

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

March 18, 1983

J. S. Suarez, Inc.
67 E. 56th St.
New York, NY 10022

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 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
Alan M. Yedin
One Renee Place
Massapequa Park, NY 11762
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of

J. S. Suarez, Inc. :

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 3/1/74-2/28/77. :

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 18th day of March, 1983, he served the within notice of Decision by certified mail upon J. S. Suarez, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

J. S. Suarez, Inc.
67 E. 56th St.
New York, NY 10022

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
18th day of March, 1983.

David Parchuck

Constance A. Huguenot

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
J. S. Suarez, Inc. :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
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under Article 28 & 29 of the Tax Law for the :
Period 3/1/74-2/28/77. :
_____ :

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 18th day of March, 1983, he served the within notice of Decision by certified mail upon Alan M. Yedin the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Alan M. Yedin
One Renee Place
Massapequa Park, NY 11762

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
18th day of March, 1983.

David Parchuck

Rennie D. 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	:	
J.S. SUAREZ, 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, 1974	:	
through February 28, 1977.	:	

Petitioner, J.S. Suarez, Inc., 67 East 56th Street, New York, New York 10022, filed a petition for revision of 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 February 28, 1977 (File No. 25534).

A formal hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 18, 1982 at 1:15 P.M. Petitioner appeared by Alan M. Yedin, C.P.A. The Audit Division appeared by Paul B. Coburn, Esq., (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined petitioner's sales which were exempt from sales and use taxes.

II. Whether the Audit Division properly determined petitioner's sales based on petitioner's bank deposits.

III. Whether petitioner collected sales tax on its sales for the period March 1, 1974 through February 28, 1977.

FINDINGS OF FACT

1. Petitioner, J.S. Suarez, Inc., operates a retail store selling ladies handbags.

2. Petitioner executed a consent extending the period for assessment of sales and use taxes for the period March 1, 1974 through February 28, 1977 to December 19, 1978.

3. On December 11, 1978, as the result of an audit, the Audit Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due in the amount of \$45,841.02 as tax, plus \$11,347.80 as penalty, and \$19,192.13 as interest, for a total amount due of \$76,380.95.

4. The Audit Division compared gross sales in the petitioner's sales journals of \$845,084.66 to the gross sales reported in the sales tax returns of \$716,838.42 for the audit period. The difference of \$128,245.24 was attributable to three factors. First, petitioner did not indicate its gross sales on its sales tax return for the period September 1, 1976 through November 30, 1976. Second, petitioner excluded its purported nontaxable sales from its reported gross sales. Lastly, petitioner did not include sales tax in the amount of its reported gross sales, but did include sales tax in gross sales in its sales journals.

5. The Audit Division performed a markup test which disclosed that petitioner had a markup of 60 percent. This percentage was applied to petitioner's purchases which resulted in adjusted gross sales of \$686,363.04.

6. An examination was conducted by the Audit Division of petitioner's purported non-taxable sales for the year 1975. The examination of the non-taxable sales resulted in \$3,345.10 or 73.98 percent being disallowed. This percentage was then applied to petitioner's purported non-taxable sales for the audit period resulting in a disallowance of non-taxable sales of \$18,558.07 and additional tax due of \$1,394.74.

7. The Audit Division also subtracted non-taxable sales of \$25,085.24 shown on petitioner's books from the purported gross sales on its books to get taxable sales of \$819,999.42. Sales tax was determined on the basis of this amount of taxable sales since petitioner did not list sales tax on any of its sales slips and because there was no sign in the store stating that sales tax was included in the price of the item. This resulted in additional tax due of \$4,325.23 for the audit period after giving petitioner credit for the tax it had previously paid.

8. The Audit Division compared bank deposits for the period March 1, 1974 to May 31, 1975 to the reported sales. The period March 1, 1974 to May 31, 1975 was chosen because the auditors did not have the bank statements for the other months. The total monthly bank deposits of \$908,047.75 were compared to gross sales in petitioners books of \$563,696.26. The difference of \$344,351.49 was considered to be unrecorded taxable sales and was divided by the gross sales reported in petitioner's books. This resulted in 61.11 percent of sales being found to be unrecorded. This percentage was then applied to the sales reported in petitioner's books for the entire audit period resulting in additional unrecorded gross sales of \$516,431.24 and additional tax due of \$40,121.05 for the audit period.

9. The Audit Division found that there were no fixed asset purchases for the audit period and concluded that since there were only a small amount of expense purchases they would not be examined.

10. Petitioner maintained a complete set of books and records including bank statements.

11. At the hearing, petitioner's representative produced a schedule of non-sales related bank deposits involving loans, refunds from customs duties,

and insurance. As a result, the Audit Division conceded there were no unrecorded sales.

12. Petitioner's representative produced at the hearing a resale certificate which the Audit Division acknowledged should be taken into account in determining petitioner's non-taxable sales. As a result of this certificate, the Audit Division conceded that the percentage of non-taxable sales disallowed should be reduced to .33379 resulting in \$8,476.00 of additional taxable sales and additional tax due of \$678.00.

13. Petitioner did not offer any evidence to establish that sales tax was separately stated on the invoices.

CONCLUSIONS OF LAW

A. That in view of Finding of Fact "11" the portion of the asserted deficiency of sales and use tax based upon unrecorded sales is cancelled.

B. That resort to the use of a test period to determine the amount of tax due must be based upon an insufficiency of record keeping which makes it virtually impossible to determine such liability and to conduct a complete audit (Matter of Chartair, Inc. v. State Tax Comm., 65 A.D.2d 44; Matter of A.J. Kurty & Sons, State Tax Commission, August 13, 1982). Since petitioner maintained adequate books and records, the use of a test period to determine the amount of petitioner's purported non-taxable sales which were subject to tax was improper. Therefore, petitioner's tax liability arising from disallowed non-taxable sales is reduced to the amount actually found due during the periods tested, with credit to be given for the resale certificate noted in Finding of Fact "12". (see Matter of A.J. Kurty & Sons, supra.)

C. That Tax Law §1132(a) provides, in part, that the tax shall be stated, charged and shown separately on the sales slip given to the customer. Since

petitioner did not list sales tax on its sales slips, the Audit Division properly determined that petitioner had not collected the tax (Matter of William Misfud d/b/a Seven Corners Liquor Store, State Tax Commission, January 2, 1980).

D. That the petition of J.S. Suarez, Inc. is granted to the extent of Conclusions of Law "A" and "B" above; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 11, 1978; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

MAR 18 1983

Richard G. W. Cline
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark J. Hall
COMMISSIONER

P 389 758 728
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <u>J. S. Suarez, Inc</u>	
Street and No. <u>67 E. 56th St.</u>	
P.O., State and ZIP Code <u>New York, NY 10022</u>	
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 389 758 729
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <u>Alan M. Yedin</u>	
Street and No. <u>One Renee Place</u>	
P.O., State and ZIP Code <u>Massapequa Park, NY 11762</u>	
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