penalty of \$1,892.00 and interest of \$1,658.13, for a total amount due of \$11,991.33 for the period December 1, 1982 through August 31, 1983. The assessments against both petitioners for the period ending August 31, 1983 included bulk sales tax based upon an estimate of the value of fixed assets of \$10,000.00, or \$825.00 in bulk sales tax. The assets were transferred in a bulk sale transaction which occurred on or about September 1, 1982.

2. Try **Us** Deli was a retail grocery and delicatessen selling taxable items such as beer, soda, paper goods, detergents, pet food, candy and cigarettes as well as providing deli counter service where sandwiches and hot drinks were prepared and sold. The business was operated out of a store located at 5401 Avenue T, Brooklyn, New York. The only records made available to the auditor upon audit were the Federal and State income tax returns for the years in issue and sales and purchases set forth on an accountant's workpapers. At hearing, petitioners produced daily records containing three volumes, one for each of the years 1979, 1980 and 1981, which reflected daily sales, purchases and various expense payments. Petitioners also produced four separate check ledgers covering 1978 through 1983. However, the ledgers were not sequentially numbered and many check stubs were missing. Petitioner did not produce any cash register tapes or purchase invoices even though requested. There were also substantial cash purchases for which no records were kept. No original source documents were retained by petitioner. Petitioner John Rahming testified that the business premises were burglarized and damaged by flooding and that various business records were destroyed. However, no substantiating documentation was produced as corroborative evidence of these events.

3. The Audit Division made a determination that the records produced by the petitioner were insufficient and elected to use a rent factor or operating ratio. This ratio was taken from a Dunn and Bradstreet publication which estimated the cost of doing business for corporations in various categories between July 1976 and June 1977. The Audit Division selected the industry category "food stores" which indicated an operating ratio of 1.49 based upon rent paid on business property. The corporation's rents were taken from its Federal income tax returns for the years 1976 through 1977.

factor to arrive at adjusted gross sales. The Audit Division estimated that 50 percent of petitioners' sales were taxable and arrived at estimated taxable sales by dividing the adjusted gross sales by two. Estimated taxable sales were reduced by reported taxable sales and then multiplied by the proper tax rate to arrive at the additional tax due per quarter for the entire audit period.

4. Even though the Audit Division was able to reconcile gross sales reported on the Federal and State corporation income tax returns and sales tax returns, petitioners failed to provide substantiating documentation, such as cash register tapes or other original documentation, for independent verification.

5. Petitioners produced a closing statement and the testimony of their attorney, Robert H. Kane, **Esq.**, with regard to the actual value **of** fixtures sold with the business on or about the first day of September 1983. Said value was stated to be \$2,000.00 and sales tax paid was stated to be \$165.00, a figure which was confirmed by the Notice to **the** Seller mailed to Try **Us** Deli, Inc. by the sales tax section of the Audit Division on October 26, **1983**.

6. John Rahming was the president of Try **Us** Deli, Inc. and managed the business for the entire period in issue. **His** duties included making purchases, keeping the **books** and records, deciding how much shelf space each item would be allotted and management of all other facets of **the** business.

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 '[i]f necessary, the tax may be estimated' [Tax Law, § 1135(2)].

(Tax Law, § 1138, subd [a], part [1])." (Korba v. New York State Tax Commission, 84 AD2d 655, 656, lv denied 56 NY2d 502.) Exactness in determining the amount of sales tax liability **is** not required where it **is** petitioner's own failure to maintain proper records which necessitates the use of external indices.

(Markowitz v. State Tax Commission, 54 AD2d 1023, affd 44 NY2d 684.)

B. That petitioners had neither sales invoices nor purchase invoices from which the Audit Division could verify the amounts entered on Try **Us** Deli, Inc.'s day books and ultimately reported on the sales tax returns. Accordingly, the Audit Division's use of the rent factor to determine petitioners' tax liability was proper. (Matter of Faliro Enterprises, Inc., State Tax Commission, June 19, 1986.) Moreover, petitioners produced no evidence, either in the form of credible 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 section 1133(a) of the Tax Law provides that "every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article".

D. That petitioner John Rahming was a person required to collect tax within the meaning and intent of section 1131(1) of **the Tax Law and**, therefore, **is** personally liable for the sales and use taxes due from Try **Us** Deli, Inc. in accordance with section 1133(a) of the Tax Law (Matter of A-1 Fence Company, Inc., State Tax Commission, August 7, 1981).

E. That bulk sales tax was paid **by** petitioner on the value of **its** fixtures, \$2,000.00, as evidenced by the closing statement dated September 1, 1983. Since the bulk sale was an arm's length transaction and the Audit Division provided no basis for its estimated value of \$10,000.00

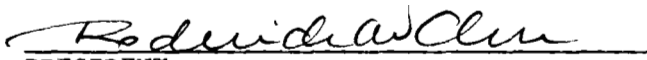
figure is accepted as correct and, therefore, no further bulk sales tax liability should have been assessed.

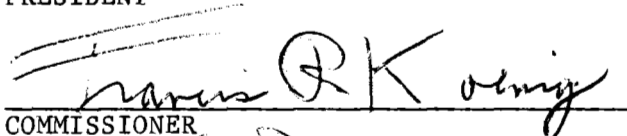
F. That the petitions of Try Us Deli, Inc. and John Rahming, as officer, are granted to the extent set forth in Conclusion of Law "E"; the notices of determination and demands for payment of sales and use taxes due issued on December 23, 1983, July 9, 1984 and December 27, 1984 are to be modified accordingly; and that except as so granted, the petitions are in all other respects denied.

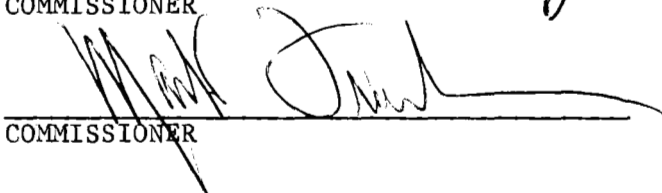
DATED: Albany, New York

STATE TAX COMMISSION

JUN 09 1987


PRESIDENT


COMMISSIONER


COMMISSIONER