

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

June 19, 1986

Deli-Stop, Inc.
88 2nd Avenue
New York, NY 10003

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
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
Norman R. Berkowitz
919 Third Ave.
New York, NY 10022

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
DELI-STOP, INC. :
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 June 1, 1980 :
through February 28, 1983. :

In the Matter of the Petition :
of :
STANLEY DINNER, AS OFFICER OF :
DELI-STOP, INC. :
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 June 1, 1980 :
through February 28, 1983. :

DECISION

In the Matter of the Petition :
of :
SAMUEL DINNER, AS OFFICER OF :
DELI-STOP, INC. :
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 June 1, 1980 :
through February 28, 1983. :

Petitioner Deli-Stop, Inc. 88 2nd Avenue, New York, New York 10003, 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 June 1, 1980 through February 28, 1983 (File No. 58949).

Petitioner Stanley Dinner, as officer of Deli-Stop, Inc., 320 East 58th 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 June 1, 1980 through February 28, 1983 (File No. 48898).

Petitioner Samuel Dinner (now deceased), as officer of Deli-Stop, Inc., 88 2nd Avenue, New York, New York 10003, 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 June 1, 1980 through February 28, 1983 (File No. 48899).

A hearing was held before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 9, 1985 at 9:30 A.M., with all briefs to be submitted by December 12, 1985. Petitioners appeared by Norman R. Berkowitz, Esq. The Audit Division appeared by John P. Dugan, Esq. (Mark F. Volk, Esq., of counsel).

ISSUES

I. Whether a field audit, wherein the Audit Division used an observation test to determine the sales tax liability of petitioner Deli-Stop, Inc., was warranted.

II. If so, whether the assessment resulting from such audit was proper.

III. Whether petitioner Stanley Dinner was a person required to collect and pay over sales tax on behalf of Deli-Stop, Inc. within the meaning and intent of sections 1131(1) and 1133(a) of the Tax Law during the period at issue herein.

FINDINGS OF FACT

1. On September 20, 1983, the Audit Division, as the result of a field audit, issued to petitioner Deli-Stop, Inc. ("the corporation") a Notice of

Determination and Demand for Payment of Sales and Use Taxes Due assessing taxes due of \$53,555.08, plus penalty of \$11,261.97 and interest of \$12,364.88, for a total amount due of \$77,181.93 for the period June 1, 1980 through February 28, 1983. On the same date, the Audit Division also issued notices of determination and demand for payment of sales and use taxes due to petitioners Stanley Dinner and Samuel Dinner as officers of Deli-Stop, Inc. The notice against each officer assessed a tax due of \$51,114.50, plus penalty of \$10,758.92 and interest of \$11,822.28, for a total amount due of \$73,695.70 for the period June 1, 1980 through February 28, 1983. The difference between the amount assessed against the corporation and the officers (\$2,440.58) presumably represents use tax determined to be due on recurring purchases which amount has not been contested and therefore is not at issue herein.

2. On November 8, 1983, the petitioners timely filed petitions for a hearing to review the assessments. The petitioners contend that (1) the corporation's books and records were sufficient to enable verification and audit of its sales tax returns, (2) the audit method adopted was not designed to reflect the proper tax due or to be fair and reasonable, but was arbitrary and capricious, and (3) Stanley Dinner was not a person required to collect, truthfully account for, or pay over the sales taxes on behalf of the corporation during the period at issue.

3. Deli-Stop, Inc. operates a delicatessen-restaurant at 88 2nd Avenue at East 5th Street in New York City. The business is open 20 hours a day, 7 days a week and has 6 tables for restaurant service.

4. On audit, an examiner for the Audit Division initiated an audit of the corporation's books and records. The examiner determined that the books and records were inadequate for the following reasons, (1) bank statements and

purchase invoices were incomplete, and (2) cash register tapes and guest checks were discarded. The examiner next compared gross sales reported on the corporation's sales tax returns to gross sales per its cash receipts journal and determined that gross sales on its sales tax returns were understated by \$296,382.00. This amount was added to reported gross sales to compute audited gross sales of \$895,430.00. The examiner then decided to perform an observation test. On July 21, 1983, two examiners positioned themselves in close proximity to the cash register between 8:30 A.M. and 4:30 P.M. (8 hours). The examiners noted nontaxable sales during this period of \$78.18. The examiners estimated nontaxable sales for the balance of the business day (12 hours) of \$39.09 ($\frac{1}{2}$ the amount of the observed period) and determined nontaxable daily sales of \$117.27 ($\$78.18 + \39.09). Nontaxable daily sales were related to average daily sales of \$892.00 resulting in nontaxable sales of 13.14% or taxable sales of 86.86%. Average daily sales were determined by dividing audited gross sales of \$895,430.00 by the number of days in the audit period, 1,004. The taxable sales percentage of 86.86% was applied to audited gross sales yielding audited taxable sales of \$777,770.00. From this amount was subtracted taxable sales reported of \$140,320.00 leaving unreported taxable sales of \$637,450.00 which represented a margin of error of 454.279%. The margin of error was applied to taxable sales reported on a quarterly basis to compute additional sales tax due of \$51,114.50.

5. Petitioner Samuel Dinner and his son petitioner Stanley Dinner each owned 50% of the capital stock of the corporation. Samuel Dinner operated the business on a full-time basis whereas Stanley Dinner was a physical education teacher and coach at the Manhattan Center for Science and Mathematics. Other than occasionally helping his father on weekends and after school, for which he

received no compensation, Stanley Dinner had no other duties regarding the corporation, i.e., he did not sign checks or decide which bills were to be paid. The corporation was entirely under the control of Samuel Dinner.

6. During the period at issue, the corporation made sales to an exempt organization, a neighborhood church, and to the City of New York. Petitioners offered uncontroverted testimony that sales were made to these exempt entities; however, no evidence was offered as to the amount of said sales.

CONCLUSIONS OF LAW

A. That section 1135(a) of the Tax Law provides that every person required to collect tax shall keep records of every sale and of all amounts paid, charged or due thereon and of the tax payable thereon. Such records shall include a true copy of each sales slip, invoice, receipt or statement.

B. That section 1138(a)(1) of the Tax Law provides, in pertinent part, that if a sales and use tax return is not filed, or if filed is incorrect or insufficient, the amount of tax due shall be determined from such information as may be available. This section further provides that, if necessary, the tax may be estimated on the basis of external indices.

C. That the books and records of Deli-Stop, Inc. were inadequate and incomplete for purposes of determining taxable sales or sales tax due.

Therefore, the use of external indices is permissible

(Matter of Korba v. N.Y.S. Tax Commission, 85 A.D.2d 655). Where, as here, records provided by the taxpayer are incomplete and insufficient, it is the bureau's duty to select a method of audit reasonably calculated to reflect the taxes due (see Matter of Urban Liquor, Inc. v. State Tax Comm., 90 A.D.2d 576; Matter of Surface Line Operators Fraternal Organization v. Tully, 85 A.D.2d 858, 859). Exactness is not required where it is the petitioner's own failure

to maintain proper records which prevents exactness in the determination of sales tax liability. Markowitz v. State Tax Commission, 54 A.D.2d 1023, 44 N.Y.2d 684.

However, the auditors offered no basis for estimating the corporation's nontaxable sales for that part of the business day that was not observed on a basis different from the period observed. This 12 hour period represented 60% of the corporation's business day. Therefore, the Audit Division is hereby directed to project nontaxable sales observed during the 8 hour period to the entire business day.

D. That section 1133(a) of Article 28 of the Tax Law imposes on any person required to collect sales tax personal liability for the tax imposed, collected and required to be collected. Section 1131(1), in defining persons required to collect tax, includes corporate officers who are under a duty to act for the corporation in complying with any requirement of Article 28. The resolution of whether an officer was under such a duty turns upon a factual determination in each instance. The relevant factors in the determination include, but are not limited to, the following: the officer's day-to-day responsibilities in the corporation; the officer's involvement in and knowledge of the financial affairs of the corporation; the identity of the person who prepared and signed the sales and use tax returns; the officer's authority to sign checks on the corporation's accounts; and, in the case of a closely-held corporation, the benefits the officer received from corporate profits.

Vogel v. N.Y.S. Dept. of Taxation, 413 N.Y.S.2d 862 (Sup. Ct. Monroe Co. 1979); Chevlowe v. Koerner, 407 N.Y.S.2d 427 (Sup. Ct. Queens Co. 1978).

E. That within the meaning and intent of sections 1133(a) and 1131(1) of the Tax Law, petitioner Stanley Dinner was not a person required to collect tax on behalf of Deli-Stop, Inc.


F. That the petition of Stanley Dinner is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 20, 1983 is cancelled.

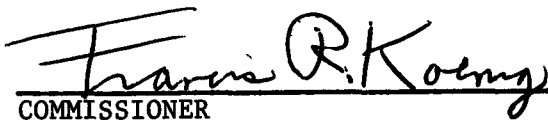
G. That the petitions of Deli-Stop, Inc. and Samuel Dinner are granted to the extent indicated in Conclusion of Law "C"; the Audit Division is hereby directed to modify the notices of determination and demand for payment of sales and use taxes due issued September 20, 1983; and that, except as so granted, the petitions are denied.

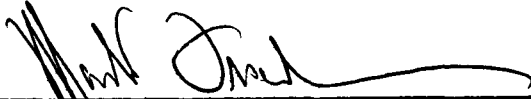
DATED: Albany, New York

STATE TAX COMMISSION

JUN 19 1986


PRESIDENT


COMMISSIONER


COMMISSIONER