

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of :

ANNEX OUTLET, LTD.

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, 1979  
through August 31, 1983.

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Petitioner, Annex Outlet, Ltd., 43 Warren Street, New York, New York 10007, 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, 1979 through August 31, 1983 (File No. 54868).

A hearing was held before Joseph W. Pinto, Jr., Hearing Officer at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 7, 1987 at 9:15 A.M. Petitioner appeared by Isaac Sternheim, CPA. The Audit Division appeared by John P. Dugan, Esq. (Michael Infantino, Esq., of counsel).

#### ISSUE

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

#### FINDINGS OF FACT

1. On May 21, 1984, 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, Annex Outlet, Ltd. ("Annex"), in the amount of \$194,349.41, plus penalty of \$48,587.31 and interest of \$88,358.54, for a total amount due of \$331,295.26 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 period June 1, 1982 through August 31, 1983 against Annex in the amount of \$76,606.20, plus penalty of \$14,469.49 and interest of \$11,469.04, for a total amount due of \$102,544.73. Annex, by its president, Elliot Levy, properly executed four consents extending the period of limitation for assessment of sales and use taxes for the periods in issue thereby allowing the Audit Division to issue their assessments at any time on or before September 20, 1984.

2. Annex operates a retail store selling electronic items such as television sets, car stereos, cassette players and audio and video games. On or about January 14, 1982 the Audit Division made a written request to Annex for all books and records pertaining to its sales tax liability for the period under audit including journals, ledgers, sales invoices, purchase invoices, cash register tapes and exemption certificates. After numerous visits to petitioner's representative's office, only sales tax returns, Federal and State income tax returns, sales invoices and a general ledger were produced. No cash register tapes, sales journal, cash disbursements journal, or purchase book were provided, indicating that the records kept by petitioner were grossly inadequate.

3. In an attempt to verify nontaxable sales which had been claimed by Annex, the Audit Division analyzed bank deposit tickets against mail orders for a test period of June 1, 1981 through August 31, 1981. Since no substantiating documentation was provided for said nontaxable sales, \$89,382.64 in said sales was disallowed for the test period. When compared to total nontaxable sales for the test period there was a resulting margin of error of 71.5222 percent. Said margin of error was applied to nontaxable sales for the entire audit period and resulted in additional tax due of \$83,207.33.

4. When the Audit Division analyzed bank deposit tickets for the test period, June 1, 1981 through August 31, 1981, it was discovered that there were numerous cash deposits, indicating that petitioner did a substantial cash business. Upon discovery of this fact, the Audit Division decided to perform a two-day observation test on June 8, 1983 and June 29, 1983. The average daily cash sales observed on those two days were \$1,648.65. The average daily cash sales were multiplied by six days and thirteen weeks resulting in \$128,594.70 of additional cash sales per quarter. This resulted in \$187,748.28 in additional tax due for the entire audit period. When added to the additional tax found due on nontaxable sales of \$83,207.33 there was a total amount due of \$270,955.61.

5. Petitioner alleged, through its representative, that the observation tests resulted in numerous errors and inaccurate audit findings and that complete records for Annex were available for the entire audit period; however, petitioner offered no evidence in any form to refute the audit findings. Moreover, petitioner's representative was advised by letter at the commencement of the audit to make all books and records available for audit. At no time during the audit, at a pre-hearing conference or at the hearing did petitioner present evidence that complete records were available.

#### CONCLUSIONS OF LAW

A. That a "vendor **is** obligated to maintain records of his sales for audit Purposes (Tax Law, section 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, section 1138, subdivision [a])." (Korba v. New York State Tax Commission, 84 AD2d 655.) 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 petitioner did not have cash register tapes, sales journals, a cash disbursements journal or purchase book from which the Audit Division could verify amounts entered on petitioner's books and records and ultimately reported on its sales tax returns. Accordingly, the Audit Division's use of an observation test to determine petitioner's tax liability was proper. (Matter of 265 City Island Seafood Market, Inc., State Tax Commission, May 6, 1983.) Moreover, petitioner produced no evidence, either in the form of testimony or documentation, to refute the audit findings and, therefore, it has not met its burden of proving wherein the audit was erroneous.

C. That Tax Law § 1145(a)(1), in effect during the period in issue states, in pertinent part, as follows:

"(a)(1)(i) Any person failing to file a return or pay over any tax to the tax commission within the time required by this article shall be subject to a penalty of five percent of the amount of tax due **if** such failure is for not more than one month, with an additional one percent for each additional month or fraction thereof during which such failure continues, not exceeding twenty-five percent in the aggregate; ...."


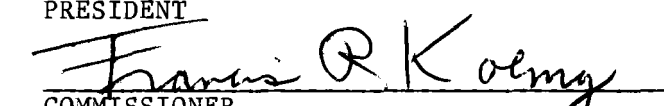

Petitioner herein **is** subject to penalty for failing to pay over the tax determined to be due in accordance with the audit performed by the Audit Division.

D. That the petition of Annex Outlet, Ltd. **is** denied and the notices of determination and demands for payment of sales and use taxes due issued May 21, 1984 are sustained together with applicable penalty and interest.

DATED: Albany, New York

STATE TAX COMMISSION

**AUG 14 1987**

  
PRESIDENT  
  
COMMISSIONER  
  
COMMISSIONER