

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
A. J. Kurtz & Sons	:	
for Redetermination of a Deficiency or a Revision	:	AFFIDAVIT OF MAILING
of a Determination or a Refund of Sales & Use Tax	:	
under Article 28 & 29 of the Tax Law for the	:	
Period 12/1/72-11/30/75.	:	

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 13th day of August, 1982, he served the within notice of Decision by certified mail upon A. J. Kurtz & Sons, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

A. J. Kurtz & Sons
5 Essex St.
New York, NY 10002

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
13th day of August, 1982.




STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
A. J. Kurtz & Sons :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the :
Period 12/1/72-11/30/75. :
_____ :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 13th day of August, 1982, he served the within notice of Decision by certified mail upon Jack L. Dlugash the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:


Jack L. Dlugash
2109 86th St.
Brooklyn, NY 11214

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
13th day of August, 1982.





STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

August 13, 1982

A. J. Kurtz & Sons
5 Essex St.
New York, NY 10002

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1138 & 1243 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Jack L. Dlugash
2109 86th St.
Brooklyn, NY 11214
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
A.J. KURTZ & SONS	:	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 December 1, 1972	:	
through November 30, 1975.	:	

Petitioner, A.J. Kurtz & Sons, formerly located at 5 Essex Street, New York, New York, 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 December 1, 1972 through November 30, 1975 (File No. 16956).

A formal hearing was held before James T. Prendergast, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 10, 1978 at 2:30 P.M. Petitioner appeared by Jack L. Dlugash, CPA. The Audit Division appeared by Peter Crotty, Esq. (Francis Cosgrove, Esq., of counsel).

ISSUES

I. Whether the audit procedures used by the Audit Division to determine additional sales taxes due from petitioner were proper.

II. Whether the disallowance of petitioner's non-taxable sales by the Audit Division was proper.

FINDINGS OF FACT

1. Petitioner, A.J. Kurtz & Sons, was the operator of a wholesale and retail dry goods store at 5 Essex Street in New York City. The dry goods it carried included sheets, pillow cases, underwear, socks and dresses.

2. Petitioner filed New York State and Local Sales and Use Tax Returns for the period December 1, 1972 through November 30, 1975.

3. Petitioner signed a consent to extend the period of limitation for assessment of sales and use taxes for the period December 1, 1972 through November 30, 1975 to December 19, 1976.

4. On October 1, 1976, as the result of an audit, the Audit Division issued against petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due assessing \$39,868.88 additional tax plus \$17,372.90 penalty and interest for the period December 1, 1972 through November 30, 1975.

5. On audit, the Audit Division found that the sales as recorded in petitioner's cash book for the periods March 1, 1974 through May 31, 1974 and December 1, 1974 through February 28, 1975 exceeded the sales as reported on petitioner's sales and use tax returns for the same periods by \$5,856.00 or 28.28 percent. The Division applied this percentage to the taxable sales as reported on the sales and use tax returns for the audit period to arrive at additional taxable sales of \$37,443.00 and tax due of \$2,788.27. The petitioner agreed to the above test period. At the hearing, the petitioner's representative conceded this amount.

6. The Audit Division further found that of petitioner's non-taxable sales for the period September 1, 1974 through February 28, 1975, sales totalling \$15,636.82 or 31.82 percent were unsubstantiated by an exemption document or proof of an out-of-country delivery. The Division applied this percentage to petitioner's non-taxable sales to arrive at disallowed non-taxable sales of \$494,886.00 and tax due of \$37,080.61.

7. Petitioner's evidence in support of sales where ultimate delivery was made out-of-country consisted of invoices of exporters which indicated the

receipt of cartons of dry goods for shipment to Israel. The invoices were insufficient to establish that the dry goods to be shipped to Israel were sold by petitioner, or that dry goods sold by petitioner were delivered to the purchaser outside New York State.

8. Petitioner's books and records were sufficient for the Audit Division to conduct a complete audit.

9. Petitioner acted in good faith at all times.

CONCLUSIONS OF LAW

A. That section 1132(c) of the Tax Law provides, in part, that it shall be presumed that all receipts for property of any type mentioned in section 1105(a) are subject to tax until the contrary is established, and the burden of proving that any receipt is not taxable shall be upon the person required to collect the tax.

B. That petitioner failed in its burden of proof to show that the non-taxable sales disallowed by the Audit Division were delivered out-of-state or that the purchaser thereof was exempt from payment of sales tax.

C. That although there is statutory authority for use of a test period to determine the amount of tax due, resort to such method of computing tax liability must be founded upon an insufficiency of record keeping which makes it vitually impossible to verify such liability and conduct a complete audit. (Chartair Inc. v. State Tax Commission, 65 A.D. 2d 44, 411 N.Y.S.2d 41.)

D. That since petitioner maintained adequate books and records, the use of a test period to determine disallowed non-taxable sales becomes arbitrary and capricious. Accordingly, petitioner's tax liability on disallowed non-taxable sales is limited to the actual amount found due for the periods tested.

E. That petitioner's tax liability on additional taxable sales (Finding of Fact "5") is sustained in full.

F. That the penalties imposed pursuant to section 1145(a) of the Tax Law and the interest in excess of the minimum statutory rate are cancelled.

G. That the petition of A.J. Kurtz & Sons is granted to the extent indicated in Conclusions of Law "D" and "F" above. The Audit Division is hereby directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on October 1, 1976. Except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

AUG 13 1982

STATE TAX COMMISSION

ACTING

PRESIDENT

COMMISSIONER

COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

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County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 29th day of October, 1982, he served the within notice of Decision by certified mail upon A. J. Kurtz & Sons, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

A. J. Kurtz & Sons
c/o Jack L. Dlugash
2109 86th Street
Brooklyn, NY 11214

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
29th day of October, 1982.

Connie A. Hagelund

J. Vredenburg

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

~~August 13, 1982~~

LE MAIL

OCT 29 1982

A. J. Kurtz & Sons
~~5 Essex St.~~
New York, NY 10002

*c/o Jack L. Dlugash
2109 86th St
Brooklyn NY 11214*

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Phone # (518) 457-2070

Very truly yours,

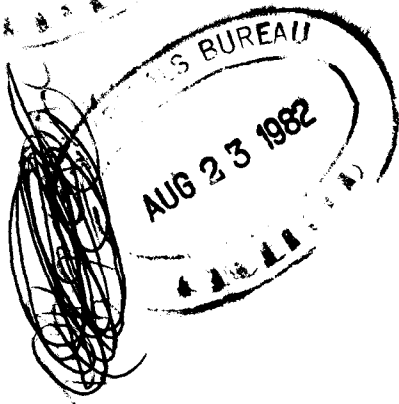
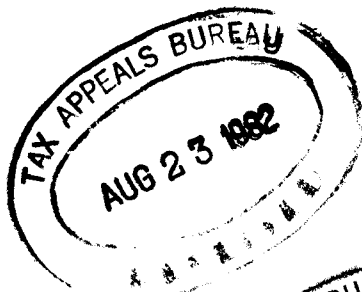
STATE TAX COMMISSION

cc: Petitioner's Representative
Jack L. Dlugash
2109 86th St.
Brooklyn, NY 11214
Taxing Bureau's Representative

TA 26 (9-79)

STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N. Y. 12227

A. J. Kurtz & Sons
5 Essex St.
New York, NY 10002



CERTIFIED

P 230 842 743

MAIL