

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

May 27, 1983

Max Altman  
d/b/a Alliance Window Shade Co.  
601 B. Surf Avenue  
Brooklyn, NY 11210

Dear Mr. Altman:

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 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 Law 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  
Building #9 State Campus  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Leo Ellman  
82 Demarest Mill Rd.  
Nanuet, NY 10954  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
MAX ALTMAN	:	DECISION
d/b/a ALLIANCE WINDOW SHADE CO.	:	
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,	:	
1974 through February 28, 1978.	:	

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Petitioner, Max Altman d/b/a Alliance Window Shade Co., 601B Surf Avenue, Brooklyn, New York 11210, 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, 1974 through February 28, 1978 (File No. 25751).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 14, 1982, at 1:15 P.M. Petitioner appeared by Leo Ellman, P.A. The Audit Division appeared by Paul B. Coburn, Esq. (Anna Colello, Esq., of counsel).

ISSUES

I. Whether a field audit performed by the Audit Division, whereby petitioner's purchases were marked up to determine sales, properly reflected the sales made by petitioner and the additional tax determined due thereon.

II. Whether the Audit Division properly disallowed certain sales claimed by petitioner to be out-of-state sales which would not be subject to New York State sales tax.

FINDINGS OF FACT

1. On April 3, 1979, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Max Altman d/b/a Alliance Window Shade Co. The Notice covered the period September 1, 1974 through February 28, 1978. The Notice was issued as a result of a field audit and asserted additional sales tax due of \$9,199.92 plus penalty and interest of \$5,063.25 for a total due of \$14,263.17.

2. Petitioner timely executed consents to extend the period of limitation for the issuance of an assessment to April 20, 1979.

3. Petitioner did not have records available for audit for the period prior to July, 1976 due to water damage from a fire. Petitioner made available copies of sales invoices for July, 1976 through February, 1978, a cash disbursement book for 1977, and copies of his Federal tax returns for 1975, 1976, and 1977. Petitioner did not maintain a sales journal.

The Audit Division reviewed sales made by petitioner for the entire year 1977. It determined that sales based on the invoices presented totaled \$48,903.00 which included sales tax. Petitioner reported sales of \$76,181.00 on Federal tax returns filed for the year 1977 with purchases of \$46,886.00. Petitioner reported sales of \$18,615.00 on sales and use tax returns filed for the period December 1, 1976 through November 30, 1977. Due to these discrepancies, the Audit Division performed a markup analysis on purchases in order to determine petitioner's sales.

The Audit Division selected sales invoices from September, 1978 for use in determining markups. With the aid of petitioner, the Audit Division determined petitioner's markup on purchases to be 74 percent (some of the actual purchase invoices could not be located to determine costs). It applied

74 percent to petitioner's purchases of \$46,886.00 from the Federal tax return filed and determined sales of \$81,582.00 for the year 1977.

The Audit Division then reviewed petitioner's sales on which no sales tax was charged for the period September 1 through November 30, 1977. It found that \$4,632.00 of such sales were substantiated by some form of certification. Based on the total sales for that quarterly period, the Division determined that 47 percent of petitioner's sales were nontaxable and applied 47 percent to the gross receipts of \$48,903.00 previously reviewed for the year 1977. The Audit Division thereby determined nontaxable sales for the year 1977 of \$22,984.00. A deduction of these nontaxable sales from the gross receipts determined based on application of the markup on purchases resulted in taxable sales for 1977 of \$58,598.00. The Audit Division then deducted the \$18,615.00 reported by petitioner as taxable sales on sales and use tax returns filed for the period December 1, 1976 through November 30, 1977 and determined unreported taxable sales of \$39,983.00 for the year 1977, or an omission of 215 percent.

The Audit Division applied the 215 percent omission rate to the taxable sales reported by petitioner of \$53,488.00 for the audit period and determined additional taxable sales of \$114,999.00 and sales tax due thereon of \$9,199.92.

4. Petitioner did not distinguish between gross and taxable sales on sales and use tax returns filed. In the preparation of same, petitioner divided the sales tax collected by 8 percent in order to determine taxable sales reported of \$53,488.00 for the entire audit period in issue.

5. Petitioner contended that the markup on purchases used on audit was in error in that it did not allow for waste in cutting shade material and that a 20 to 25 percent discount was given on the sale of venetian blinds. Petitioner offered no documentary evidence that the selling prices used by the Audit

Division, which were taken from petitioner's own sales invoices, were in error nor did he produce documentation of any costs other than those stated or reviewed at the time of the audit.

6. Petitioner's purchases from the Federal tax return which were marked up on audit for the year 1977 erroneously included labor costs for installation. Petitioner's cash disbursement book for the year 1977 showed \$44,081.00 in merchandise purchases.

7. Petitioner made out-of-state deliveries of merchandise sold and kept such sales in a separate sales book. The Audit Division was not made aware of this fact at the time of the audit. At a prior conference held with petitioner, the out-of-state sales book was made available and certain sales were followed up by the Audit Division for verification; however, these were disallowed. Petitioner made the following out-of-state deliveries which were verified through petitioner's customers during the year 1977:

<u>CUSTOMER</u>	<u>SALE AMOUNT</u>
Sloane	\$12,114.00
General Window	13,211.00
Moloff	1,190.00
Gordon	800.00
Corona	400.00
Total	<u>\$27,715.00</u>

8. Finally, petitioner argued that since the Audit Division's examination of nontaxable sales for the period September 1 through November 30, 1977 disclosed that all were substantiated, the audit results should be limited to the error in reporting tax collected of \$7.97<sup>1</sup> or a margin of error of .018 percent which results in additional tax due of \$77.02 for the audit period.

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<sup>1</sup> The Audit Division found petitioner underreported tax of \$7.97 during the quarter ended November 30, 1977; however, it did not segregate this omission in the results of the audit findings. Presumptively this error is reflected in the markup application method of audit.

9. Petitioner acted in good faith without intent to evade any additional tax due.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides that if a return when filed is incorrect or insufficient, the amount of tax due shall be determined from such information as may be available. If necessary, the tax may be estimated on the basis of external indices such as purchases.

In view of the inconsistencies between the sales invoices provided to the Audit Division, the sales reported on sales and use tax returns filed, and the sales reported on Federal tax returns, the Audit Division's use of purchases to verify sales was proper and in accordance with the provisions of section 1138(a) of the Tax Law.

B. That in applying the markup percentage to petitioner's purchases from the Federal tax return filed for the year 1977, the Audit Division failed to consider the fact that installation labor costs were included. The purchases marked up for that period are accordingly reduced to \$44,081.00 pursuant to Finding of Fact "6". That the markup determined by the Audit Division applied to the merchandise purchases only results in sales of \$76,700.94 for the year 1977. It may therefore be reasonably concluded that the sales of \$76,181.00 as reported on petitioner's Federal tax return filed for the year 1977 were correct.

C. That the Audit Division reviewed and found that \$22,984.00 of petitioner's sales were nontaxable (Finding of Fact "3"). Petitioner further substantiated nontaxable sales of \$27,715.00 as being delivered outside New York State (Finding of Fact "7"). Petitioner's taxable sales for the year 1977 were therefore \$25,482.00 of which he reported \$18,615.00 on sales and use tax

returns filed for the period. Petitioner's omission error in reporting taxable sales is hereby reduced to 36.89 percent.

D. That resort to the use of a test period as a method of computing tax liability must be founded upon an insufficiency of record keeping which makes it virtually 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).

That petitioner did not have records available for audit for the period September 1, 1974 through June 30, 1976. Petitioner did have sales invoices available for audit for the period July, 1976 through February 28, 1978. These records, however, were not presented in their entirety at the time of audit. The Audit Division's use of the test period of calendar year 1977 was proper.


E. That the penalty and interest in excess of the minimum statutory rate are cancelled.

F. That the petition of Max Altman d/b/a Alliance Window Shade Co. is granted to the extent indicated in Conclusions of Law "C" and "E" above; that the Audit Division is directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued April 3, 1979; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

MAY 27 1983

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Max Altman :  
d/b/a Alliance Window Shade Co. :

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 :  
9/1/74-2/28/78. :

State of New York  
County of Albany

David Parchuck, 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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Max Altman, d/b/a Alliance Window Shade Co., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Max Altman  
d/b/a Alliance Window Shade Co.  
601 B. Surf Avenue  
Brooklyn, NY 11210

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  
27th day of May, 1983.

David Parchuck

William A. Haglund

AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Max Altman :  
d/b/a Alliance Window Shade Co. :

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 9/1/74-2/28/78. :

State of New York  
County of Albany

David Parchuck, 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 27th day of May, 1983, he served the within notice of Decision by certified mail upon Leo Ellman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Leo Ellman  
82 Demarest Mill Rd.  
Nanuet, NY 10954

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  
27th day of May, 1983.

David Parchuck

William W. DeLong  
AUTHORIZED TO ADMINISTER  
OATHS PURSUANT TO TAX LAW  
SECTION 174

P 481 207 813

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

PS Form 3800, Feb. 1982

Sent to <b>Leo Ellman</b>	
Street and No. <b>82 Demarest Mill Rd.</b>	
P.O., State and ZIP Code <b>Manvet, NY 10954</b>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
<b>TOTAL Postage and Fees</b>	<b>\$</b>
Postmark or Date	

P 481 207 812

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

PS Form 3800, Feb. 1982

Sent to <b>Max Altman</b> <b>d/b/a Alliance Window Shades</b>	
Street and No. <b>601 B. Surf Avenue</b>	
P.O., State and ZIP Code <b>Brooklyn, NY 11210</b>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
<b>TOTAL Postage and Fees</b>	<b>\$</b>
Postmark or Date	