

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition

of

MARILYN KRAMER,
OFFICER OF BEACON HILL SPORTSWEAR, INC.

DETERMINATION

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 September 1, 1981 :
through August 31, 1984.

Petitioner, Marilyn Kramer, officer of Beacon Hill Sportswear, Inc., 37A Main Street, Monsey, New York 10952, 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 September 1, 1981 through August 31, 1984 (File No. 60398).

A hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 11, 1987 at 1:15 P.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Gary Palmer, Esq., of counsel).

ISSUES

I. Whether the Audit Division's determination of Beacon Hill Sportswear, Inc.'s sales and use tax liability during the period at issue was proper.

11. Whether petitioner is personally liable pursuant to Tax Law §§ 1131(1) and 1133(a) for the sales and use tax due from Beacon Hill Sportswear, Inc.

111. Whether the Audit Division's assertion of penalty pursuant to Tax Law § 1145(a)(1) was proper.

FINDINGS OF FACT

1. On February 20, 1985, following an audit, the Audit Division issued to petitioner, Marilyn Kramer, officer of Beacon Hill Sportswear, Inc., a Notice

of Determination and Demand for Payment of Sales and Use Taxes Due for the period September 1, 1981 through August 31, 1984 asserting \$16,177.51 in sales tax due plus penalty and interest. The tax asserted due from petitioner was based on the results of an audit of Beacon Hill Sportswear, Inc. (the "corporation"), and upon the assertion that petitioner was personally liable for sales tax due from the corporation pursuant to Tax Law §§ 1131(1) and 1133.

2. During the period at issue, petitioner was president of the corporation, which was engaged in the retail sale of women's sportswear, and she actively managed its day-to-day affairs. Petitioner also signed sales tax returns on the corporation's behalf during the audit period.

3. On audit, the Audit Division reviewed the books and records of the corporation and found a discrepancy between gross sales as reported on the corporation's sales tax returns and gross sales as determined from the corporation's records. The Audit Division then calculated the corporation's audited taxable sales for the audit period based upon the corporation's own records. The Audit Division made allowances for the corporation's wholesale sale of old stock at the end of each quarter and deposits of personal funds into the corporation's accounts. These calculations resulted in a finding of \$359,576.00 in additional taxable sales and the additional tax due as set forth in the notice of determination herein.

4. Petitioner presented no evidence to refute the Audit Division's assertion that she was a responsible officer of the corporation, nor did she dispute the basic audit methodology. Petitioner did contend that the Audit Division had failed to make an allowance for certain nontaxable sales made during the audit period. Petitioner contended that the corporation had made sales to New Jersey residents and New Jersey deliveries of merchandise with

respect to such sales. The corporation's store was located near the New York-New Jersey border. Petitioner, however, produced no evidence of specific transactions which resulted in a New Jersey delivery; rather, petitioner produced only general statements that such sales were made during the audit period with no indication as to specific amounts of the sales or the specific dates of the purported transactions.

5. On each of its sales tax returns filed during the audit period, the corporation listed identical amounts for gross sales and taxable sales. On no part of these returns did the corporation claim any nontaxable sales.

CONCLUSIONS OF LAW

A. That Tax Law § 1138(a)(1) provides that "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." Under the circumstances herein, the Audit Division properly determined the corporation's sales tax liability based upon information contained in the corporation's own books and records. Petitioner has failed to show wherein such methodology was improper. Additionally, petitioner has failed to establish the existence of the amount of nontaxable sales as alleged herein. In this regard, it is noted that petitioner presented no evidence of specific nontaxable transactions.


B. That in light of Finding of Fact "2", the Audit Division properly determined that petitioner was a person required to collect tax imposed by Article 28 of the Tax Law pursuant to Tax Law § 1131(1). The Audit Division's assertion of petitioner's personal liability pursuant to Tax Law § 1133(a) for tax collected or required to be collected by the corporation was therefore proper.

C. That petitioner has failed to establish that the failure to properly report and remit the sales tax at issue herein was due to reasonable cause and not willful neglect (~~see~~ 20 NYCRR 536.5). With respect to this issue, the amount of the deficiency **is** noted. Also, although petitioner contended at hearing that the corporation had made nontaxable sales during the audit period, the corporation claimed no nontaxable sales on its sales tax returns filed during the audit period. Accordingly, the Audit Division's assertion of penalty herein was proper.

D. That the petition of Marilyn Kramer, officer of Beacon Hill Sportswear, Inc., **is** in all respects denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated February 20, 1985, is sustained.

DATED: Albany, New York

SEP 11 1987


ADMINISTRATIVE LAW JUDGE