

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

November 10, 1983

Casino Smoke Shop, Inc.  
6 W. Park Ave.  
Long Beach, NY 11516

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 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  
Robert Katz  
66 North Village Ave., P.O. Box 876  
Rockville Centre, NY 11570  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
CASINO SMOKE SHOP, INC. : 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 March 1, 1977 :  
through October 6, 1979.

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Petitioner, Casino Smoke Shop, Inc., 6 West Park Avenue, Long Beach, New York 11561, 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, 1977 through October 6, 1979 (File No. 34829).

A formal hearing was held before Doris Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 8, 1982 at 9:15 A.M., with all briefs submitted by June 22, 1983. Petitioner appeared by Robert Katz, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Alexander Weiss, Esq., of counsel).

ISSUE

Whether the Audit Division properly computed the assessment issued against petitioner in reliance on an external index, specifically, a statement by the new owner of the store regarding sales volume at the time of his takeover of the business.

FINDINGS OF FACT

1. On May 28, 1981, the Audit Division issued to petitioner, Casino Smoke Shop, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due under Articles 28 and 29 of the Tax Law for the period March 1, 1977

through October 6, 1979 in the amount of \$29,291.05, plus interest. The method employed to calculate the assessment will be discussed in detail infra.

2. During the audit period, Paul Birkahn was the sole shareholder and officer of Casino Smoke Shop, Inc. The business was conducted from a small store, occupying approximately 600 square feet, situated on a commercial street in a residential neighborhood. The store was open six and one-half days per week: 8 A.M. to 6 P.M. Monday through Friday, 8 A.M. to 5 P.M. on Saturday and 9 A.M. to 1 P.M. on Sunday. Mr. Birkahn's aim, when he purchased the business and throughout the period he operated it, was to augment the wholesale portion of the business, since the retail side was very poor. In pursuit of this aim, petitioner purchased cigarettes in volume for cash from two suppliers: Sanders, Langson and South Shore Tobacco. Most of petitioner's sales were made to small retail stores, who did not sell in sufficient volume to warrant purchasing from a regular jobber. Petitioner also made retail sales of cigarettes and sundry items.

3. Sanders, Langson and South Shore Tobacco provided petitioner with invoices for all purchases made. Petitioner, on the other hand, did not furnish its wholesale sales purchasers with receipts or invoices, but records of wholesale sales were maintained by Mr. Birkahn on a monthly basis. Petitioner introduced in evidence such records for the period April, 1978 through March, 1979, reflecting sales made to 25 different wholesale accounts in amounts ranging from approximately \$36 to \$1,684. The monthly sales totals to these wholesale accounts are shown below.

<u>Month</u>	<u>Sales</u>
4/78	\$ 6,204.96
5/78	7,100.87
6/78	2,304.41
7/78	1,295.89
8/78	1,328.47

9/78	1,111.16
10/78	19,510.40
11/78	18,805.66
12/78	24,897.23
1/79	15,546.88
2/79	16,993.08
3/79	16,901.29
	<u>\$132,000.30</u>

Petitioner introduced, in addition, eight undated, blanket resale certificates executed by the owner or an officer or partner of six of the 25 wholesale purchasers, plus two purchasers not reflected in the aforementioned records. According to Mr. Birkahn, he experienced difficulty in obtaining resale certificates due to, among other things, changes in ownership of the purchasing firms.

All business records were stored at Mr. Birkahn's residence.

Petitioner did not furnish its retail customers with receipts.

4. Petitioner engaged the services of an accountant, who prepared a cash receipts journal, cash disbursements journal (which recorded expenses paid by check), year-end trial balances and required tax returns.

5. Petitioner did not submit a sales and use tax return for the first quarterly period at issue. For the remaining quarterly periods under consideration, petitioner filed returns, reporting gross and taxable sales and remitting sales tax in the following amounts:

<u>Period Ended</u>	<u>Gross Sales</u>	<u>Taxable Sales</u>	<u>Tax</u>
8/31/77	\$ 8,815	\$ 2,873	\$ 229.80
11/30/77	12,780	2,522	176.55
2/28/78	12,320	2,386	167.00
5/31/78	10,311	2,208	154.56
8/31/78	13,887	2,830	198.10
11/30/78	13,588	3,062	214.36
2/28/79	17,512	3,014	210.99
5/31/79	58,593	3,097	216.76
8/31/79	64,772	4,266	298.64
10/6/79	20,317	2,406	168.45
	<u>\$232,895</u>	<u>\$28,664</u>	<u>\$2,035.21</u>

6. On October 6, 1979, the business was sold. The new owner instituted several changes in the business operation including longer hours (7 A.M. until late at night weekdays, 8 A.M. to 8 P.M. Saturdays and 8 A.M. to 5 P.M. Sundays), additional inventory (e.g., additional cigarette brands, coffee, soda, pastry and greeting cards), and elimination of wholesale sales.

7. In approximately December, 1980, the Audit Division commenced an audit of petitioner's books and records. The sales tax examiner requested access to petitioner's purchase invoices for the period April 1, 1978 through March 31, 1979, receipts for cash sales made to and resale certificates issued by wholesale customers, the cash receipts and cash disbursements journals, and the accountant's worksheets and year-end trial balances.

The examiner's testimony regarding the purchase invoices provided him conflicts with Mr. Birkahn's testimony. Mr. Birkahn stated that all purchase invoices were provided as requested; the examiner, however, characterized the invoices as "fragmentary". This conflict can be resolved by reference to the examiner's testimony that he was given invoices from only "a couple of suppliers, Sanders and Langson and let me see, South Shore Tobacco...". His conclusion that the invoices were incomplete thus appears to be founded on his erroneous assumption of more than two suppliers.

Because of the absence of sales receipts, the absence of resale certificates from the majority of wholesale accounts, and petitioner's failure to provide affidavits from wholesale purchasers regarding the amount of their purchases as requested, the examiner disallowed all sales claimed to have been made for resale.

Having concluded that it was impossible to verify either purchases or sales, on December 4, 1980, the examiner visited the store and asked the new

owner the weekly volume of cigarette sales at the time he began operation of the business. The new owner stated he sold approximately 700 to 900 cartons per week.

The assessment was estimated, based on: (a) the sale of 800 cartons of cigarettes per week, with one-half sold as packages and one-half as cartons; (b) an average sale price of 58.75 cents per pack, adjusted for cigarette and sales tax included therein; and (c) weekly miscellaneous taxable sales in the amount of \$100.00.

The examiner attempted to check his estimate by consolidating the following figures from the accountant's worksheets for the fiscal year ended March 31, 1979 to arrive at total gross sales: total sales (of cash purchases) of \$132,000, wholesale and nontaxable sales of \$111,483 and sales for resale of \$29,928.<sup>1</sup>

The examiner also assessed use tax upon petitioner's purchases of fixed assets during the periods ended May 31, 1977, November 30, 1977 and February 28, 1979 in the respective amounts of \$689.60, \$103.32 and \$73.50, and sales tax upon the bulk sale of the business assets in the amount of \$1,050.00.

8. Sometime after the commencement of the audit but prior to its completion, a fire occurred in Mr. Birkahn's apartment building. Although his apartment itself did not catch fire, its contents, including all petitioner's business records with the exception of those in evidence, were severely damaged by smoke and water.

#### CONCLUSIONS OF LAW

A. That by reason of the serious inadequacies in petitioner's record keeping, the Audit Division properly resorted to use of an external indicator

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<sup>1</sup> The accountant's basis for distinguishing between "wholesale and nontaxable sales" and "sales for resale" is unknown.

to calculate petitioner's tax liability. Tax Law sections 1135(a) and 1138(a). Petitioner did maintain a journal of sales to wholesale customers at least for the period April 1, 1978 through March 31, 1979; but sales receipts documenting the journal, as well as receipts documenting sales to all other customers, were totally lacking. Petitioner furnished for the Audit Division's examination purchase invoices reflecting cash purchases made; however, the journal recording purchases made by check was not supported by invoices. Furthermore, in view of the absence of resale certificates from 19 of petitioner's wholesale purchasers, and the absence of any other independent verification of the amounts of sales for resale (by purchasers' affidavits or otherwise), the Audit Division properly treated all sales as taxable.


B. That the Audit Division is hereby directed to recalculate the assessment based on weekly sales of 700 cartons of cigarettes, taking account that the new owner's weekly business hours were longer than petitioner's.

C. That the petition of Casino Smoke Shop, Inc. is granted to the extent indicated in Conclusion of Law "B"; the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on May 28, 1981 is to be modified accordingly; and except as so modified, the assessment is in all other respects sustained.

DATED: Albany, New York

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
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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 March 1, 1977 - October 6, 1979. :  
\_\_\_\_\_ :

AFFIDAVIT OF MAILING

State of New York  
County of Albany

Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 10th day of November, 1983, she served the within notice of Decision by certified mail upon Casino Smoke Shop, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Casino Smoke Shop, Inc.  
6 W. Park Ave.  
Long Beach, NY 11516

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  
10th day of November, 1983.

Maucha L. Drunelle

Connie A. Hagelund



P 470 315 100

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Robert Katz</i>	
Street and No. <i>66 N. Village Ave, P.O. Box</i>	
P.O., State and ZIP Code <i>Rockville Centre, NY 11570</i>	
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	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982

P 470 315 099

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NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Casino Smoke Shop</i> <i>enc</i>	
Street and No. <i>66 W. Park Ave.</i>	
P.O., State and ZIP Code <i>Long Beach, NY 11516</i>	
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	
TOTAL Postage and Fees	\$
Postmark or Date	

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Connie Hagelund, being duly sworn, deposes and says that she is an employee of the State Tax Commission, over 18 years of age, and that on the 10th day of November, 1983, she served the within notice of Decision by certified mail upon Robert Katz the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert Katz  
66 North Village Ave., P.O. Box 876  
Rockville Centre, NY 11570

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  
10th day of November, 1983.

Martha L. Driscoll

Connie Hagelund