

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
OCEAN STATE JOB LOT OF NY2006, LLC	:	
OCEAN STATE JOB LOT OF NY2007, LLC	:	DETERMINATION
OCEAN STATE JOB LOT OF NY2009, LLC	:	DTA NOS. 828330,
	:	828359 and 828360
for Revision of Determinations or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax	:	
Law for the Period Ended February 29, 2016.	:	

Petitioners, Ocean State Job Lot of NY2006, LLC, Ocean State Job Lot of NY2007, LLC, and Ocean State Job Lot of NY2009, LLC, filed petitions for revision of determinations or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period ended February 29, 2016.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, in Albany, New York, on May 14, 2019 at 10:30 a.m., with all briefs to be submitted by September 6, 2019, which date began the six-month period for the issuance of this determination. Petitioners appeared by Tracy C. Baran, Esq., and Gerald S. Benson, CPA. The Division of Taxation appeared by Amanda Hiller, Esq. (Stephanie Scalzo, Esq., of counsel).

ISSUE

Whether petitioners are entitled to refunds of sales tax based on their alleged overreporting and payment of tax on partially non-taxable clothing and footwear sales, and on their claimed underreporting of exempt sales.

FINDINGS OF FACT¹

1. Petitioners, Ocean State Job Lot of NY2006, LLC (OSJL -2006/Store No. 501), Ocean State Job Lot of NY2007, LLC (OSJL-2007/Store No. 502), and Ocean State Job Lot of NY2009, LLC (OSJL-2009/Store No. 509), are three limited liability companies operating local retail stores at three different locations in New York State, to wit, in Ballston Spa, Schenectady, and New City, respectively. The three entities are sometimes collectively referred to herein as petitioners or as Ocean State Job Lot (OSJL).

2. On March 18, 2016, each of the petitioners filed a New York State and local quarterly sales and use tax return for monthly filers (form ST-810) for the sales tax quarterly period spanning December 1, 2015 through February 29, 2016. On December 22, 2016, each of the petitioners filed an amended form ST-810 for the same sales tax quarterly period, together with individual applications for refunds of sales tax paid. The refund applications allege overpayments of sales tax by each of the petitioners for the noted quarterly period, and seek refunds in the respective amounts of \$4,113.02, \$4,953.29, and \$4,827.52. The amended returns and the refund applications did not include an explanation of the basis upon which the refunds were sought, and did not include any documentation in support of such claimed refunds.

3. A comparison of petitioners' returns as originally filed for the noted three-month quarterly period, to their amended returns for such period reveals the following information:

OSJL-2006/Store No. 501	Original Return	Amended Return	Difference
Taxable Sales (Main Form)	\$1,120,470.00	\$1,044,425.00	(\$76,045.00)

¹ Pursuant to 20 NYCRR 3000.15 (d) (6), the Division submitted with its brief proposed findings of fact numbered 1 through 15. Each of the proposed facts are supported by the record, and have been consolidated, condensed, combined, renumbered and substantially incorporated herein (*see* State Administrative Procedure Act § 307 [1]).

Schedule H (Clothing and Footwear Eligible for Exemption)	\$226,604.00	\$266,939.00	\$40,335.00
Net Taxable Sales	\$1,347,074.00	\$1,311,364.00	(\$35,710.00)
Total Non-Taxable Sales	\$279,063.00	\$314,771.00	\$35,708.00
Gross Sales	\$1,626,136.00	\$1,626,136.00	-----

OSJL-2007/Store No. 502	Original Return	Amended Return	Difference
Taxable Sales (Main Form)	\$982,171.00	\$890,908.00	(91,263.00)
Schedule H (Clothing and Footwear Eligible for Exemption)	\$216,011.00	\$274,703.00	58,692.00
Net Taxable Sales	\$1,198,182.00	\$1,165,611.00	(\$32,571.00)
Total Non-Taxable Sales	\$232,521.00	\$265,021.00	\$32,500.00
Gross Sales	\$1,430,702.00	\$1,430,702.00	-----

OSJL-2009/Store No. 509	Original Return	Amended Return	Difference
Taxable Sales (Main Form)	\$576,833.00	\$569,191.00	(\$7,642.00)
Schedule H (Clothing and Footwear Eligible for Exemption)	\$171,248.00	\$171,248.00	-----
Net Taxable Sales	\$748,081.00	\$690,439.00	(\$57,642.00)
Total Non-Taxable Sales	\$57,930.00	\$115,572.00	\$57,642.00
Gross Sales	\$806,011.00	\$806,011.00	-----

4. By letters dated March 31, 2017, the Division of Taxation (Division) requested that petitioners submit documentation, by May 1, 2017, in support of the each of the amended returns and refund applications, as follows:

“In order to continue with the review of your claim, the following supporting documentation is needed: a detailed explanation for amending your return, a spread sheet (vendor name, invoice date, invoice #, total cost and amount of sales tax charged on each), copies of invoices and credit memos, and any exemption documents.”

Petitioners did not respond to the foregoing letters.

5. By letters dated April 27, 2017, the Division again requested the foregoing supporting documentation, and extended the date for submission thereof to May 16, 2017. In each instance, the Division’s letters included the name and telephone number of the reviewing tax technician, and an invitation to contact that person with any questions or concerns regarding petitioners’ requests for refunds. Again, petitioners did not respond to the foregoing letters, or submit any of the requested documentation.

6. The claims were reviewed as submitted, and each was denied in full for lack of explanation and substantiation. On May 26, 2017, the Division issued a notice of account adjustment to petitioner Ocean State Job Lot of NY2007, LLC (OSJL-2007/Store No. 502), and to Ocean State Job Lot of NY2009, LLC (OSJL-2009/Store No.509), denying their claims for refund in full. On June 2, 2017, the Division issued a notice of account adjustment to petitioner Ocean State Job Lot of NY2006, LLC (OSJL -2006/Store No. 501), denying its claim for refund in full.

7. OSJL’s current director of tax, Gerald Benson, testified at hearing. Mr. Benson was not employed by OSJL during the sales tax quarterly period at issue, or at the time the amended returns and refund applications were filed. Mr. Benson noted that the refund claims pertain only

to the month of December 2015, and concern an alleged error involving an overpayment of tax due based on petitioners' clothing and footwear sales and/or its claimed exempt sales.²

8. At hearing, petitioners presented a spreadsheet, together with an individual underlying one-page summary report for each of the three individual petitioners.³ The one-page summary reports pertain to the month of December 2015, and list in columnar format daily total cash sales, credit card sales, and debit card sales, as well as cash register over/under amounts, tax collected, and net sales. Each column is totaled at its base. The column labelled net sales reflects the sum of the daily cash sales, credit card sales, debit card sales, and cash register over/under amounts, as reduced by the column listing the sum of the tax amounts collected on such sales.

9. The above-referenced spreadsheet was prepared by Mr. Benson, and was offered as his explanation and calculation of how the claimed overreporting and alleged overpayment of tax liability for each petitioner occurred. Mr. Benson admitted that the amounts on the spreadsheet do not align with the sales and use tax returns filed by petitioners for the sales tax quarterly period at issue, noting that the returns cover a three-month period while the refund claims only relate to the month of December 2015. He also stated that the numbers on the spreadsheet he created have changed since the original calculations, and noted that he does not have access to

² The Division does not dispute that qualifying sales of clothing and footwear made during certain specific periods, including as relevant here December 2015, were not subject to the 4% statewide general sales tax, but rather were subject only to local sales taxes at the rate imposed by the particular locality.

³ The spreadsheet includes data and calculations pertaining to two other OSJL entities (Store Nos. 505 and 508), and reflects alleged overpayments and refunds sought by those entities in the respective amounts of \$2,171.95 and \$4,958.18. Mr. Benson alleged that these two refund claims were based on the same issue as is presented in this matter, and that the refunds sought by these other, non-petitioner taxpayers were granted by the Division. Petitioners argue that it would be illogical for the Division to have granted two refunds but disallowed three others, when all such claims were made upon the same premise. The record herein contains no information concerning the two claims allegedly granted, including whether any additional or different evidence may have been presented in connection therewith.

the numbers upon which the amounts of sales originally reported by petitioners on their returns as initially filed were calculated. He stated that he believes the amounts on his spreadsheet row entitled "Over Payment" concern sales amounts related to clothing and footwear that were erroneously added to, rather than subtracted from, gross sales, hence resulting in an overstatement in the computation and reporting of each petitioner's tax liability.

10. According to Mr. Benson, the information on the summary reports reflects the individual daily totals, and the monthly total amounts of each of the items sold in each of the petitioner's stores, as rung into each petitioner's in-store cash registers, and thereafter electronically transferred to the OSJL computerized record keeping system known as Paragon. Mr. Benson stated his understanding that the summary reports appended to his spreadsheet came from a program within OSJL's Paragon system that compiles data generated by each of OSJL's individual stores. He admitted he is not otherwise familiar with those reports, and does not have access to the relevant program under which they were created. He also admitted that the summary reports submitted into evidence do not identify clothing and footwear sales, as opposed to other sales, and that the portion of tax collected from clothing and footwear sales would be identified through a different system query. Thus, the record does not include any substantiation upon which the dollar amounts of claimed clothing and footwear sales set forth on the spreadsheet for each store were, or may have been calculated.

11. The proposed methodology underlying the refund claims, as set forth on the spreadsheet and described in testimony by Mr. Benson, is essentially the same for each of the three petitioners. As a representative example, the spreadsheet column pertaining to petitioner OSJL-2006 (Store No. 501) for the month of December 2015 reflects the following information:

Gross Sales (total sales receipts net of taxes collected)	\$835,340.07
Net Clothing & Footwear Sales (included in above Gross Sales)	\$177,437.03
Claimed Exempt Sales (basis for exemption not specified)	\$125,975.20
Tax Collected (Gross sales, less claimed exempt sales, at 7% rate)	\$37,234.95
Tax Collected on Clothing & Footwear (at 3% local rate)	\$5,323.11
Total Tax Collected	\$42,558.06
Use Tax on Purchases of \$11,195.51 Subject to Tax	\$783.69
Total Tax Due	\$43,341.75
Total Tax Paid	\$47,454.77
Claimed Overpayment	\$4,113.02

12. The original and amended sales tax returns filed by petitioners (*see* finding of fact 2) reflect quarterly total amounts, and there is no monthly breakdown but for the summary sheets for the month of December 2015 (only), as described above. Mr. Benson admitted he did not in fact know how petitioners calculated the amounts of sales and use tax reported on their sales tax returns as originally filed for the quarterly period in issue, or for any of the three months included therein. He further stated that since petitioner had amended its returns, the reported sales information thereon did not relate to his spreadsheet, again noting that the returns cover a three-month period while his spreadsheet covers only one month (December 2015). Thus, for the above-described spreadsheet example pertaining to Store No. 501, the record does not provide direct support or explanation as to how the Total Tax Paid (\$47,454.77) for the month of December 2015 was determined. Rather, Mr. Benson surmised that such amount originated with the amount of tax shown as collected for Store No. 501 (\$42,558.06), as set forth on the summary sheet for that store, and that OSJL's personnel appear to have added "some clothing number," and that the tax on that number served to increase the \$42,558.06 amount to \$47,454.77.

13. Mr. Benson's determination that tax in the amount of \$37,234.95 was collected on taxable sales other than non-clothing and footwear sales was based on the December 2015 monthly summary report showing that petitioner Store No. 501 collected \$42,558.06 in total tax,

and upon his assertion that included therein was \$177,437.03 in qualifying clothing and footwear sales subject to tax only at the 3% local sales tax rate for Saratoga County, New York. Thus, total tax collected (\$42,558.06), less tax allegedly pertaining to clothing and footwear sales (\$5,323.11 [i.e., \$177437.03 x 3% = \$5,323.11]), results in \$37,234.95 of tax collected on taxable sales (other than non-clothing and footwear sales) in the amount of \$531,927.84.⁴

14. The monthly summary report for December 2015 does not include any breakdown of sales receipts specifying an amount for clothing and footwear, and the record is unclear as to how Mr. Benson discerned the dollar amount of clothing and footwear sales allegedly made in December 2015 was \$177,437.03. He was similarly unable to explain the basis for the conclusion, set forth on his spreadsheet, that the dollar amount of exempt sales made in December 2015 was \$125,975.20.⁵ Mr. Benson alluded, without detail, to inquiries he made to other OSJL employees, and testified in response to questions concerning how he calculated the clothing and footwear sales amounts, and how he arrived at the amounts of refund sought, as follows:

“The clothing is generated through a different query. The last time I saw that list, it was approximately five hundred pages long and gives us a total.

* * *

So we - - the base issue is we know what we collected, so that is the amount that needs to be remitted. So, the difference between the forty-two thousand five fifty-eight o six, with the addition of our use tax of seven eighty-three point sixty-nine, again, we don't have the original numbers that generated the forty-seven thousand four fifty-four seventy seven. So, all we're really saying is we know we owe the forty three thousand three forty-one five. We know we paid forty-seven four fifty-four seventy-seven, and there's the difference.”

⁴ Fully taxable nonclothing and footwear sales for the month of December 2015 allegedly consisted of gross sales (\$835,340.07), less alleged qualifying clothing and footwear sales (\$177,438.03), less alleged non-taxable exempt sales (\$125,975.20) (*see* finding of fact 11).

⁵ Mr. Benson was likewise unable to explain why exempt sales as reported for each petitioner were greater on the amended sales tax returns than on the sales tax returns as originally filed.

15. In response to further questioning as to why a tax amount in excess of that shown on the monthly summary report was remitted, Mr. Benson explained his understanding and belief as follows:

“[OSJL personnel] actually took a clothing number and calculated the tax due on the clothing and then added that to what was collected and what the system determined to be the correct amount.

* * *

That they paid the additional clothing sales tax over and above what was already collected. So they saw the collection number, calculated a clothing tax number and added it to the collection.”

16. The foregoing described lack of calculation specificity is true for the refund claims submitted by each of the other petitioners in this matter.

17. In sum, petitioners’ refund claims rest on the position that the correct amount of sales tax liability is that reflected on the summary sheets produced by petitioners’ computerized system, plus the additional amounts of use tax self-reported by petitioners on items purchased and used or consumed in-store, as opposed to having been sold by petitioners. Petitioners maintain, specifically for the month of December 15, 2015, that the amounts remitted in excess of the system recorded sales tax amounts, plus the use tax amounts added thereto, reflect errors by OSJL personnel, who either simply failed to rely on the information captured by OSJL’s computerized system, or misapprehended that sales tax on clothing and footwear was already included therein and, thus, added an amount to reflect the same.

CONCLUSIONS OF LAW

A. Tax Law § 1132 (c) creates a presumption that all receipts from the sale of tangible personal property are subject to tax until the contrary is established, and places the burden on vendors to prove which of their receipts are not subject to tax (*see Matter of Sol Wahba v New*

York State Tax Commn., 127 AD2d 943 [3d Dept 1987]; *Matter of On the Rox Liqs. v State Tax Commn.* 124 AD2d 402 [3d Dept 1986]). Consistently, in proceedings before the Division of Tax Appeals, it is well established that petitioners bear the burden of proving, by clear and convincing evidence, that a statutory notice of determination, including as here a notice of refund denial, is erroneous or incorrect (*see Matter of Goodfriend*, Tax Appeals Tribunal, January 15, 1998, citing *Matter of Meskouris Bros. v Chu*, 139 AD2d 813 [3d Dept 1988]).

B. On each of the returns at issue herein, petitioners self-assessed the amounts of tax reported as due (*see Matter of Johnson*, Tax Appeals Tribunal, October 12, 2017). Thus, in order to prevail on their refund claims, petitioners were required to establish that their original returns were in error, and that their amended returns are correct.

C. The evidence presented in this case falls short of meeting petitioners' burden. First, petitioners provided no explanation or documents in support of their amended returns and accompanying refund claims at the time of filing the same, or thereafter, despite the reviewing auditor's specific written requests for such support. At hearing, petitioners' evidence consisted of the testimony of an employee hired after the period at issue, describing his belief as to what may have occurred. This testimony was accompanied by a spreadsheet he constructed showing his breakdown of each of petitioners' sales for December 2015, in turn supported only by a one-page summary sheet for each store listing sales (net of sales tax collected), sales tax collected, and the various methods of payment utilized by purchasing customers (i.e., cash, credit card, or debit card). Petitioners submitted no documents in support of their witness's testimony concerning the claimed amounts of clothing and footwear sales, or claimed exempt sales appearing on the spread sheet, notwithstanding that these items underly the spread sheet calculations upon which petitioners attempt to justify their refund claims. Without more, the

summary sheets relied upon to the extent described above in preparing the spread sheet, simply do not support the testimony by showing the basis upon which the claimed dollar amounts of clothing and footwear sales or claimed exempt sales were determined and presented on the spread sheet. In fact, the only reference to any supporting documents was a single mention regarding a long list of clothing and footwear transactions generated via a different query to petitioners' record keeping system (*see* finding of fact 14). If petitioners' witness relied on such data to construct the spread sheet, that source data should have been offered to support the computations set forth on the spread sheet.

D. Petitioners argue that the amounts of tax actually reported on their returns as filed were erroneous, and resulted from incorrect (or unnecessary) manual changes made by OSJL's personnel at the time the returns were filed. Petitioners maintain, in contrast, that the sales tax liability amount captured for each petitioner on OSJL's computer system was correct, and that such amount, together with the amount of use tax self-reported by each petitioner (as set forth on the spread sheet provided in this proceeding), should be accepted by the Division as the correct amount of each petitioner's liability, leaving petitioners entitled to the refunds sought herein. Unfortunately, the limited information provided by the summary sheets does not fulfill petitioners' obligation to provide supporting records sufficient to establish that their returns as filed were incorrect, based on either an overpayment of tax paid on clothing and footwear sales, or on an underreporting of claimed exempt sales, as alleged. Accordingly, petitioners have not met their burden of proving entitlement to the refunds sought (*see Matter of On the Rox Liqs.; Matter of Broadview Networks, Inc.*, Tax Appeals Tribunal, June 14, 2012). Testimony by a witness who was not employed during the period in question, based upon his alleged familiarity with petitioners' sales tax issue and returns, his review of the noted summary schedules, his

conversations with other (unnamed) OSJL employees, and his possible review of other system-generated sales reports, which led to his reconstruction of sales figures and the creation of a spreadsheet based on the witness's belief as to what may have occurred, without any further supporting documentary evidence, is simply insufficient to meet petitioners' burden of proving entitlement to the refunds sought (*see Matter of Shree Purshottam Corp.*, Tax Appeals Tribunal, May 27, 2010; *Matter of Sheridan Hollow, Inc.*, Tax Appeals Tribunal, July 13, 2006).

E. The petitions of Ocean State Job Lot of NY2006, LLC, Ocean State Job Lot of NY2007, LLC, and Ocean State Job Lot of NY2009, LLC, are hereby denied and the notices of account adjustment dated March 26, 2017 and June 2, 2017, are sustained.

DATED: Albany, New York
March 5, 2020

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE