

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
James II Galleries, Ltd.

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision
of a Determination or Refund of Sales & Use Tax
under Article 28 & 29 of the Tax Law for the
Period 9/1/77 - 8/31/80.

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 21st day of September, 1984, he served the within notice of Decision by certified mail upon Robert Bandman, 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 Bandman
Prager & Fenton
444 Madison Ave.
New York, NY 10022

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
21st day of September, 1984.

David Parchuck

Connie A. Hagedorn
Authorized to administer oaths
pursuant to Tax Law section 174

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

September 21, 1984

James II Galleries, Ltd.
15 East 57th 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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only 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 Bandman
Prager & Fenton
444 Madison Ave.
New York, NY 10022
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
JAMES II GALLERIES, LTD.	:	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 September 1, 1977	:	
through August 31, 1980.	:	

Petitioner, James II Galleries, Ltd., 15 East 57th Street, New York, New York 10022, 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, 1977 through August 31, 1980 (File No. 37509).

A formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 7, 1983 at 2:00 P.M., with all briefs to be submitted by March 15, 1984. Petitioner appeared by Leonard Spitalnik, C.P.A. and Robert Bandman, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether the Audit Division used proper audit procedures in determining petitioner's additional sales tax due.

FINDINGS OF FACT

1. On February 19, 1982, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, James II Galleries, Ltd., in the amount of

\$38,549.20, plus penalty of \$9,452.30 and interest of \$12,192.89, for a total due of \$60,194.39 for the period September 1, 1977 through August 31, 1980.

2. Petitioner had executed consents extending the period of limitation for assessment of sales and use taxes due for the period September 1, 1977 through August 31, 1980 to March 20, 1982.

3. Petitioner is engaged in the business of selling antique decorative and semi-precious jewelry. The sale prices of the items vary from less than \$100.00 to over \$1,000.00. During the period in issue, petitioner maintained books and records consisting of a general ledger, cash receipts journal, cash disbursements journals, purchase and sales journals, sales invoices, purchase invoices, bank statements and cancelled checks. Petitioner's sales invoices were available for audit, however, they were not sequentially numbered.

4. On audit, the auditor determined that since petitioner's sales invoices were not sequentially numbered, petitioner's books and records were inadequate. Because of the nature of petitioner's business, not all items are sold during the year purchased and, in fact, not all items purchased during the audit period were sold during the audit period. As a result, a markup test to verify the accuracy of petitioner's records would have involved checking numerous invoices to match purchases to sales. The auditor felt that this would be a difficult and time-consuming task. Therefore, he simply took a markup percentage of 154.88 which had been determined upon the audit of another taxpayer. This markup was applied to petitioner's purchases to determine additional taxes due of \$38,034.56, despite the fact that the auditor also calculated an average

markup of 117.5 percent based on two years' statements of account and profit and loss as shown on Federal income tax returns.¹

5. The taxpayer with the 154.88 markup percentage supposedly operated a business similar to petitioner's. The Audit Division, however, failed to show that there were any similarities between the two businesses. In fact, there is some doubt whether the other taxpayer was in the antique jewelry business.² Moreover, no account was taken of petitioner's increase in inventory during the last year of the audit period. The auditor's supervisor testified that "to be fair, we should consider the difference between the opening inventory, which is as of September '77, and the closing inventory as of August of '80". No account was taken of the fact that not all purchases made during the audit period were also sold during the audit period. It was merely assumed that all items purchased were sold during the period.

6. For the tax year 1980, the Internal Revenue Service performed a Tax Compliance Measurement Program audit of petitioner. The result of this item-by-item audit was a disallowance of \$947.00 in expenses with a resulting deficiency of \$436.00 for the year. In spite of this Federal audit, the Audit Division completely disregarded petitioner's Federal returns in attempting to verify the accuracy of petitioner's books and records.

7. Petitioner acted in good faith and there was no attempt made to evade the tax.

¹ The auditor also disallowed \$6,433.00 in nontaxable sales resulting in additional tax due of \$514.64. This amount was not raised as an issue at the hearing.

² Petitioner's representative alleged that he was told orally that the other taxpayer was in the business of selling china and silver.

CONCLUSIONS OF LAW

A. That section 1135(a) of the Tax Law, in effect during the period at issue, provides:

"Every person required to collect tax shall keep records of every sale or amusement charge or occupancy and of all amounts paid, charged or due thereon and of the tax payable thereon, in such form as the tax commission may by regulation require. Such records shall include a true copy of each sales slip, invoice, receipt, statement or memorandum upon which subdivision (a) of section eleven hundred thirty-two requires that the tax be stated separately."

B. That section 1138(a)(1) of the Tax Law provides:

"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, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors."

C. That petitioner maintained all of the records required by section 1135 and, although the Audit Division may employ a markup test to verify the accuracy of such records (Matter of Toysun Restaurant Corp., State Tax Commission, October 22, 1982), the audit method adopted must be "reasonably calculated to reflect the taxes due" (W. T. Grant Co. v. Lazarus, 2 N.Y.2d 196). In the present case, use of a markup percentage from another firm which may or may not have been in a similar business does not, in itself, show that petitioner's books and records were inaccurate. Such a method did not reasonably reflect the taxes due, especially in light of the complete audit performed by the Internal Revenue Service which found only minor discrepancies in petitioner's returns. The additional taxes due are, therefore, to be reduced to \$514.64 and penalty and interest in excess of the statutory minimum are waived.

D. That the petition of James II Galleries, Ltd. is granted to the extent indicated in Conclusion of Law "C"; that the Audit Division is directed to

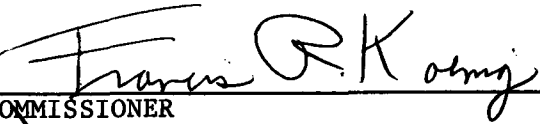
modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued February 19, 1982 accordingly; and that, except as so granted, the petition is in all other respects denied.

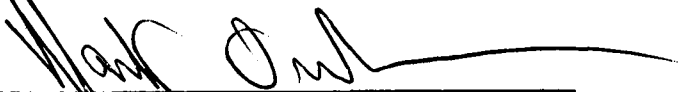
DATED: Albany, New York

STATE TAX COMMISSION

SEP 21 1984


PRESIDENT


COMMISSIONER


COMMISSIONER

P 693 168 641

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517 PS Form 3800, Feb. 1982	Sent to	
	Robert Bandman	
	Street and No.	
	144 Madison Ave.	
	City, State and ZIP Code	
	NY, NY 10022	
	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		

P 693 168 640

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517 PS Form 3800, Feb. 1982	Sent to	
	James H Galleries, Ltd.	
	Street and No.	
	15 East 57th St.	
	City, State and ZIP Code	
	New York, NY 10022	
	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		