

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

BLACKJACK DISTRIBUTORS, 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 March 1, 1981
through November 30, 1983.

DECISION

In the Matter of the Petition

of

JAMES SCOTTI,
OFFICER OF BLACKJACK DISTRIBUTORS, 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 March 1, 1981
through November 30, 1983.

Petitioner Blackjack Distributors, Inc., c/o James Scotti, 163-03 26th Avenue, Flushing, New York 11358, 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, 1981 through November 30, 1983 (File No. 55135).

Petitioner James Scotti, officer of Blackjack Distributors, Inc., 163-03 26th Avenue, Flushing, New York 11358, 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, 1981 through November 30, 1983 (File No. 55136).

A hearing was held before Robert F. Mulligan, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 19, 1986 at 9:45 A.M. and continued at the same location and

before the same Hearing Officer on March 11, 1987 at 1:15 P.M., with all briefs to be submitted by April 24, 1987. Petitioners appeared by Alvin Kalstein, CPA. The Audit Division appeared by John P. Dugan, Esq. (Joseph W. Pinto, Jr., Esq., of counsel, at the hearing on June 19, 1986 and Patricia L. Brumbaugh, Esq., of counsel, at the hearing on March 11, 1987).

ISSUES

I. Whether a field audit properly determined unpaid sales and use taxes due from Blackjack Distributors, Inc.

11. Whether James Scotti was a person required to collect tax on behalf of Blackjack Distributors, Inc.

FINDINGS OF FACT

1. Petitioner Blackjack Distributors, Inc. ("the corporation") operated a pornographic book store at 210 West **42nd** Street in New York City during the period at issue. In addition to books, the corporation sold magazines, adult novelties and other items. It also offered its customers the use of coin-operated film viewing machines.

2. (a) The audit was commenced on August 29, 1983, when the auditor went to the corporation's place of business and obtained its accountant's name from the cashier. The auditor then scheduled an appointment with the accountant for October 11, 1983. On said date, the auditor went to the accountant's office. The accountant was not in, but had left the corporation's records with his secretary.

(b) The auditor found that the records were incomplete and inadequate. The auditor had requested the last two Federal income tax returns filed, sales tax returns, bank statements, the general ledger and disbursement records. The auditor was furnished with the Federal income tax returns for the fiscal years ended September 30, 1981 and September 30, 1982. The sales tax returns were

also provided and it was noted that the returns for the period December 1, 1980, through August 31, 1981 showed taxable sales only; gross sales were not shown. A total of 13 bank statements for the 20 month period October 1981 through May 1983 were also presented to the auditor. Deposits shown on said statements ranged from a low of \$270.00 for the month of May 1982, to a high of \$25,500.00 for the month of February 1983, with a monthly average of \$7,610.51. The general ledger was available, but there were no entries for the period December 1, 1980 through September 30, 1981. No purchase invoices were furnished.

(c) Because records were deemed to be inadequate, sales were estimated. The auditor used the gross sales reported on the corporation's Federal income tax return for the fiscal year ending September 30, 1981, i.e., \$282,654.81. The officer's salary of \$7,600.00 shown on the return appeared to be too low, so the auditor increased it by \$10,000.00, added that figure to gross sales and rounded the figure to \$300,000.00. Quarterly sales were then determined to be \$75,000.00 (\$300,000.00 divided by 4).

(d) The auditor used the taxable percentage of 95.80 percent determined in a prior audit of the business, which audit covered the period June 1, 1974 through May 31, 1977. The 4.20 percent treated as exempt sales consisted of publications which had been deemed to be newspapers.

(e) Application of the 95.80 percent taxable percentage to the \$75,000.00 estimated sales per quarter resulted in \$862,200.00 in taxable sales for the audit period. Tax due was computed to be \$70,592.67. Tax paid or assessed earlier was deducted, leaving additional tax due of \$59,870.89.

3. On June 20, 1984, the Audit Division issued the following notices of determination and demands for payment of sales and use taxes due for the period March 1, 1981 through November 30, 1983:

(a) to Blackjack Distributors, Inc. - tax due \$55,000.41, penalty \$11,675.76, plus interest;

(b) to James Scotti, individually and as officer of Blackjack Distributors, Inc. - tax due \$59,216.40, penalty \$12,223.83, plus interest.

The higher amount assessed against Mr. Scotti was due to assessments issued and credited against the corporation and not its officers. Penalty and statutory interest were recommended because errors determined in the prior audit had not been corrected.

4. Although the corporation did not segregate receipts from the film viewing machines, which were nontaxable, from other sales which were taxable, records made available by the Audit Division after the hearing showed that such receipts constituted an average of 15.14 percent of gross sales during the period October 1, 1974 through September 30, 1977.

5. During and prior to the period at issue, the stock of the corporation was owned by Alfred Scotti, brother of petitioner James Scotti. The business was originally operated by Alfred Scotti, but when James Scotti **lost** the lease to his own store, he went to work for the corporation. James Scotti became president of the corporation and managed the business during the audit period. However, the date he became president and manager does not appear in the record. James Scotti had the authority to, and in fact did, sign checks on behalf of the corporation.

6. Petitioners contend that the corporation's business started failing in late 1981 and that eventually, in December 1983, the inventory and fixtures were turned over to the corporation's landlord for back rent owed. The corporation, it is claimed, ceased doing business at that time.

CONCLUSIONS OF LAW

A. That Tax Law § 1138(a)(1) provides, in pertinent part, as follows:

"If a return required by this article **is** not filed, or if a return when filed **is** incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available. If necessary, the tax may be estimated **on** the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors."

B. That where a taxpayer's records are incomplete **or** insufficient, the Audit Division may select a method reasonably calculated to reflect the sales and use taxes due, and the burden then rests upon the taxpayer to demonstrate by clear and convincing evidence that the method of audit or amount of tax assessed **was erroneous**. (Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858.)

C. That, in this case, the records of Blackjack Distributors, Inc. were clearly incomplete in that only a portion of the general ledger was available, only **13** out of 20 bank statements were produced and no invoices were presented. Accordingly, subject to certain modifications, infra, it was proper for the Audit Division to estimate taxes based on sales per the Federal income tax returns and the taxable percentage from an earlier audit of the same business.

D. That although it was permissible to estimate taxes, it was improper for the Audit Division to assume, without further investigation, that the officer's salary shown on the 1981 return was inadequate. Accordingly, sales are reduced to \$282,654.81 per year, or \$70,663.70 per quarter.

E. That the taxable percentage **is** to be reduced from 95.80 percent to 80.66 percent based on an allowance of 15.14 percent for nontaxable film viewing receipts (Finding of Fact "4").


F. That petitioner James Scotti was a person required to collect tax on behalf of Blackjack Distributors, Inc. within the meaning of Tax Law §§ 1133(a) and 1131(1) and is personally liable for payment of the taxes owed by the corporation.

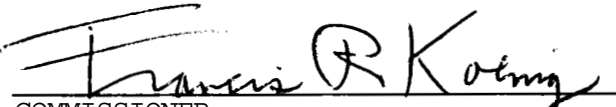
G. That the petitions of Blackjack Distributors, Inc. and James Scotti, as officer, are granted to the extent indicated in Conclusions of Law "D" and "E"; and except as so granted, the petitions are denied and the notices of determination and demands for payment of sales and use taxes due issued on June 20, 1984, as so modified, are sustained.

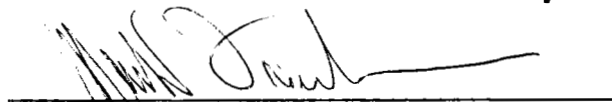
DATED: Albany, New York

STATE TAX COMMISSION

AUG 14 1987


PRESIDENT


COMMISSIONER


COMMISSIONER