

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

SAM & RAJ APPLIANCE :
DISCOUNT CENTER, INC. :

DECISION

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 December 1, 1978
through November 30, 1981. :

Petitioner, Sam & Raj Appliance Discount Center, Inc., 37-08 74th Street, Jackson Heights, New York 11373, filed an exception to the determination of the Administrative Law Judge issued on September 3, 1987 with respect to its petition for a revision of a determination of sales and use taxes under Articles 28 and 29 of the Tax Law (File No. 804807). Petitioner appeared by Seymour Finder, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Michael Gitter, Esq. of Counsel).

The parties did not submit briefs nor request oral argument on this exception. After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

The issues raised on this appeal are whether the Division of Taxation properly treated as taxable certain sales the petitioner claimed to be exempt and properly included in gross sales certain amounts petitioner contended were loans.

FINDINGS OF FACT

Findings of fact 7c, 7e and 9 of the Administrative Law Judge's determination are modified by this opinion as hereinafter indicated. All of the remaining facts found by the Administrative Law Judge are adopted by the Tribunal and summarized and supplemented as follows.

In November of 1981, the Division of Taxation commenced a field audit of petitioner for sales and use taxes due for the period December 1, 1978 through November 30, 1981. The revised assessment that ultimately resulted from this audit, which totaled \$77,721.86 in tax, was based on an analysis of petitioner's claimed nontaxable sales and reported gross sales.

With respect to the nontaxable sales, the auditor reviewed those claimed by the petitioner for the month of June 1981. Of a total \$305,277.19 claimed, the auditor disallowed \$28,284.50. From this amount of disallowed nontaxable sales, the auditor calculated a margin of error of 9.27 percent and applied this margin of error to petitioner's claimed nontaxable sales for the entire audit period.

In the second aspect of the audit, the auditor compared petitioner's cash receipts with reported gross sales for the sales tax quarter ending November 30, 1981, and found cash receipts to be \$213,845.67 more than gross sales. Of this difference, the auditor disallowed \$36,717 which the petitioner claimed to have been loans received from certain individuals. From this disallowed amount, the auditor calculated a margin of error of 17.17 percent which was applied to the entire audit period increasing petitioner's gross sales.

The Administrative Law Judge rendered a determination holding that the Division of Taxation improperly disallowed certain of the claimed nontaxable sales and certain of the

deductions from cash receipts, but that the remaining items had been properly disallowed. The petitioner's exception challenges only certain of those findings that held items had been properly disallowed. We will consider the petitioner's exception item by item. The petitioner did not raise any general challenge to the audit methodology employed in this audit. Exceptions I and 2

The petitioner challenges the Administrative Law Judge's findings that the Division of Taxation properly disallowed a claimed nontaxable sale of \$1,681.00 to Soliman Abdel Nutalib (finding of fact 7(d)(ii)) and \$809.00 of a claimed nontaxable sale to Dr. T. Venkataswamy (finding of fact 7(d)(v)). In each case the nontaxable sale was initially disallowed by the auditor because an incorrect exemption certificate was presented by the petitioner to substantiate the claim. Each claimed exemption was based on the purchaser's status as an officer of a United Nations mission. A properly completed Certificate of Diplomatic Consular Tax Exemption was required for an individual to claim such exemption; instead, the petitioner presented an Exempt Organization Certificate to support each of the claimed exemptions. The auditor attempted to verify the exempt purchases by contacting the purchasers. In the case of the Mutalib sale, the purchaser's response did not verify any portion of the purchase at issue. In the case of the Venkataswamy sale, the purchaser's response confirmed only a portion of the total claimed exemption. The confirmed amount was allowed by the Division.

Exceptions 3 and 4

The petitioner also challenges the Administrative Law Judge's findings that the Division of Taxation properly disallowed claimed nontaxable sales to Tara Shah (finding of fact 7(d)(iii)) and to Vallee Chunhaswadikul (finding of fact 7(d)(iv)). Petitioner claimed the sales

were not taxable because the goods shipped out of New York State. In each instance, the petitioner issued an invoice to the purchaser listing an address outside of the United States. However, the petitioner did not directly ship the goods to the purchasers at the foreign addresses. Instead, the purchasers each hired a private carrier, Lanna Trading and Shipping Ltd. to pick up the goods at the petitioner's place of business. The private carrier then transported the goods to its warehouse, repacked them with other goods of the purchasers and arranged to have them exported by a common carrier from the United States. On the bills of lading the goods were listed as used household goods.

Exception 5

Petitioner next takes exception to finding of fact 7(c) of the Administrative Law Judge's determination because it failed to include a second sale to Mercedes Buenaventura in the amount of \$1,153.92. The list of allowed nontaxable sales at finding of fact 7(c), which includes a sale in the amount of \$561.75 to Mercedes Buenaventura, is based on a letter from the Division of Taxation written after the hearing whereby the Division conceded that certain sales were exempt because the Division verified the validity of the identification numbers used to claim these exemptions. The Division's letter attached a list of the verified numbers and stated that they covered 92.3% of the claimed sales to diplomatic personnel, but the letter did not itemize the list of conceded sales nor explain the calculation of the percentage. Among the list of verified numbers was 2721 issued to Mercedes Buenaventura. The sale at issue of \$1,153.92 was invoiced to N. Buenaventura and showed the identification number 2721. The hearing transcript does not indicate any claim by the Division that N. Buenaventura was not

Mercedes Buenaventura. Based on these facts, we find no reason to treat the two Buenaventura sales differently and find, therefore, that the \$1,153.92 sale to N. Buenaventura is nontaxable.

Exception 6

The final exception raised by the petitioner relates to the audit analysis performed of petitioner's cash receipts as compared to gross sales for the sales tax quarter ending November 30, 1981. Petitioner takes exception to finding of fact 8(d) of the Administrative Law Judge's determination which disallowed five claimed loans totaling \$15,382.00. Petitioner claims that these amounts, as loans, should not be included in gross sales. The Administrative Law Judge found that the petitioner did not support its claim that it received these loans from third parties with credible testimony or evidence.

OPINION

Exceptions 1 and 2

The petitioner failed to sustain its burden, under section 1132(c) of the Tax Law, to prove that the disallowed Mutalib and Venkataswamy sales were exempt. We affirm the Administrative Law Judge's determination holding these sales taxable.

Exceptions 3 and 4

The facts establish that the purchasers, Tara Shah and Vallee Chunhaswadikul, each took delivery in New York of the goods purchased from the petitioner through the acts of their designee, Lanna Trading and Shipping Ltd. Since actual delivery took place in New York, these sales were subject to the sales tax even if the goods were subsequently exported from the United States. (Matter of Continental Arms Corp. v. State Tax Commn., 130 AD2d 929 [3d Dept 1987]; In the Matter of David Hazan, Inc., Tax Appeals Tribunal, April 21, 1988.)

Accordingly, we affirm the Administrative Law Judge's determination holding these sales taxable.

Exception 5

As stated above, we find the \$1,153.92 in sales to N. Buenaventura as nontaxable; therefore finding of fact 7(c) of the Administrative Law Judge's determination is modified to include this sale as not taxable. Finding of fact 7(e) of the determination is also modified to reflect the N. Buenaventura sale as not taxable, by making the appropriate reduction in petitioner's total disallowed sales, the error percentage, and in the sales tax due. Finding of fact 9 of the determination is also modified to reflect the appropriate reduction in tax, penalty and interest due.

Exception 6

Based on the Administrative Law Judge's finding that petitioner did not submit credible evidence or testimony to substantiate that certain loans in the amount of \$15,382.00 were received during the test period, we affirm the Administrative Law Judge's determination including this amount in petitioner's gross sales.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the petitioner, Sam & Raj Appliance Discount Center, Inc. to findings of fact 7(c) and 7(e) of the determination of the Administrative Law Judge is partially granted and except as so granted the exception is in all other respects denied;
2. The determination of the Administrative Law Judge is modified to the extent that:
 - (a) finding of fact 7(c) is modified to include a sale of \$1,153.92,

(b) findings of fact 7(e) and 9 are modified to reduce the error percentage and the tax due, and

(c) conclusion of law E is modified to reflect the above modifications to such findings of fact and except as so modified, is affirmed;

3. The petition of Sam & Raj Appliance Discount Center, Inc. is granted to the extent indicated by conclusion of law E of the Administrative Law Judge's determination as further modified by paragraph "2" above, and except as so granted is in all other respects denied; that the Division of Taxation is directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on June 20, 1983; and that except as so granted, the petition is in all other respects denied.

BATED: Albany, New York
APR 28, 1988

John P. Dugan
President

Francis R. Koenig
Commissioner