

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

MIRIAM LEWIS  
OFFICER OF AQUARIUS BATHS, 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 June 1, 1982  
through November 30, 1982.

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Petitioner, Miriam Lewis, Officer of Aquarius Baths, Ltd., 263 West 70th Street, New York, New York 10023, 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, 1982 through November 30, 1982 (File Nos. 63374, 64492 and 64493).

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 January 28, 1987 at 9:15 A.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

#### ISSUE

Whether sales and use tax was properly estimated by the Audit Division based on prior returns filed by Aquarius Baths, Ltd.

#### FINDINGS OF FACT

1. On November 9, 1983, the Audit Division issued two notices of determination and demands for payment of sales and use taxes due to petitioner, Miriam Lewis, as Officer of Aquarius Baths, Ltd:

(a) The notice for the period June 1, 1982 through August 31, 1982 claimed \$497.98 in sales and use tax, \$89.64 in penalty and \$80.99 in interest.

This notice was cancelled and a new notice for \$497.98 in tax, \$124.50 in penalty and \$163.94 in interest, was issued on March 29, 1985.

(b) The notice for the period September 1, 1982 through November 12, 1982 claimed \$1,386.20 in tax, \$207.93 in penalty and \$183.87 in interest. This notice was cancelled and a new notice for \$1,386.20 in tax, \$346.55 in penalty and \$414.76 in interest, was issued on March 29, 1985.

2. The Department of Taxation and Finance issued warrants and subpoenas against petitioner for collection of the original assessments.

3. The warrants and subpoenas were withdrawn on January 3, 1985, by virtue of a stipulation between petitioner and the Department of Taxation and Finance in a proceeding in the Supreme Court, State of New York, County of New York. As part of the stipulation, petitioner was to be granted a hearing to challenge the said assessments. The hearing was held pursuant to said stipulation.

4. Petitioner concedes her liability with respect to the Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period June 1, 1982 through August 31, 1982, in the amount of \$497.98 plus penalty and interest, as the corporation filed a return for said period in such amount, but without a remittance.

5. Petitioner protests the amount of the assessment for the period September 1 through November 12, 1982.

6. Petitioner was president of Aquarius Baths, Ltd. during the period at issue and does not challenge her liability as a person required to collect tax on behalf of said corporation.

7. The assessment for the period September 1 through November 12, 1982, was issued by the Audit Division "based on the average taxable sales as reported on previous returns filed".

8. The corporation sold whirlpool baths, saunas, spas and other luxury bathroom equipment. Between 85 and 90 percent of the corporation's sales were to designers, contractors and architects. Approximately 10 to 15 percent were retail sales.

9. In February 1982, the corporation was forced to move from its location at 211 West 20th Street, where it had a full showroom with working displays, as the landlord had converted the building into a cooperative with residential lofts. The corporation then took a much smaller space at 109 West 38th Street in Manhattan's Garment District and its business began to deteriorate.

10. During the quarter March 1, 1982 through May 31, 1982, the corporation had \$4,848.97 in taxable sales and remitted to the State \$400.04 in sales tax due.

11. The corporation ceased doing business on October 31, 1982 and subsequently filed for bankruptcy.

12. Petitioner contends that the estimated amount does not reflect the deteriorating nature of the business after the move in February 1982 and that business was very slow during the period at issue, which was just prior to the corporation's filing for bankruptcy.

13. No books or records were made available to the Audit Division by either the corporation or the petitioner.

#### 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 the amount of tax assessed was erroneous. (Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858.)

C. That in this case, petitioner's records were incomplete and inadequate in that no books or records were made available for inspection. Accordingly, it was proper for the Audit Division to estimate sales based on prior returns filed. However, the estimate made fails to recognize the deterioration of the business after its move in February 1982.

D. That the assessment for the period September 1 through November 12, 1982, is to be modified as follows:

Using an average of tax reported for the periods March 1, 1982 through May 31, 1982 and June 1, 1982 through August 31, 1982:

<u>Quarter</u>	<u>Tax Reported</u>
3/1 - 5/31/82	\$400.04
6/1 - 8/31/82	497.98
TOTAL	\$898.02

This results in an average of \$449.01 per quarter. Since the business ceased operations on October 31, 1982, it was in business for only two-thirds of the sales tax quarter ending November 30, 1982. Thus, the tax due for said period is hereby determined to be \$299.34 ( $2/3 \times 449.01$ ).


E. That the petition of Miriam Lewis, Officer of Aquarius Baths, Ltd., is granted to the extent that the Notice of Determination and Demand for Payment

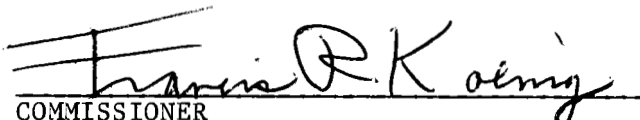
of Sales and Use Taxes Due issued on March 29, 1983, for the period September 1, 1982 through November 12, 1982, is to be modified according to Conclusion of Law "D". Except as **so** granted, the petition **is** denied and the notices of determination and demands for payment of sales and use taxes due issued on March 29, 1985, are otherwise sustained.


DATED: Albany, New York

STATE TAX COMMISSION

JUL 01 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER