

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

November 9, 1982

R & G Outfitters, Inc.
and Estate of Bernard Rosenthal
c/o 2 Herricks Ave.
Lawrence, NY 11559

To the Executors:

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
D. Bernard Hoenig
Hoenig & Hoenig
170 Broadway
New York, NY 10038
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
R & G OUTFITTERS, INC. : DECISION
and :
ESTATE OF BERNARD ROSENTHAL :
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 March 1, 1974 :
through April 15, 1977.

Petitioners, R & G Outfitters, Inc. and the Estate of Bernard Rosenthal c/o Hoenig & Hoenig, Esqs., 170 Broadway, New York, New York 10038 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 March 1, 1974 through April 15, 1977 (File No. 19992).

A formal hearing was held before Robert A. Couze, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on August 7, 1981 at 1:30 P.M. Petitioner appeared by Hoenig & Hoenig, Esqs. (D. Bernard Hoenig, Esq., of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq., (Angelo A. Scopellito, Esq., of counsel).

ISSUE

Whether the Audit Division's estimate of petitioners' sales tax liability was proper.

FINDINGS OF FACT

1. R & G Outfitters, Inc. was a business located in Brooklyn, New York. It was a business that is commonly known as an army-navy store where wearing apparel and other miscellaneous items were sold. The business also cashed checks, made loans, transfers and sold American Express Money Orders.

2. On June 15, 1977 a Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued against R & G Outfitters, Inc. and Bernard Rosenthal, individually and as officer, for the period March 1, 1974 to April 15, 1977 asserting liability as follows:

<u>PERIOD ENDING</u>	<u>ADDITIONAL TAX</u>	<u>PENALTY & INTEREST</u>	<u>TOTAL</u>	
"5/31/74	\$ 1,361.53	\$ 830.53	\$2,192.06	
8/31/74	1,461.37	847.59	2,308.96	
11/30/74	1,567.18	861.94	2,429.12	
2/28/75	1,536.14	798.79	2,334.93	
5/31/75	1,485.49	727.89	2,213.38	
8/31/75	1,512.38	695.69	2,208.07	
11/30/75	1,521.29	608.51	2,129.80	
2/29/76	1,435.53	488.08	1,923.61	
5/31/76	1,389.75	389.13	1,778.88	
8/31/76	1,152.54	253.55	1,406.09	
11/30/76	905.89	144.94	1,050.83	
2/28/77	3,696.85	369.68	4,066.53	
4/15/77	1,848.42	-0-	1,848.42	
TOTAL	\$20,874.36	\$7,016.32		\$27,890.68"

3. The tax liability was predicated on an estimate since the auditor was of the opinion that the corporate petitioner did not have proper documentation of its business transactions.

4. The estimate was based on a previous audit which had been made for a series of prior years other than the years in issue.

5. The audit in issue herein was conducted May 17, 1977.

6. The corporate petitioner's accountant and sole witness, Steven J. Greenberg, CPA prepared its sales tax returns for the period 1974 until it went out of business in 1977.

7. Mr. Greenberg was retained by the corporate petitioner not only for the preparation of sales tax returns for the periods of time in issue but also for the purpose of creating a set of books based on the history of the business that transpired in the store. In creating the books Mr. Greenberg was required

to and did utilize the evidence or documents that were available to him, such as bank statements, weekly and daily cash register sales tapes and any other third party data that would have been available, such as cancelled checks, etc. The books were kept, inventories were made and all tax returns were prepared and filed; all based on the same information.

8. The cash register tapes, the corporate books, the bank statements and invoices from suppliers were all maintained in the store. Allegedly, all of these records were destroyed during a fire which occurred in October 1976.

9. The corporate petitioner's witness did not offer any reason as to why the taxpayer did not maintain any books and records for the period of time subsequent to the fire.

10. The auditor estimated the asserted tax deficiency because he said the records given to him were basically Mr. Greenberg's worksheets for the years 1974 and 1975 and a cash receipts and cash disbursements summary showing monthly figures for sales and purchases for 1976. It was also the auditor's position that Mr. Greenberg's worksheets were self-serving.

11. The testimony of corporate petitioner's witness did not indicate whether he had "certified" the accuracy of the records from which the summary information illustrated on the worksheets had been taken and the returns prepared. Moreover, a request by the auditor for source documents to verify the accuracy of the summary information shown on the worksheet for 1976 was not complied with.

12. However, the auditor admitted that had he examined the corporate petitioner's corporate income tax returns, along with Mr. Greenberg's worksheets and that had he considered Mr. Greenberg's notations on his copies of the corporate sales and use tax returns, that he may have possibly come to a more

accurate audit, but on the other hand he did not think such a method was more appropriate than the method which he employed.

13. The auditor did not make any effort to examine any of the documents, records, etc. that Mr. Greenberg put in evidence during the hearing, herein.

CONCLUSIONS OF LAW

A. That the petitioners failed to sustain the burden of proving that the asserted tax deficiency is incorrect.

B. That even if the auditor had examined the documents, records, et cetera that petitioner put in evidence during the hearing herein the auditor still would not have been able to determine the tax liability as they were not supporting documents to verify the accountant's figures.

C. That the Tax Law section 1138 provides as follows:

"§1138. Determination of tax.

(a)(1) 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..."

D. That the Audit Division's determination of additional taxes due was determined "from such information as may be available", in accordance with section 1138(a)(1) of the Tax Law.

E. That the petition herein is denied and that the Notice of Determination and Demand for Payment of Sales and Use Taxes Due is sustained.

DATED: Albany, New York

NOV 09 1982

STATE TAX COMMISSION

Robert V. Bond
PRESIDENT

Frank R. Koenig
COMMISSIONER

[Signature]
COMMISSIONER

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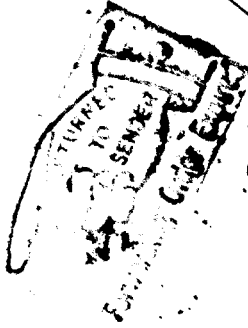
STATE OF NEW YORK

State Tax Commission

TAX APPEALS BUREAU

STATE CAMPUS

ALBANY, N. Y. 12227



D. Bernard Hoenig
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16 Court St.
Brooklyn 11241

CERTIFIED

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MAIL