

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of :

MILT LEVIN, LTD. : **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 September 1, 1977 :
through May 31, 1984.

Petitioner, Milt Levin, Ltd., 35 East 8th Street, New York, New York 10003, 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, 1977 through May 31, 1984 (File No. 61261).

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 29, 1987 at 1:15 P.M. Petitioner appeared by Melvin M. Steier, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Gary Palmer, Esq., of counsel).

ISSUE

Whether the Audit Division properly estimated petitioner's sales tax liability for the audit period.

FINDINGS OF FACT

1. During the audit period, petitioner, Milt Levin, Ltd., operated a retail men's clothing store.

2. On February 20, 1985, as the result of a field audit, the Audit Division issued against petitioner two notices of determination and demands for payment of sales and use taxes due pursuant to Articles 28 and 29 of the Tax Law. The first notice covered the periods: September 1, 1977 through November 30,

1977; June 1, 1978 through November 30, 1978; **March** 1, 1979 through February 29, 1980; June 1, 1980 through August 31, 1980. It asserted a total tax due for those periods of \$33,637.12 plus penalty and interest. The second notice was for the period December 1, 1980 through May 31, 1984 and asserted a total tax due of \$36,877.92 plus penalty and interest.

3. Petitioner, by its president, executed two consents extending the period of limitation for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law. Together, they extended the period of limitation for the taxable period December 1, 1980 through February 28, 1982 to June 20, 1985.

4. At the commencement of the audit, the auditor was told by petitioner's representative that no books or records were available because they had been subpoenaed by the "General Corporation Tax Unit" (also referred to as the "enforcement unit"). When the auditor contacted the enforcement unit, she was informed that the subpoenaed records consisted of 60 days worth of cash register tapes and sales receipts generated by cash and credit card sales. No other records had been obtained pursuant to the subpoena.

5. Since the auditor was unable to obtain adequate books and records to verify petitioner's reported sales, she estimated taxable sales on the basis of information available, in this case, information supplied by the enforcement unit. The 60 day period for which sales receipts were available consisted of 60 non-consecutive days, primarily in 1979 and 1980, but a few receipts from 1978, 1981 and 1982 were also included. The gross receipts for these 60 days totalled \$43,764.49. Adjusting for sales tax included in the gross figure, the auditor calculated average daily taxable sales of \$673.82. This figure was used to calculate taxable sales for the period December 1, 1980 through May 31, 1984 of \$743,292.48. Reported taxable sales were subtracted from this amount

to calculate additional taxable sales of \$450,997.00, with a tax due on that amount of \$36,877.92. At the same time, it was determined that sales and use tax returns had not been filed for eight sales tax quarters in 1977, 1978, 1979 and 1980. The results of the audit were used to determine sales taxes due for these eight quarters as well.

6. At a Tax Appeals Bureau conference, petitioner established that sales tax returns had been filed for all periods assessed, except those quarters ending November 30, 1978 and February 29, 1980. As a consequence, the Audit Division agreed to cancel assessments for the following periods; September 1, 1977 through November 30, 1977; June 1, 1978 through August 31, 1978; March 1, 1979 through November 30, 1979 and June 1, 1980 through August 31, 1980. In addition, the Audit Division conceded that total tax due for the periods September 1, 1978 through November 30, 1978 and December 1, 1979 through February 29, 1980 should be reduced to \$6,207.12.

7. At hearing, petitioner offered no evidence. It protested the modified assessment on the ground that records of sales from a random sixty day period could not accurately reflect taxable sales for a three year audit period.

CONCLUSIONS OF LAW

A. That under section 1135 of the Tax Law, every person required to collect tax is also required to keep records of every sale and of all the amounts paid, charged or due on that sale and of the tax payable on that sale. Such records are to be available for inspection and examination upon demand by the Tax Commission and to be preserved for a period of three years (Tax Law §1135). Where such records are not made available, or where, upon examination, the records are deemed insufficient to verify taxable sales, the Audit Division is empowered by Tax Law § 1138(a)(1) to determine the amount of tax due from

such information as may be available; where necessary, the tax may be estimated on the basis of external indices. In the absence of the records required to be kept under section 1135, the Audit Division may select any audit methodology reasonably calculated to reflect sales taxes due, and the taxpayer must then show the method of audit or amount of tax assessed was erroneous (Matter of Carmine Restaurant, Inc. v. State Tax Commn, 99 AD2d 581). Exactness is not required from the audit where petitioner's own faulty recordkeeping has prevented it (Matter of Micheli Contracting Corp. v. New York State Tax Commn, 109 AD2d 957). Inasmuch as petitioner presented no evidence of its sales for the period December 1, 1980 through May 31, 1984, the assessment for that period must be upheld.


B. That the Audit Division has conceded that the assessment for the period September 1, 1977 through August 31, 1980 should be reduced to \$6,207.12 (~~see~~ Finding of Fact "6").

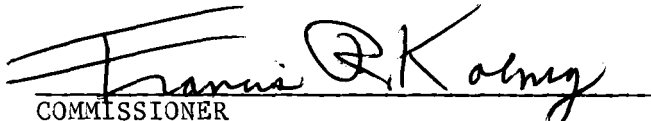
C. That the petition of Milt Levin, Ltd. is granted to the extent indicated by Conclusion of Law "8"; that the notices of determination and demands for payment of sales and use taxes due issued on February 20, 1985 shall be modified accordingly; and that in all respects, the petition is denied.

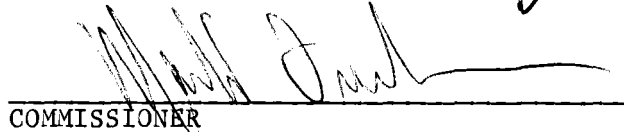
DATED: Albany, New York

STATE TAX COMMISSION

AUG 27 1987


PRESIDENT


COMMISSIONER


COMMISSIONER