

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
AHMED S. AHMED :
d/b/a A & A GROCERY STORE :

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, 1980 :
through August 31, 1983. :

DECISION

In the Matter of the Petition :
of :
YAHYA S. AHMED :
d/b/a A & A GROCERY STORE :

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, 1980 :
through August 31, 1983. :

Petitioners. Ahmed S. Ahmed and Yahya S. Ahmed, d/b/a A & A Grocery Store, 1677
Nostrand Avenue, Brooklyn, New York 11226, filed an exception to the determination of the
Administrative Law Judge issued on January 28, 1988 with respect to their petitions 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, 1980 through August 31, 1983 (Files Nos. 801095 and 801096).
The petitioners appeared by Bertie L. Graham, P.A. The Division of Taxation appeared by
William F. Collins, Esq. (Lawrence A. Newman, Esq. of counsel).

Neither party filed a brief on exception. Oral argument at the request of petitioners was
held on June 7, 1988.

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

ISSUE

Whether an audit properly determined sales and use taxes due from petitioners.

FINDINGS OF FACT

We find the facts as stated in the Administrative Law Judge's determination and such facts are incorporated herein by this reference. These facts may be summarized as follows.

A & A Grocery Store was a partnership consisting of Ali S. Ahmed, Ahmed S. Ahmed and Yahya S. Ahmed. The partnership operated a grocery store at 1677 Nostrand Avenue, Brooklyn, New York.

The Brooklyn District Office conducted a field audit of the business for the period September 1, 1979 through May 31, 1982. Although a consent extending the period of limitation on assessment for the period September 1, 1979 through August 31, 1980 was obtained, it expired prior to assessment. Accordingly, the audit period was revised to September 1, 1980 through August 31, 1983.

The audit was conducted as follows:

(a) Gross sales as per the cash receipts journal agreed with gross sales reported on the United States partnership returns filed for 1980 and 1981.

(b) A comparison between sales per the cash receipts books and the sales tax returns filed could not be made because petitioners' cash receipts books were incomplete.

(c) The auditor analyzed purchases made for the months of April, May and June 1981. The analysis revealed that sundry taxable purchases were 9.85

percent of total purchases.

(d) Cash disbursements showed purchases of \$13,872.00 in beer, \$22,634.00 in soda and \$17,973.00 in cigarettes for the original audit period of September 1, 1979 through May 31, 1982.

(e) Markup tests were made for the categories of taxable sundry, beer, soda and taxable cigarettes using purchase and selling prices for 1982. The resulting markups were as follows:

Taxable Sundry	-	37.54%
Beer	-	21.72%
Soda	-	47.82%
Taxable Cigarettes	-	32.49%

(f) The above markups were applied to purchases for the original audit period after allowing 2 percent for pilferage, resulting in adjusted taxable sales of \$124,738.00.

(g) It is noted that for the original audit period, purchases as per records were \$384,562.00 while audited taxable sales were \$124,738.00, or 32.4 percent of purchases.

(h) As petitioners had reported taxable sales of \$51,750.00, the figure of \$124,738.00 in audited taxable sales represented an increase of \$72,988.00 and resulted in an error percentage of 141.04 percent for the original audit period. This percentage was applied to taxable sales reported, resulting in additional taxable sales of \$87,635.00 and tax due of \$7,160.39 for the extended audit period September 1, 1980 through August 31, 1983.

On December 13, 1983, the Division of Taxation issued notices of determination and demand for payment of sales and use taxes due to petitioners Ahmed S. Ahmed, d/b/a A & A Grocery Store and Yahya S. Ahmed, d/b/a A & A Grocery Store, each in the amount of

\$7,160.21 in tax, \$1,395.89 in penalty and \$1,285.89 in interest. Each notice was for the period September 1, 1980 through August 31, 1983 and totaled \$9,841.97.¹

At the hearing, the parties agreed that assessment for the quarters ending prior to June 1, 1982 was not in issue and, in fact, it was stipulated that payments had been made thereon by petitioners.

Average monthly purchases for the period September 1, 1979 through May 31, 1981 were \$12,279.00 and average quarterly purchases for the same period were \$36,837.00. Average taxable sales shown on the sales tax returns for this period were \$4,531.43.

After the hearing, petitioners' representative submitted additional documentation showing that the average purchases for the months of December 1982 through February 1983 and the months of June 1983 through August 1983, were \$10,895.00 per month, or \$32,685.00 per quarter. It is noted that average quarterly taxable sales reported for the period June 1, 1982 through August 31, 1983 were \$5,479.00.

Petitioners' representative also submitted calculations purporting to show that taxable purchases constituted 11.7 percent of total purchases for one three-month period; however, said calculations were not substantiated.

In addition, we find that the Division by letter notified petitioners of the audit and requested petitioners' books and records be made available for examination for the period June 1, 1979 through May 31, 1982. The Division did not make a request for, nor examine petitioners' records for the period after June 1, 1982.

OPINION

¹ A similar assessment was issued to Ali S. Ahmed on the same date but is not at issue herein.

Petitioners contest only the assessment for the period from June 1, 1982 to August 31, 1983, asserting that they had adequate books and records and that it was improper for the Division to estimate taxes by means of a mark-up test. The Division argues that petitioners' books and records were not adequate and complete and that it was proper for the Division to estimate taxes by means of a mark-up test. The Administrative Law Judge sustained the Division's use of the mark-up test but reduced the estimated tax liability based, in part, on documentation submitted by petitioners subsequent to the hearing. We reverse the determination of the Administrative Law Judge.

The decision in Chartair, Inc. v. State Tax Commn. (65 AD2d 44) makes it clear that resort to external indices as a method of computing sales tax liability must be founded on a determination of the insufficiency of the taxpayer's record keeping which makes it virtually impossible to verify sales receipts and conduct an audit. There must be an actual request for the taxpayer's books and records (Matter of Christ Cella, Inc. v. State Tax Commn., 102 AD2d 352) for the entire period of the assessment (Matter of Adamides v. Chu, 134 AD2d 776, Iv to appeal denied 71 NY2d 806) and the Division must make a thorough examination of such records (Matter of King Crab Restaurant, Inc. v. Chu, 134 AD2d 51 [3d Dept 1987]) before proceeding to external indices to determine the taxpayer's sales tax liability. The issue in this case is whether the audit for the period June 1, 1982 to August 31, 1983 meets these standards. We conclude that it does not.

The Division never requested petitioners' books and records for this period and never made an examination of records maintained by petitioner during this period. Instead, the results of the audit for the earlier period were automatically extended to this subsequent period. Absent

some rationale, such an automatic extension of audit results, beyond Che audit' performed, cannot be sustained in light of Matter of Adamides v. Chu (*supra*).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioners, Ahmed S. Ahmed and Yahya S. Ahmed, is granted to the extent that the assessment for the period from June 1, 1982 to August 31, 1983 is cancelled, but except as so granted is in all other respects denied;

2. The determination of the Administrative Law Judge is modified as indicated in paragraph "1" above, but except as so modified is sustained;

3. The petitions of Ahmed S. Ahmed and Yahya S. Ahmed are granted to the extent indicated in paragraph "1" above and the Division of Taxation is directed to modify the notices of determination issued on December 13, 1983 accordingly, but except as so granted are in all other respects denied.

Dated: Albany, New York
NOV 10 1988

John P. Dugan
President

Francis R. Koenig
Commissioner