

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :

of :

SCHUYLER MARKET, INC. :

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, 1980 :  
through February 28, 1983.

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DECISION

In the Matter of the Petition :

of :

PETER DEMARTINO :  
OFFICER OF SCHUYLER MARKET, INC. :

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, 1980 :  
through February 28, 1983.

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Petitioners, Schuyler Market, Inc., 689 Columbus Avenue, New York, New York 10025 and Peter DeMartino, Officer of Schuyler Market, Inc., 50 West 97th Street, #5c, New York, New York 10025, 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 June 1, 1980 through February 28, 1983 (File Nos. 54964 and 54965).

A hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 30, 1986 at 9:15 A.M. Petitioners appeared by Verini & Gottlieb, Esqs. (Stephen Gottlieb, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Gary Palmer, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined additional sales taxes due from Schuyler Market, Inc. based on an examination of available books and records.

II. Whether Peter DeMartino is personally liable for sales taxes due from Schuyler Market, Inc.

III. Whether a consent extending the period of limitation for assessment of sales and use taxes executed on behalf of a corporation also extends the statute of limitations for issuing an assessment against an officer of the corporation.

FINDINGS OF FACT

1. Petitioner Schuyler Market, Inc. ("Schuyler") operated a Pioneer supermarket located at 689 Columbus Avenue, New York, New York.

2. On May 21, 1984, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner Schuyler Market, Inc. covering the period June 1, 1980 through February 28, 1983 for taxes due of \$59,422.98, plus interest of \$16,663.70, for a total of \$76,086.68. On the same date, an identical notice was issued against petitioner Peter DeMartino, as officer of Schuyler.

3. The Audit Division obtained consents from Schuyler extending the period of limitation for assessment of sales and use taxes for the period June 1, 1980 through May 31, 1981 to June 20, 1984. One consent was executed by Natale DeMartino, President and the other by Peter DeMartino, Secretary. Petitioner Peter DeMartino took the position that the consents were valid only for the corporation and consequently the notice issued to him individually on May 21, 1984 was not timely with respect to the period June 1, 1980 through February 28, 1981.

4. On audit, the Audit Division found that Schuyler maintained inadequate and incomplete books and records. Schuyler did not have any cash register tapes to make an independent verification of entries in the cash receipts journal. In addition, purchase invoices for the audit period were not available because they were destroyed by a flood in the basement. In order to verify the accuracy of taxable sales reported, the Audit Division listed all purchases by supplier from the checkbook. Purchases from suppliers that sold only taxable products (beer, soda, tobacco) amounted to \$551,383.00. Pioneer (Schuyler's primary supplier) and several drug suppliers sold nontaxable as well as taxable items. The Audit Division analyzed seven invoices from Pioneer during the months of March 1983 and May 1983 and determined that 38.9 percent of the purchases would be taxable when resold. The taxable percentage for the drug suppliers was 67 percent. Purchases totalling \$2,080,094.00 were categorized as follows: Pioneer - \$1,493,908.00; drugs - \$20,099.00; beer - \$259,570.00; soda - \$168,048.00; slush puppies - \$424.00; slipper tree - \$325.00; cigarettes - \$120,134.00; cigars - \$13,348.00; and miscellaneous - \$4,238.00. The purchases from Pioneer were reduced by 60 percent to account for meat and 38.9 percent was applied to the balance to arrive at the taxable purchases; 67 percent was applied to the "drug" category. The total taxable purchases for the audit period amounted to \$868,852.00 after allowing 3 percent for pilferage. A markup percentage was computed for each category of purchases based on cost and selling prices in effect at the time of the audit for selected items within each category. The markup percentages were applied to the applicable purchases to determine taxable sales of \$1,215,024.00. This amount was adjusted to \$1,208,424.00 to reflect sales of \$6,600.00 to exempt organizations. Schuyler

reported taxable sales of \$478,130.00 for the same period, leaving additional taxable sales of \$730,294.00 and tax due thereon of \$59,422.98.

5. Schuyler reported its taxable sales on sales tax returns filed by estimating that 13 percent of gross sales were taxable.

6. Schuyler is a Pioneer Market and, as such, is a member of an association of supermarkets which buys and advertises on behalf of its members in order to be competitive with larger supermarket chains.

7. Schuyler took the position that the taxable sales determined by the Audit Division were excessive for the following reasons:

(a) The percentage of taxable purchases from Pioneer was approximately 20.5 percent. The invoices analyzed by the Audit Division included an extraordinary amount of seasonal and promotional purchases of taxable items.

(b) The markups computed by the Audit Division did not give consideration to sales and promotions and this high volume sales of low markup items.

(c) The markups did not account for the inflationary trend of selling prices between 1980 and 1983.

8. Peter DeMartino was the secretary-treasurer of Schuyler and was active in the day-to-day management and financial affairs of the business. He produced no evidence with respect to his personal liability for any taxes due from Schuyler.

#### CONCLUSIONS OF LAW

A. That section 1135(a) of the Tax Law provides that every person required to collect tax shall keep records of every sale and of all amounts paid, charged or due thereon and of the tax payable thereon. Such records shall include a true copy of each sales slip, invoice, receipt or statement.

B. That Schuyler did not have cash register tapes or any other record that would serve as a verifiable record of taxable sales. Under such circumstances,

the Audit Division's use of a test period and markup percentage audit was proper in accordance with section 1138(a) of the Tax Law (Matter of Licata v. Chu, 64 NY2d 873).

C. That the Audit Division reasonably calculated Schuyler's tax liability with the limited books and records available for audit. When a taxpayer's recordkeeping is faulty, exactness is not required of the examiner's audit (Matter of Meyer v. State Tax Commission, 61 AD2d 223). Schuyler failed in its burden of establishing that the amount of tax assessed was erroneous (Matter of Licata, supra).

D. That Peter DeMartino was a person required to collect tax pursuant to section 1131(1) of the Tax Law and therefore bears personal liability for the tax determined due from Schuyler in accordance with section 1133(a) of the Tax Law.

E. That section 1147(c) of the Tax Law provides that prior to the expiration of the period for the assessment of additional tax, a taxpayer may consent in writing to an extension of the period within which additional tax due may be determined. Such consent by a corporation extends the liability of its corporate officers required to collect tax under sections 1131(1) and 1133(a) of the Tax Law for the period consented to by the corporation. Therefore, since Schuyler signed a consent to an extension, the liability of Peter DeMartino was extended for the same period (Matter of Jack Galione, State Tax Commission, October 6, 1982).

F. That the petitions of Schuyler Market, Inc. and Peter DeMartino, Officer of Schuyler Market, Inc., are denied and the notices of determination and demands for payment of sales and use taxes due issued May 21, 1984 are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

OCT 20 1986

Roderich W. Chen  
PRESIDENT

Francis R. Koenig  
COMMISSIONER

Michael J. J. J.  
COMMISSIONER