

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

ISABEL GROCERY STORE

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, 1980
through April 22, 1983.

Petitioner, Isabel Grocery Store, c/o Oscar Sosa, 5218 8th Avenue, Brooklyn, New York 11220, 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 June 1, 1980 through April 22, 1983 (File No. 56754).

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 October 22, 1986 at 2:45 P.M., with all briefs to be submitted by November 22, 1986. Petitioner appeared by Sol Lipper, P.A. The Audit Division appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUE

Whether the Audit Division's computation and assessment of tax against petitioner was proper.

FINDINGS OF FACT

1. Oscar Sosa, d/b/a Isabel Grocery Store, owned and operated a small grocery store located at 5218 8th Avenue, Brooklyn, New York. On or about April 22, 1983, Mr. Sosa sold Isabel Grocery Store to Enid Grocery Store, Inc.
2. On August 22, 1983, the Audit Division, through its Brooklyn District Office, issued a Notice of Determination and Demand for Payment of Sales and

Use Taxes Due to petitioner, Isabel Grocery Store. The notice was addressed to Isabel Grocery Store at 5218 8th Avenue, Brooklyn, New York and was sent by certified mail. Said notice encompassed the period June 1, 1980 through April 22, 1983 and determined additional sales tax due of \$2,739.35, plus penalty of \$512.87 and interest of \$506.81, for a total amount due of \$3,759.03.

3. The notice mailed to petitioner was issued under "Notice Number S830822740C" and it also contained the notation "BSQ#147,534". The following explanation was shown on the notice:

"As a result of a review of returns filed and you not sending information requested, 40% of your reported gross sales are held to be taxable. The following taxes are determined to be due in accordance with Section 1138 of the Sales Tax Law.

THE TAX ASSESSED HEREIN HAS BEEN ESTIMATED AND/OR DETERMINED TO BE DUE IN ACCORDANCE WITH THE PROVISIONS OF SECTION 1138 OF THE TAX LAW AND MAY BE CHALLENGED THROUGH THE HEARING PROCESS BY THE FILING OF A PETITION WITHIN 90 DAYS."

4. Petitioner challenged the aforementioned assessment by a letter to the Audit Division dated August 29, 1983. The Audit Division, in turn, responded by alleging that said letter did not constitute a timely petition to contest the notice of determination and by alleging that the assessment as determined was proper and valid.

5. Following a hearing, the Commission issued its decision, on June 12, 1986, that a timely petition to contest the assessment herein had been filed and remanded the matter for further hearing with respect to the merits of the assessment.

6. As noted, the assessment was issued based upon petitioner's alleged failure to respond to and return an information questionnaire (Bulk Sale Questionnaire No. 147534) issued by the Audit Division in connection with the bulk sale by petitioner of its business. Without such information as requested

upon the questionnaire, the Audit Division, based upon office experience, determined that forty percent of petitioner's reported gross sales were taxable sales. Tax was calculated thereon and, after allowance of credit for those taxes paid by petitioner per returns, the instant assessment of \$2,739.35 resulted.

7. At hearing, petitioner produced a copy of a completed **bulk** sale questionnaire and maintained that the bulk sale questionnaire had been returned to the Audit Division as requested. However, there was no testimony or other evidence as to the date, time and place of mailing or other proof of delivery of such questionnaire to the Audit Division.

8. Petitioner also alleged that its sales tax returns, as filed during the period, reflected a range of from twenty to thirty percent of its gross sales reported as taxable sales and that the Audit Division's calculation of forty percent amounts to a penalty against petitioner for failure to respond to the bulk sale questionnaire.

CONCLUSIONS OF LAW

A. That section 1135(a) of the Tax Law provides, in part, 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. In addition, section 1132(c) of the Tax Law provides, in pertinent part, that:

"It shall be presumed that **all** receipts for property or services of any type mentioned in subdivisions (a), (b), (c) and (d) of section eleven hundred five, are subject to tax until the contrary is established, and the burden of proving that any receipt...is not taxable hereunder shall be upon the person required to collect tax".

B. That petitioner has not provided evidence to substantiate its assertion that the bulk sale questionnaire was completed and returned to the Audit Division, or that the information requested thereon was otherwise provided.

Faced with such lack of response, the Audit Division accepted petitioner's reported gross sales per petitioner's sale tax returns; however, it asserted, based on office experience, that forty percent of said reported gross sales were taxable sales. The Audit Division, in effect, disallowed a portion of petitioner's claimed nontaxable sales.


C. That petitioner, in turn, has failed to sustain its burden of proof pursuant to Tax Law section 1132(c) to show that the Audit Division's assessment based on forty percent, as described, was erroneous and that the varying percentages **of** nontaxable sales per petitioner's returns were correct. Accordingly, the assessment as issued must be sustained (Matter of North East Seafood Trading Co., Inc., State Tax Commn., February 18, 1986) .


D. That the petition of Isabel Grocery Store is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated August 22, 1983 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

FEB 03 1987


PRESIDENT


COMMISSIONER


COMMISSIONER