

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions

of

KUSHNER'S DELICATESSEN, INC.
AND BURTON KUSHNER, AS OFFICER

DECISION

for Revision of Determinations or for Refunds :
of Sales and Use Taxes under Articles 28 and 29
of the Tax Law for the Period June 1, 1980
through May 31, 1984.

Petitioners, Kushner's Delicatessen, Inc. and Burton Kushner, as officer, 185 Richards Street, Brooklyn, New York 11231, each filed a petition for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1980 through May 31, 1984 (File Nos. 57571, 57882, 63222 and 64098).

A hearing was held before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 24, 1987 at 1:15 P.M., with all briefs to be filed by May 11, 1987. Petitioners appeared by Irving Cimring, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Mark F. Volk, Esq., of counsel).

ISSUE

Whether the Audit Division, in the absence of books and records, properly determined the additional sales tax liability of Kushner's Delicatessen, Inc. for the period June 1, 1980 through May 31, 1984, based on the findings of a prior audit.

FINDINGS OF FACT

1. At all times relevant, petitioner Kushner's Delicatessen, Inc. ("petitioner") operated a delicatessen in the Red **Hook** section of Brooklyn at

185 Richards Street. Petitioner sold cigarettes, beer and sandwiches, as well as some dairy items, canned goods, bread and meat by the pound. Petitioner had no facilities for eating on the premises and all sales were take-out.

2. On or about June 21, 1983, the Audit Division initiated an audit of petitioner's books and records for the period June 1, 1980 through May 31, 1984. This was the second recent audit of petitioner's books and records, which had previously been audited for the period September 1, 1976 through February 29, 1980. For the first audit period, the Audit Division determined that petitioner underreported taxable sales by 199.77 percent. At the time of the second audit, the first audit was under protest. Petitioner complained that it should not be audited again until the first audit was resolved and threatened to withhold its books and records. Failing to be dissuaded by petitioner's objections, the Audit Division continued its audit.

3. Petitioner provided the auditor with bank statements and its accountant's workpapers. The auditor requested but was not provided with cash register tapes, U.S. corporation income tax returns, and purchase invoices for the three-month test period of March, April and May of 1983. On March 20, 1984, after numerous appointments to review petitioner's books and records were either postponed by petitioner's accountant or otherwise proved fruitless, the Audit Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due assessing a tax due of \$6,031.68, plus penalty of \$1,507.92 and interest of \$2,600.19, for a total amount due of \$10,139.79 for the period June 1, 1980 through May 31, 1981. The aforesaid notice was timely issued pursuant to a consent executed by petitioner that extended the statute of limitations for assessment of sales and use taxes for the period June 1, 1980 through February 28, 1981 to March 20, 1984. The

issuance of the notice was also instigated by the Audit Division's failure to obtain another consent from petitioner. The tax deficiency was arrived at by applying the 199.77 percent error ratio (as determined in the first audit) to reported taxable sales of \$37,742.00. This resulted in additional taxable sales of \$75,396.00 which, when multiplied by the 8 percent tax rate, resulted in additional taxes due of \$6,031.68.

4. On or about July 20, 1984, the auditor advised petitioner that he now required purchase invoices for the entire audit period in lieu of just the test period, otherwise, the audit would be completed using the error ratio from the first audit. Petitioner advised the auditor that many purchase invoices were destroyed during recent break-ins and could not be made available. Consequently, on September 20, 1984, the Audit Division issued to petitioner a second Notice of Determination and Demand for Payment of Sales and Use Taxes Due assessing a tax due of \$5,568.18, plus penalty of \$1,392.05 and interest of \$1,789.06, for a total amount due of \$8,749.29 for the period June 1, 1981 through May 31, 1982. The tax deficiency was computed by applying the 199.77 percent error ratio to taxable sales reported of \$33,785.00. This resulted in additional taxable sales of \$67,493.00 which, when multiplied by the appropriate sales tax rate (8% and 8½%), resulted in additional taxes due of \$5,568.18.

5. Finally, on February 8, 1985, after it concluded that no additional books and/or records would be forthcoming, the Audit Division issued to the petitioner a third Notice of Determination and Demand for Payment of Sales and Use Taxes Due assessing a tax due of \$8,946.15, plus penalty of \$1,799.19 and interest of \$1,772.28, for a total amount due of \$12,517.62 for the period June 1, 1982 through May 31, 1984. On the same date, the Audit Division also issued a similar notice to Burton Kushner with the following explanation:

"You are personally liable as officer of Kushner's Delicatessen, Inc., under Sections 1131(1) and 1133 of the Tax Law for the following taxes determined to be due in accordance with Section 1138(a) of the Tax Law."

The tax deficiency was computed by applying the 199.77 percent error ratio to taxable sales reported of \$26,262.00 for the periods ended August 31, 1982 through May 31, 1983 and November 30, 1983, plus estimated taxable sales of \$18,672.00 for the periods ended August 31, 1983, February 29, 1984 and May 31, 1984 (no returns were filed for these periods). This resulted in additional taxable sales of \$108,438.00 (including the estimated taxable sales of \$18,672.00) which, when multiplied by the 8 $\frac{1}{4}$ percent sales tax rate, resulted in taxes due of \$8,946.15. The record does not indicate why Burton Kushner was not held liable for taxes determined to be due for the period June 1, 1980 through May 31, 1982.

6. At the hearing, petitioner complained, as it did on prior occasions to the Audit Division, that the auditor's request for purchase invoices for the entire audit period was unreasonable. Petitioner maintained that an observation test should have been performed which would have shown how badly business had deteriorated in that section of Brooklyn.

7. Petitioner contended that the business was closed for a time near the end of the audit period because the owner had been arrested. Petitioner further claimed that it did not sell beer for an unspecified period of time at the end of the audit period.

8. Petitioner offered no evidence to support its contentions. Also, no testimony or evidence was offered on the liability of Burton Kushner for the taxes assessed against him as an officer.

CONCLUSIONS OF LAW

A. That, in view ~~of~~ the missing purchase invoices (see Finding of Fact "4"), petitioner failed to maintain books and records required under section 1135(a) of the Tax Law. Without proper books and records, the Audit Division was unable ~~to~~ verify taxable sales reported or to determine such sales accurately. It was, therefore, proper and correct for the Audit Division to determine the petitioner's taxable sales from available information as provided in section 1138(a) of the Tax Law (~~see~~ Hatter of Chartair, Inc. v. State Tax Commission, 64 AD2d 44).

B. That the audit procedures used by the Audit Division, namely, the results of a prior audit, to determine petitioner's sales tax liability were proper.


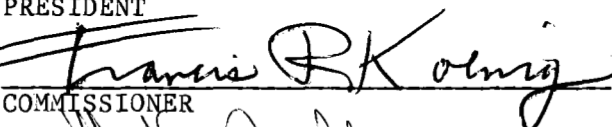

C. That once established that the Audit Division selected a method of calculation reasonably designed to reflect the tax due, it was incumbent upon petitioner to show by clear and convincing evidence that the method of audit or amount of tax assessed was erroneous. It cannot be said from the testimony or evidence presented at the hearing that petitioner has sustained its burden (see Matter of Carmine Rest. v. State Tax Commission, 99 AD2d 581).

D. That the petitions of Kushner's Delicatessen, Inc. and Burton Kushner, as officer, are denied and the notices of determination and demands for payment of sales and use taxes due issued March 20, 1984, September 20, 1984 and February 8, 1985 are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

AUG 21 1987


PRESIDENT

COMMISSIONER

COMMISSIONER