

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MERRICK DISCOUNT CENTER, LTD.	:	DECISION
AND KANAT ARBAY, AS OFFICER	:	
for Revision of Determinations or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period January 1, 1979	:	
through August 31, 1981.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on August 23, 1990 with respect to the petition of Merrick Discount Center, Ltd. and Kanat Arbay, as Officer, c/o Jack M. Portney, 2050 Center Avenue, P.O. Box 346, Fort Lee, New Jersey 07024 for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period January 1, 1979 through August 31, 1981 (File Nos. 800362, 800885, 800887, 801114 and 801115). Petitioners appeared by Jack M. Portney, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Irwin A. Levy, Esq., of counsel).

Petitioners filed a brief on exception. Oral argument, at the request of the Division, was heard on January 30, 1991.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether the Division of Taxation properly determined additional sales and use taxes due on the gasoline service station operations of petitioner Merrick Discount Center, Ltd.

II. Whether petitioner Kanat Arbay was a person required to collect tax on behalf of the corporate petitioner and is, thus, liable for unpaid sales and use taxes due.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner Merrick Discount Center, Ltd. operated a Power Test gasoline station located at 4030 Merrick Road, Seaford, New York, from December 1979 through early August 1981. The station had 16 gasoline pumps and no repair bays. Petitioner Kanat Arbay was president and owner of Merrick Discount Center, Ltd. (hereinafter referred to as "Merrick").

Initially this case was assigned to Elaine Sullivan, a tax auditor with the Mineola District Office of the New York State Department of Taxation and Finance. Ms. Sullivan made an unannounced visit to the gasoline station located at 4030 Merrick Road in Seaford, New York, on June 21, 1982, at which time petitioner Kanat Arbay was no longer the owner of Merrick Discount Center, Ltd. Ms. Sullivan was informed by the new owner Billur Akdenis that the station had been purchased August 12, 1981 from Kanat Arbay.

She then attempted to contact Mr. Arbay by sending him a notice referred to as a flasher. Subsequently, Frank Gulotta, Mr. Arbay's attorney, contacted Ms. Sullivan. She made an appointment with him on July 28, 1982, which was rescheduled for August 18, 1982, requesting the books and records of the petitioners. Upon arriving at Mr. Gulotta's office on August 18, 1982, Ms. Sullivan was informed that he was cancelling the appointment, that the books and records were at the office of petitioners' accountant and that the accountant would be calling Ms. Sullivan. Upon arriving back at her office, she was informed that Mr. Jack Portney, petitioner's C.P.A., had already personally visited her office in an attempt to speak with her. Ms. Sullivan's testimony revealed that she did not make any further attempt to contact Mr. Portney to acquire books and records of petitioners' service station operations.

Ms. Sullivan further testified that when she visited the gasoline station for the unannounced observation, she took with her an appointment letter requesting books and records. The appointment date was July 12, 1982, and it was addressed to Kaovat Discount Center. She stated

that Merrick Discount Center, Ltd. was trading as Kaovat Discount Center, 4030 Merrick Road.

On the appointment letter, the request for books and records was as follows:

"All books and records pertaining to your sales tax liability for the period under audit should be available. This would include journals, ledgers, sales invoices, purchase invoices, cash register tapes, exemption certificates and all sales tax records. Additional information may be required during the course of the audit."

There is no further testimony as to what Ms. Sullivan did with that appointment letter. It is not clear whether she subsequently mailed it to Mr. Arbay at the Merrick Road address, gave it to Mr. Akdenis, or obtained a different address in order to make the request for books and records from petitioners or their representative Mr. Gulotta. It appears that a verbal request for some books and records, for the period June 1, 1979 through February 28, 1982, was made to Mr. Gulotta, but no request was made to Mr. Portney.

Ms. Sullivan proceeded with the audit by obtaining third-party gasoline supplier verification from the Power Test petroleum distributor, the company responsible for supplying Merrick with its gasoline. Having obtained information with respect to the gallons purchased for the period September 1980 through November 1980, Ms. Sullivan calculated estimated taxable sales for that three-month period, and compared that figure to the taxable sales reported on the sales tax returns. An error rate was computed and applied to the total reported taxable sales for the audit period December 1, 1979 through August 31, 1980¹ to arrive at audited taxable sales of \$2,961,329.00. As a result of Ms. Sullivan's calculations, the Division of Taxation issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Kanat Arbay, as officer of Merrick Discount Center, Ltd., dated November 20, 1982, in the amount of \$65,538.83,² with penalty and interest for a total assessment of \$118,068.87. The periods assessed were as follows:

"As officer of Merrick Discount Center Ltd., you are personally liable under sections 1131(1) and 1133 of the tax law for the following.

¹Transcript page 22 erroneously describes the audit period as 8/21/81.

²Transcript page 22 indicates that the assessment was \$63,538.83.

<u>Period Ending</u>	<u>Tax Due</u>	<u>Penalty Due</u>	<u>Interest Due</u>
022880	7352.94	3676.47	2517.57
053180	27197.52	13598.76	8489.43
083180	30988.37	15494.19	8753.62"

Ms. Sullivan's testimony indicates that during the course of the audit she was never informed by petitioners' representatives that a significant portion of the gasoline purchased by petitioners was purchased for resale. In fact, when Ms. Sullivan was informed that petitioners' explanation for the large discrepancy between gasoline purchases and sales reported according to the sales tax returns as filed was due to resale to other gasoline stations, and having been shown copies of sales invoices and resale certificates prepared by petitioners later submitted into evidence, she was not inclined to place much significance on these documents at the time of the hearing.

Sometime after the issuance of the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated November 20, 1982, petitioners' case was sent to the Special Investigations Bureau for review. Special Investigations made a request for additional records of petitioners. A comparison was made between the gross sales per the Federal income tax returns, the sales tax returns as filed, and the deposits according to the accountant's write-up work. A conclusion was reached that the amounts reported according to the books and Federal returns were approximately 18 times higher than amounts reported on the sales tax returns. Special Investigations also pursued additional third-party verification information from which Ms. Sullivan made further computations and assessments. Gasoline purchases were supplied by the Power Test company for the period December 1979 through August 1981. The taxable gasoline purchases totalled \$2,756,329.00 as compared to the taxable sales reported for the same period of \$162,783.00. The taxable gasoline purchases from the third-party verification information were marked up 15 percent, an estimated markup based on average statewide estimates used during similar audits performed during that time. This resulted in additional sales tax due for the period December 1979 through August 1981 of \$210,489.44. As a result of these calculations, and in accordance with a field audit report prepared by Ms. Sullivan dated

January 11, 1984 notices of determination and demands for payment of sales and use taxes due were issued to both Merrick Discount Center, Ltd. and Kanat Arbay as officer on February 24, 1984 assessing tax due of \$81,076.10 with penalty and interest for a total amount of \$150,893.33.

The notices contained the following explanation of their assessments:

Merrick Discount Center Ltd.

"The following taxes have been determined to be due in accordance with Section 1138 of the Tax Law, and are based on an audit of your records. In addition, fraud penalties of 50 percent of the amount of the tax due plus statutory interest have been added pursuant to Section 1145(A)(2).

THE TAX ASSESSED HEREIN HAS BEEN ESTIMATED AND/OR DETERMINED TO BE DUE IN ACCORDANCE WITH THE PROVISIONS OF SECTION 1138 OF THE TAX LAW AND MAY BE CHALLENGED THROUGH THE HEARING PROCESS BY THE FILING OF A PETITION WITHIN 90 DAYS.

<u>PERIOD ENDED</u>	<u>TAX DUE</u>	<u>PENALTY</u>	<u>INTEREST</u>
02/29/80 380	\$ 547.68	\$ 273.84	\$ 284.22
05/31/80 480	2,025.80	1,012.90	986.33
08/31/80 181	2,308.11	1,154.06	1,066.37
11/30/80 281	2,326.87	1,163.44	1,001.26
02/28/81 381	2,430.82	1,215.41	969.76
05/31/81 481	35,378.35	17,689.18	12,979.61
08/31/81 182	36,058.47	18,029.24	11,991.61

NOTE: This assessment is in addition to assessment Nos. S821029034N and S831214006N."

Kanat Arbay
As Officer

"You are personally liable as officer of Merrick Discount Center Ltd. under Sections 1131(1) and 1133 of the Tax Law for the following taxes determined to be due in accordance with Section 1138(a) of the Tax Law. In addition, fraud penalties of 50 percent of the amount of the tax due plus statutory interest have been added pursuant to Section 1145(A)(2).

THE TAX ASSESSED HEREIN HAS BEEN ESTIMATED AND/OR DETERMINED TO BE DUE IN ACCORDANCE WITH THE PROVISIONS OF SECTION 1138 OF THE TAX LAW AND MAY BE CHALLENGED THROUGH THE HEARING PROCESS BY THE FILING OF A PETITION WITHIN 90 DAYS.

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NOTE: This assessment is in addition to assessment Nos., S821029035N and S831214007N."

The field audit report prepared by Ms. Sullivan also indicates that two additional assessments were issued, one to Merrick Discount Center, Ltd. and the other to Kanat Arbay, as officer, in the same amounts assessing tax due of \$63,874.51, with penalty and interest, for a total amount due of \$120,334.87. The notices were dated December 20, 1983 and, according to the field audit report, assessment numbers S831214006N and S831214007N were issued for the period September 1, 1980 through February 28, 1981 in order to protect the statute of limitations. Although these notices of determination contain the explanation "[s]ince you have not submitted your records for audit as required by Section 1142 of the Tax Law, the following taxes are determined to be due in accordance with Section 1138 of the Tax Law...", there is no testimony as to how these amounts were calculated, whether any records were reviewed or whether petitioners or a representative was consulted.

Executed with respect to taxable period September 1, 1979 through November 30, 1981 was a consent extending the period of limitation for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law allowing appropriate amounts of sales and use taxes to be determined for those periods at any time on or before December 20, 1983. The vendor is identified as Merrick Discount Center, Ltd. and it contains the signature of Jack Portney, C.P.A., petitioners' representative. The Division of Taxation did not produce a consent extending the statute of limitations beyond December 20, 1983.

As Ms. Sullivan indicated by her testimony, at one point in time the file was transferred to the Special Investigations Bureau. There it was handled by Andrew Coughlin who testified that he visited the subject premises on June 7, 1982 viewing eight gasoline pumps and no repair bays.

It came to his attention also that the business had been sold during August 1981 and the new owner was Billur Akdenis. Subsequent to his visit to the station, Mr. Coughlin contacted Mr. Gulotta, petitioners' attorney, and visited his office for the purpose of summarizing records in the possession of Mr. Gulotta. Purchases per books were compared to the sales tax returns as filed.

In January 1983, Mr. Coughlin subpoenaed the records representing gasoline purchases by Merrick from Power Test for the period December 1979 through August 12, 1981. Upon receiving the Power Test records, Mr. Coughlin prepared a schedule analyzing the gallons of gasoline purchased and the purchases in terms of dollars. His calculations resulted in potential additional sales tax due of \$180,792.92. It appears, however, that the assessments in issue were as a result of calculations made by the Mineola District Office and not by Mr. Coughlin.

Jack Portney, certified public accountant, appeared on behalf of petitioners to represent their positions. Mr. Portney testified that Kanat Arbay obtained gasoline not only for his own retail sale purposes but also for resale. He made reference to the fact that Mr. Arbay would pump gasoline from the station during the night when his business was not in operation with a special pump purchased for that purpose. Evidence submitted by Mr. Portney on behalf of petitioners' resale contention included sales invoices covering the period January 1980 through July 1981 showing sales of various types of gasoline to Ahmet Batur at 2 Saratoga Boulevard, Island Park, New York and Apokan Discount, 189 Sunrise Highway, Amityville, New York totalling over \$2,500,000.00. He also submitted the original resale certificates executed by Apokan Discount to Merrick Discount Center, Ltd. dated May 8, 1980 indicating that there was tangible personal property for resale and the resale certificate executed by Ahmet Batur dated February 25, 1980 indicating the same resale activity. Mr. Portney also presented a schedule of purchases of gasoline between January 1980 and July 1981 offset by sales for resale in gallons and dollars as well as retail sales to customers. During the hearing, Mr. Portney clearly indicated that petitioners agree with the Power Test information submitted for the purpose of showing the gallons of gasoline purchased by Merrick. Mr. Portney also submitted correspondence which was a

verification from the Heinrich Petroleum Equipment Company, Inc. dated July 10, 1985 stating that Kanat Arbay purchased a Blackmer explosion-proof pump from this corporation during the year 1978 and that since the company was unable to locate the invoice, the letter was being submitted as part of the proof of purchase. Lastly, Mr. Portney submitted into evidence a statement in Turkish which he claims is notarized, as well as bearing an English translation of the same by Abdullah Nevruzhan (whose signature appears on the Apokan Discount resale certificate issued to Merrick) which states as follows:

"I owned several gas stations from 1978 through 1983 and purchased the majority of my gasoline purchases from the gas stations on Long Island owned by Mr. Kanat Arbay, during the above periods my gasoline trucks and drivers would pick up the gasoline at night after the stations had closed by pumping directly from the ground tanks into the truck with portable pumps [sic]. I hope this will clarify [sic] the circumstances regarding my relations with Mr. Kanat Arbay and his gas stations.

Respectfully submitted,

Abdullah Nevruzhan"

It is noted that the statement in the English translation is not dated; however, it does appear that the Turkish copy bears a date stamp and date within the body of the notarization of "19/6/1984."

Mr. Portney, by his testimony, explained that Kanat Arbay was the Turkish ambassador to the State of Pennsylvania and with his political and personal connections was able to obtain large appropriations of gasoline during the 1979 and 1980 gasoline crisis. He further testified that Mr. Arbay had become acquainted with other Turkish people in the gasoline business and assisted them by obtaining large allocations of gasoline which they were unable to obtain directly. He resold substantially all the gasoline he obtained during this period and a very small portion was sold at retail.

OPINION

In the determination below, the Administrative Law Judge held that it was unclear whether an adequate request for books was made in the first instance and it appeared clear from the testimony that whatever records were requested were not thoroughly examined to determine their

adequacy. The Administrative Law Judge held that the Division of Taxation (hereinafter the "Division") failed to determine that petitioners' books and records were inadequate, failed to conduct an audit, and it failed to show that the assessment was based on an audit of petitioners' records.

Although the Administrative Law Judge concluded that the Division's resort to an estimate methodology was not justified, the Administrative Law Judge determined that petitioners met their burden of proving that the results of the investigation and that portion of the "audit" so performed resulted in an erroneous assessment. Further, the Administrative Law Judge held that the Division deliberately overlooked records supporting the resale of gasoline by petitioners.

On exception, the Division alleges that petitioners had audited taxable sales of gasoline and oil amounting to \$2,756,329.00 plus \$413,449.00 (15% mark-up) and argues that although petitioners have shown sales for resale in the amount of \$2,500,000.00 there still remains unsubstantiated sales of \$506,995.00 and taxes due on such amount since only \$162,783.00 was reported as taxable sales. The Division also seeks an assessment against Kanat Arbay based on the unsubstantiated sales of \$506,995.00.

Petitioners argue that the State of New York never conducted an audit of their books and records. Petitioners contend that the State's auditors were directed by their supervisors to make assessments based on third party calculations and, since the allegations and assessments against Merrick Discount Center were cancelled, the issue of officer responsibility should not be an issue. Lastly, petitioners respectfully request that the determination of the Administrative Law Judge be affirmed as being consistent with the evidence submitted.

We affirm the determination of the Administrative Law Judge for the reasons stated below.

The Division has the authority to determine "from such information as may be available" the amount of tax actually due from a taxpayer for a given period when any one of its sales tax returns is either not filed or states an incorrect or insufficient amount of tax due (Tax Law § 1138[a][1]). However, when the vendor maintains a comprehensive set of books and records, "such information as may be available" (Tax Law § 1138[a][1]) is restricted to his books and

records and not external indicia because "the honest and conscientious taxpayer who maintains comprehensive records as required has a right to expect that they will be used in any audit to determine his ultimate tax liability" (Matter of Chartair, Inc. v. State Tax Commn., 65 AD2d 44, 411 NYS2d 41, 43).

To determine the adequacy of a taxpayer's records, the Division must first request (Matter of Christ Cella, Inc. v. State Tax Commn., 102 AD2d 352, 477 NYS2d 858, 859) and thoroughly examine (Matter of King Crab Rest. v. Chu, 134 AD2d 51, 522 NYS2d 978, 979-80) the taxpayer's books and records for the entire period of the proposed assessment (Matter of Adamides v. Chu, 134 AD2d 776, 521 NYS2d 826, 828, lv denied 71 NY2d 806, 530 NYS2d 109).

In the matter at hand, the Division failed to follow this procedure. Testimony by Division representatives points out that petitioners' books and records were never examined. The auditor who issued the assessment was advised by the taxpayers' attorney that the accountant had the books and records, yet she never contacted the accountant's office asking for the books and records (Tr., p. 37).

There was no evidence presented or testimony to support the conclusion that there was a thorough examination of the taxpayers' books and records (Matter of King Crab Rest. v. Chu, supra) to determine through verification drawn independently from within these records (see, Matter of Meyer v. State Tax Commn., 61 AD2d 223, 402 NYS2d 74, 76, lv denied 44 NY2d 645, 406 NYS2d 1025; see also, Matter of Giordano v. State Tax Commn., 145 AD2d 726, 535 NYS2d 255; Matter of Hennekens v. State Tax Commn., 114 AD2d 599, 494 NYS2d 208; Matter of Urban Ligs. v. State Tax Commn., 90 AD2d 576, 456 NYS2d 138), that they are, in fact, so insufficient that it is "virtually impossible (for the Division) to verify taxable sales receipts and conduct a complete audit" (Matter of Chartair, Inc. v. State Tax Commn., supra, 411 NYS2d 41, 43) "from which the exact amount of tax can be determined" (Matter of Mohawk Airlines v. Tully, 75 AD2d 249, 429 NYS2d 759, 760).

Therefore, since the record before us lacks evidence that a thorough examination was made of the taxpayers' records, we conclude that the notices of determination and demand for payment of sales and use taxes due dated November 20, 1982, December 20, 1983, and February 24, 1984 must be cancelled.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is in all respects denied;
 2. The determination of the Administrative Law Judge is affirmed;
 3. The petitions of Merrick Discount Center, Ltd. and Kanat Arbay, as Officer, are granted;
- and
4. The notices of determination issued November 20, 1982, December 20, 1983 and February 24, 1984 are cancelled.

DATED: Troy, New York
June 27, 1991

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner