

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
SAIME DISCOUNT, 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 December 1, 1980 through November 30, 1981. :

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on June 7, 1990 with respect to the petition of Saime Discount, 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 December 1, 1980 through November 30, 1981 (File Nos. 801109 and 801110). Petitioners appeared by Jack M. Portney, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Irwin Levy, Esq., of counsel).

The Division of Taxation submitted a letter in lieu of a brief in support of its exception. Petitioners submitted a brief in opposition. Oral argument, at the request of the Division, was held 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 petitioners' additional sales and use taxes due on their gasoline service station operations.

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 except for finding of fact "3" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

On February 24, 1984, the Division of Taxation issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner Saime Discount, Ltd., for the period December 1, 1980 through November 30, 1981, containing the following explanation:

"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."

It asserted additional tax due of \$163,515.94, plus penalty and interest totalling \$136,630.49, for a total amount due of \$300,146.43. On the same date, an additional Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued to petitioner Kanat Arbay, as officer of Saime Discount, Ltd., in the same amounts as noted above asserting liability as follows:

"You are personally liable as officer of Saime Discount, 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."

The taxes due for the various periods have been broken down as follows:

<u>Period Ended</u>	<u>Tax Due</u>	<u>Fraud Penalty Due</u>	<u>Interest</u>	<u>Total</u>
2/28/81 381	\$25,273.01	\$12,636.51	\$10,082.41	\$ 47,991.93
5/31/81 481	33,347.30	16,673.69	12,234.48	62,255.47
8/31/81 182	41,947.57	20,973.79	13,950.08	76,871.44
11/30/81 282	62,947.99	31,474.00	18,605.53	<u>113,027.52</u>
				\$300,146.36 ¹

Petitioner Saime Discount, Ltd. operated an Amoco gasoline service station at Dutch Broadway and Corona Avenue in Valley Stream, New York, from December 1, 1980 through November 30, 1981. The station had five gas pumps, and it was determined that no repair work was done at this station. Kanat Arbay was president and owner of Saime Discount, Ltd.

¹This total differs from the total amount due as per the summary of tax liability due to a \$.07 discrepancy for one of the quarters representing an amount of tax due.

We modify the first paragraph of the Administrative Law Judge's finding of fact "3" to read as follows:

Initially, this case was assigned to Andrew Coughlin of the Special Investigations Bureau late in 1982. Mr. Coughlin visited the Amoco service station on October 22, 1982, after the business was no longer owned by Kanat Arbay. At that point in time, it was being operated as Meryem Discount² and was owned by Yilmaz Toksoy. At the same time Mr. Coughlin was investigating Saime Discount, Ltd., he also was responsible for the review of the books and records of various other service stations owned by Kanat Arbay. Mr. Coughlin was informed that Jack Portney, C.P.A., would handle the service station investigations and represent Kanat Arbay. Mr. Coughlin testified that his "log" appeared to show that back on October 25, 1982, he asked Mr. Portney for records for four service stations, one of them being Saime Discount, Ltd. However, he could not remember asking for particular records. Furthermore, there is no written evidence of a request for records from Saime Discount, Ltd.³

Approximately at the same time, Mr. Coughlin subpoenaed Amoco, the gasoline supplier, for information pertaining to purchases made by Kanat Arbay for the gasoline service station in question. He was able to obtain monthly statements covering the period November 30, 1980

²Testimony in the record also refers to the subsequent owner as "Yilmaz Discount" at various times during the hearing.

³The first paragraph of the Administrative Law Judge's finding of fact "3" read as follows:

"Initially, this case was assigned to Andrew Coughlin of the Special Investigations Bureau late in 1982, after the business was no longer owned by Kanat Arbay. At that point in time, it was being operated as Meryem Discount* and was owned by Yilmaz Toksoy. At the same time, Mr. Coughlin was investigating Saime Discount, Ltd., he also was responsible for the review of the books and records of various other service stations owned by Kanat Arbay. Mr. Coughlin was informed that Jack Portney, C.P.A., would handle the service station investigations and represent Kanat Arbay. It is from Mr. Portney that Mr. Coughlin requested books and records on or about October 25, 1982. Although it is unclear from the record which books and records were specifically requested, it appears as though books and records pertaining to cash receipts and business operations were among those requested by Mr. Coughlin."

* Testimony in the record also refers to the subsequent owner as "Yilmaz Discount" at various times during the hearing.

Finding of fact "3" has been modified to more accurately reflect the record.

through November 30, 1981, indicating that certain purchases were made by the owner or operator of the station, Kanat Arbay, designated by customer number 53287. There is testimony that indicates that the customer number assigned by the dealer remains the number assigned to a particular station location whereas the name of the customer changes if the supplier is aware that the station is being operated by a new owner. During this time, Mr. Coughlin was also able to obtain the sales tax returns filed by Mr. Arbay from New York State tax records in Albany. While Mr. Portney was preparing to submit various books, records and documents from petitioners' business, Mr. Coughlin analyzed the information obtained from Amoco. He prepared a schedule which showed the breakdown of gallons purchased for each type of gasoline per month from December 1980 through October 1981, and computed the total cost of the gasoline based on the particular price of that type. He compared those figures to the taxable sales reported on Mr. Arbay's tax returns and calculated a difference upon which he computed an additional tax due of \$139,208.97.

In approximately April 1983, the Special Investigations Bureau ceased its operation and the files being handled by Mr. Coughlin were then transferred to various local district offices. Petitioners' case herein was transferred to the Mineola District Office at which point an assessment had not been issued, nor had the investigation been completed. Subsequent to the time that Mr. Coughlin no longer retained the file for Saime Discount, Ltd., Mr. Portney contacted him with certain of the business's books and records. When Mr. Portney asked what he should then do with the records, he was instructed by Mr. Coughlin to "wait until the auditor gets in touch with you and give it to him". The file was then assigned to Kathleen Day, formerly Kathleen Kennedy, a sales tax auditor, of the Mineola District Office.

Mrs. Day testified that the case was assigned to her only to work up an assessment and not as an audit. As a result, she utilized only the records that were already contained within the file: bank statements showing deposits, third-party verification from Amoco Oil Company and sales tax returns filed by Kanat Arbay for Saime Discount, Ltd. Mrs. Day never contacted

petitioners nor requested additional information. She merely utilized the information obtained by Mr. Coughlin in the previous few months to produce the notices of determination at issue herein.

Mrs. Day determined that gasoline purchases per the Amoco verification statements for the period December 1, 1980 through November 30, 1981, were \$2,055,689.00. These purchases were marked up an estimated 15% based on an average statewide markup utilized in similar audits performed during that time by Mrs. Day. This resulted in audited taxable gas sales of \$2,364,042.00. In addition, oil purchases per the Amoco statements of \$15,729.00 were also marked up an estimated 80%, which resulted in audited taxable oil sales of \$28,312.00. Thus, the total of audited taxable sales of gas and oil amounted to \$2,392,354.00 as compared to reported taxable sales during this period of \$87,143.00. The additional sales tax due computed on this difference was \$163,515.94.

In addition to computing the assessment, Mrs. Day also made a comparison of bank deposits of \$1,736,509.00, which had been made during the same taxable period for which taxable sales of \$87,143.00 had been reported.

Jack Portney, a Certified Public Accountant, appeared on behalf of petitioner to represent his position. Mr. Portney explained that Kanat Arbay was the Turkish ambassador to the State of Pennsylvania and was in a very high level of business in Turkey. Mr. Portney testified that, in years preceding and during the period at issue, when Mr. Arbay came to the United States his association with the gasoline companies overseas enabled him to obtain large allocations of gasoline during the years 1979 through 1981 when gasoline was in very short supply. Mr. Arbay obtained gasoline not only for his own retail sale purposes but also for resale. Mr. Portney further described Mr. Arbay's association with other Turkish gas station owners who were unable to obtain as great an allocation of gasoline for retail sale, and stated that they would pump the gasoline from Mr. Arbay's stations during the night when his business was not in operation with a special pump purchased for that particular purpose.

By the time Mr. Portney had invoices, resale certificates and other documentation together which purportedly exonerated petitioners, the Special Investigations Bureau had long been terminated. Since Mr. Coughlin's division was terminated, and Mrs. Day was not placed in the position to perform any audit procedures, the first opportunity Mr. Portney was given to submit this information on behalf of petitioners was at the conference level.

The evidence submitted by Mr. Portney on behalf of petitioners' resale contention was as follows:

(a) Sales invoices covering the period February 1981 through November 1981 showing sales of various types of gasoline to Sevinc and Ahmet Batur at 2 Saratoga Boulevard, Island Park, New York, and Apokan Discount, 189 Sunrise Highway, Amityville, New York (which is owned and operated by Abdullah Nevrushan) totalling \$1,868,684.00.

(b) Two resale certificates showing Sevinc Batur and Abdullah Nevrushan as purchasers of tangible personal property for resale from Saime Discount, Ltd., principally engaged in the business of a gasoline service station, dated January 19, 1981 and January 28, 1981, respectively.

(c) As an analysis of the sales information from petitioner's records, Mr. Portney presented a schedule of purchases of gasoline between February 1981 and November 1981, offset by sales for resale in gallons and dollars as well as retail sales to customers.

(d) A statement in Turkish, which Mr. Portney claims is notarized, as well as an English translation of the same, by Abdullah Nevrushan which states as follows:

"I own 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.

I hope this will clarify 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 as though the Turkish copy bears a date stamp and date within the body of the notarization of "19/6/1984."

(e) A letter from the Nassau Fire Commission dated March 21, 1980, addressed to Mr. Kanat Arbay, c/o Merrick Discount Center, Ltd., a Power Test gasoline service station also being operated by Mr. Arbay during an overlapping period. Although the letter pertains to another gas station owned by Mr. Arbay, Mr. Portney's explanation for the submission of this evidence is that it happened to be a complaint lodged against a specific station for activities that were taking place similarly with all of Mr. Arbay's stations, and those such activities are described within this correspondence. The letter addresses the transporting of gasoline fuel and the requirement that an explosive proof pump with appropriate extension cord be used for such purpose.

(f) A letter of verification from the Henrich 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 business was unable to locate the invoice, this letter was being submitted as part of the proof of purchase.

OPINION

In the determination below, the Administrative Law Judge held that it was unclear that an adequate request for records was made for petitioners' records and that no evidence was presented by the Division of Taxation (hereinafter the "Division") which would support the conclusion that the taxpayers' records were so insufficient as to make it impossible to verify taxable sales and conduct a complete audit. Nonetheless, the Administrative Law Judge assumed that an adequate request for records was made and that the resort to external indices was appropriate. The Administrative Law Judge examined the audit and held 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 because the Division grossly and deliberately overlooked the

records supporting the resale of gasoline by petitioners. Thus, the Administrative Law Judge determined that there was no liability and, therefore, no need to address the issue of whether Kanat Araby was a person required to collect tax.

On exception, the Division alleges that petitioners had sales of \$2,392,354.00 (including a 15% mark-up) of Amoco gasoline during the audit period and argues that although petitioners have shown sales for resale in the amount of \$1,868,684.00, there still remains unsubstantiated sales of \$436,527.00 and taxes due on such amount since only \$87,143.00 was reported as taxable sales during the tax period. The Division also seeks an assessment against Kanat Arbay based on the unsubstantiated sales of \$436,527.00.

Petitioners argue that the State of New York never conducted an audit of petitioners' books and records and, further, the State's auditors were directed by their supervisors to make assessments based on third party verifications already contained in the file.

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]). 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). The purpose of the examination is 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).

In the matter at hand, the Division did not follow this procedure. There is no evidence in the record of a written request to the taxpayers for books and records, and while this may not be fatal to the sufficiency of the request for records, the evidence presented does not support the conclusion that there was a request in any form for specific books and records. Instead, testimony by two Division auditors points out rather vividly that there never was a formal request by the Division for specific books and records.

The first auditor stated that he did not make an assessment and was only investigating and trying to obtain the various books and records and also any information from third parties (Tr., p. 26). In fact, when asked by the Division's attorney, "[d]id you request books and records from Mr. Portney?", the auditor answered, "[f]or this particular service station I do have a letter and I could refer to the log" (Tr., p. 12). It is important to note here that neither the letter nor the log referred to by the auditor were entered into the record as evidence by the Division and no other evidence as to their content is disclosed. Furthermore, when asked by the Division's attorney, "when you said records, did you specifically specify what particular records you were looking for?", the auditor answered, "I cannot remember at this time asking for particular records" (Tr., p. 13).

The second auditor testified that the case was not assigned to her as an audit, but that she was given the case only to work up an assessment (Tr., pp. 47-48). When asked by the Administrative Law Judge, "[d]id you ever request any records of the taxpayer?", she further testified, "[n]o, I did not" (Tr., pp. 52-53).

The record before us lacks any evidence of the clear and formal request for specific books and records required by Matter of Christ Cella, Inc. v. State Tax Commn. (*supra*, 477 NYS2d 858, 859); therefore, we conclude that the assessments for the period December 1, 1980 through November 30, 1981 must be cancelled. Without a specific request for the records, it is not necessary to examine any other aspect of the audit. Thus, the resort to external indices to estimate tax for this period was improper (Matter of Adamides v. Chu, *supra*; Matter of Christ Cella, Inc. v. State Tax Commn., *supra*; Matter of Anton's Car Care Ctr., Ltd., Tax Appeals Tribunal, November 23, 1988; Matter of Ahmed, Tax Appeals Tribunal, November 10, 1988).

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 petition of Saime Discount, Ltd. and Kanat Arbay, as Officer, is granted; and

4. The notices of determination issued February 24, 1984 are cancelled.

DATED: Troy, New York
June 13, 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