STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MARY RINALDI SWET	:	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, 1982 through November 30, 1985.	:	

Petitioner Mary Rinaldi Swet, 14 Cox Avenue, West Hampton Beach, New York 11978, filed an exception to the determination of the Administrative Law Judge issued on July 12, 1990 with respect to her petition 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, 1982 through November 30, 1985 (File No. 805287). Petitioner appeared by Kase & Druker, Esqs. (James O. Druker, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Lawrence A. Newman, Esq., of counsel).

Petitioner filed a brief on exception; the Division of Taxation filed a letter in response to petitioner's exception. Oral argument was not requested.

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

ISSUES

I. Whether petitioner kept adequate books and records from which to conduct an audit, thereby rendering the 1985 estimate improper.

II. Whether petitioner was legally acting as an agent when purchasing goods at retail for her clients, thereby exempting her from sales tax liability.

III. Whether petitioner is liable for sales tax on purchases of materials which were incorporated into a capital improvement project.

FINDINGS OF FACT

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

Pursuant to a field audit of Mary Rinaldi Swet d/b/a Mary Michael Rinaldi Interior Design ("petitioner"), the Division of Taxation, onJune 11, 1986, issued to such petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due in the amount of $11,153.28, plus interest, for a total amount due of $14,130.31 for the period December 1, 1982 through November 30, 1985.

Previously, on February 27, 1986, petitioner executed a consent extending the period of limitation for the assessment of sales and use taxes whereby she agreed that such taxes for the period December 1, 1982 through February 28, 1983 could be assessed at any time on or before June 20, 1986.

During the period at issue, petitioner was an interior decorator and designer who consulted, designed rooms and provided furnishings for homeowners and commercial accounts in Suffolk and Nassau Counties and in New York City. Books and records for the entire audit period were requested by the auditor. Petitioner produced sales tax returns, Federal and State income tax returns, a cash book which set forth purchases and cash receipts, a client folder which contained the final statements sent by petitioner to her clients, monthly bank statements and cancelled checks. Sales journals, sales invoices (other than the final statements) and worksheets for sales and Federal income tax returns were not provided to the auditor.

From the aforesaid records, the auditor determined that sales tax accrued had not been remitted in a timely manner, i.e., sales tax was accrued until each job was completed. Gross sales were not reported on petitioner's sales tax returns. Personal and business checkbooks were combined. Petitioner's cash books were categorized by the auditor as being "confused and out of sequence." The auditor thereupon requested petitioner to reconstruct her data for a one-year period (December 1, 1982 through November 30, 1983), but she was unable to do so. Gross

sales (commission income) and net income reported on petitioner's 1983 and 1984 Federal income tax returns could not be reconciled to her books and records nor to the sales tax returns filed during these years. The books and records were, therefore, deemed to be inadequate due to the lack of an audit trail.

The auditor (along with petitioner) then attempted to summarize petitioner's cash books and client folders. The cash books revealed that petitioner had performed services for 28 different clients (excluding multiple jobs for two clients) during the audit period. Petitioner was able to produce 23 client folders and 14 final statements for the period. The auditor categorized the figures contained in the cash books into fees, purchases, expenses and other on a client-by-client basis. Petitioner was asked to summarize the cash books in a similar manner and to provide specifics regarding wholesale versus retail purchases and the sales tax paid or billed. By comparing these summaries, the auditor determined audited gross sales to be $337,214.90 for the audit period. Audited taxable sales and sales tax due thereon were computed, by locality (with tax due at the applicable rate), as follows:

Locality	Taxable Sales	Sales Tax Due
Suffolk County	$112,580.98	$ 8,266.43
Nassau County	26,309.42	2,170.52
New York City	193,675.68	15,978.23
Total	$332,566.08	$26,415.18

An allocation of sales tax paid at retail and per sales tax returns was performed to correct errors in locality reporting and to allow credit when tax was paid on petitioner's purchases. While she had remitted sales tax in the amount of $12,400.93 with her returns, the auditor could identify only $12,111.56 with clients specifically analyzed through petitioner's cash books. Total sales tax paid was determined to be $15,262.90 and, when applied to audited tax due of $26,415.18, additional tax due was calculated to be $11,153.28 which is the amount of the assessment at issue herein.

Petitioner's fees were computed in one of the following ways:

(a) Purchases were made, at wholesale, through the design trade which is the decorating and designer building also known as 979 in the trade. Petitioner would add in her 30 percent commission when billing her client for such purchases; or

(b) Because purchases from the decorating and designer building were expensive, petitioner would sometimes purchase at retail. The client would then be billed for petitioner's expenditures plus a designer fee which would be computed in a manner similar to that set forth in subparagraph (a) or, in some cases, on an hourly basis or by the design. For some of the retail purchases, the client would accompany petitioner and make the actual purchase. In most cases, however, petitioner would make the purchase herself.

In her perfected petition (Exhibit "C"), petitioner conceded that she owed approximately $4,333.00 in sales tax on commissions charged in conjunction with wholesale purchases made on behalf of her clients. In these instances, she was reimbursed the net price plus 30 percent (her commission). Petitioner stated that she had failed to pay tax on the commission due to the fact that she was unaware that such commissions were taxable. In addition, petitioner conceded that she owed $2,000.00 in tax from a particular job (later identified as the Jacobs job) where the client was supposed to pay the sales tax directly (petitioner had used her resale number), but failed to do so.

At the hearing, petitioner conceded that, in instances where she bought merchandise at a designer discount and then billed the client for the cost plus her commission, these purchases were taxable along with the fees when based upon a percentage thereof. Subsequent to the hearing, petitioner submitted a list of items which she agreed had been properly assessed (which comprised the approximately $4,333.00 referred to in the perfected petition). These items were as follows:

Client	Items Conceded	Taxable Amount
Scharf	Fees	$ 1,767.00
	Resales	5,344.00
Jacobs	Resales	32,005.00
Bouy, Unit 11	Resales	3,027.00
	Fees	2,000.00
Konheim	Fees	7,735.00

With respect to the Scharf account, an examination of the audit report indicates that tax was assessed on fees totalling $1,944.29, purchases of $5,878.24 and expenses of $133.16. Petitioner paid sales tax (either at the time of the purchases or with the filing of sales tax returns) in the amount of $342.10. Tax was assessed at the rate of 7.25 percent on all but $400.00 worth of purchases (the applicable rate at the time of these purchases was 7.50 percent). Total tax due on this account is $577.79 ($7,555.69 x .0725 [$547.79] + $400.00 x .075 [$30.00] = $577.79). Petitioner has conceded tax liability on fees and resales totalling $7,111.00 (tax due thereon at 7.25 percent would be $515.55). Petitioner, therefore, concedes liability for all but $62.24 of the total assessment ($577.79) relating to this account.

On the Jacobs account, tax was assessed on fees in the amount of $13,871.35, purchases of $41,688.91 and expenses of $779.51. Tax due thereon (at 8.25 percent) is $4,648.03. Petitioner conceded liability on resales totalling $32,005.00 with tax due thereon in the amount of $2,640.41. Tax had previously been paid in the amount of $585.98. Remaining at issue, therefore, is $1,421.64 ($4,648.03 - $2,640.41 - $585.98).

For Bouy, Unit 11, tax was assessed on fees of $3,138.59 and purchases of $9,256.02 with tax due thereon (at 7.5 percent) in the amount of $929.60. Petitioner conceded liability on resales and fees totalling $5,027.00 with tax due thereon in the amount of $377.03. Tax had previously been paid in the amount of $578.27. Remaining at issue, therefore, is $25.70.

On the Konheim account, tax was assessed on fees of $8,642.03, purchases of $32,788.13 and expenses of $804.10 with tax due thereon of $3,484.33. Petitioner conceded liability on fees of $7,735.00 with tax due thereon of $638.14. Tax had previously been paid on purchases or

with returns in the amount of $1,916.05. Remaining at issue, therefore, is tax assessed in the amount of $930.14.

Based upon the foregoing, total concessions by petitioner were in the amount of $4,171.13, thereby reducing the portion of the assessment at issue to $6,982.15. It is unclear how petitioner arrived at the amounts of resales and fees which were conceded to be taxable. In addition, it is also unclear whether petitioner concedes an additional tax liability on the Jacobs account due to the failure of the client to pay the tax directly. As noted above, petitioner admitted liability for sales tax in instances where she bought merchandise at a designer discount and then billed the client for her cost plus commission. It must, therefore, be presumed that the balance of the assessment (exclusive of the capital improvement certificate issues which will hereinafter be addressed) relates to purchases made at retail along with commissions computed thereon.

Petitioner submitted certificates of capital improvement for work performed by Creative Millwork (contractor) for two of her clients, Goldstein and Lipton. She contends that materials purchased by her in connection with the work performed should be exempt from tax on the basis that such materials became part of a capital improvement.

With respect to the purchases made at retail by petitioner for her clients, it is her position that such purchases were made as an agent for these clients and, as such, are exempt from sales or use tax. Admittedly, petitioner did not enter into a written agreement with any of the clients which authorized her to act as their agent nor did she communicate to vendors (either verbally or by notation on purchase invoices) that she was purchasing the merchandise as agent for the client.

Tax was not assessed by the Division of Taxation on any purchases made by the clients, but tax was assessed on all purchases (and fees based thereon), whether at wholesale or retail, made by petitioner. Tax was not assessed on fees charged solely for designer services and which were not computed based upon the amounts expended by the clients for the purchase of services and materials.

OPINION

The Administrative Law Judge determined that petitioner Mary Rinaldi Swet was not acting as an agent on behalf of her clients when making purchases at retail and, thus, the entire amount of her billings (cost of purchases plus her fee or commission) was taxable. The Administrative Law Judge also determined that the certificates of capital improvements submitted by petitioner did not render her purchases of materials used in a capital improvement project as nontaxable.

On exception, petitioner argues that she was legally acting as an agent for her clients when she purchased materials at retail and, therefore, was not liable for the tax on the cost of her purchases, plus her fee or commission contained in the billings to her clients. Furthermore, petitioner argues that the certificates of capital improvements exempt her from liability for taxes on those particular jobs. Petitioner also argues that the Division's sales tax estimate for 1985 was improper because the 1985 return was 100% consistent with her records.

In response, the Division of Taxation agrees fully with the Administrative Law Judge's determination and asks that it be affirmed.

We affirm the determination of the Administrative Law Judge.

The first issue that we address concerns the Division's right to use estimate techniques to determine sales tax for 1985. Petitioner argues that the Division only compared petitioner's 1983 and 1984 Federal income tax returns to her books, records and sales tax returns and found discrepancies and failed to make such a comparison for 1985. Had the Division made such a comparison for 1985, petitioner asserts, no discrepancy would have been discovered. On this basis, petitioner contends that the Division did not have the right to estimate taxes for 1985.

First, we note that petitioner has raised this argument for the first time on exception. Although the Division called the individual who performed the audit as a witness, petitioner did

not attempt to question the auditor with respect to the adequacy of petitioner's records. Further, we find petitioner's argument totally unfounded.

The Division's right to use estimate techniques depends on whether the taxpayer's books and records are adequate to support a complete audit (see, Matter of Mohawk Airlines v. Tully, 75 AD2d 249, 429 NYS2d 759; Matter of Chartair, Inc. v. State Tax Commn., 65 AD2d 44, 411 NYS2d 41) not, as suggested by petitioner, on whether the taxpayer's sales tax returns are consistent with its books and records. Further, it is well established that the Division is not required to accept as valid records created by the taxpayer that are not confirmed by independent source documents (see, Matter of Club Marakesh v. Tax Commn. of State of New York, 151 AD2d 908, 542 NYS2d 881, lv denied 74 NY2d 616, 550 NYS2d 276; Matter of Giordano v. State Tax Commn., 145 AD2d 726, 535 NYS2d 255). Here we find that the auditor examined the books and records for the entire audit period and correctly found that it was not possible to verify that the only record petitioner provided of her taxable sales, the final statements sent to 14 clients, (although petitioner performed services for 28 clients during the audit period) was an accurate account of petitioner's taxable sales. Therefore, we conclude that petitioner's records were inadequate and the Division's resort to an estimate technique was justified.

The second issue which we address is whether petitioner proved that she was acting as an agent for her clients when she purchased materials at retail.

Petitioner concedes that items purchased by her at a designer discount (wholesale) to which she added a commission on the final bill to her clients are resales and are taxable at the final amount including the commission. Nevertheless, petitioner argues that when she purchased items at retail she was acting as an agent for her clients and, therefore, her commission is not subject to sales tax.

> "To establish an agency or representative relationship there must be a manifestation that petitioners consented to act on behalf of their clients, subject to the latter's control and that the clients authorized this fiduciary relationship" (Matter of Hooper Holmes

> v. Wetzler, 152 AD2d 871, 544 NYS2d 233, 235 [citations omitted], lv denied 75 NY2d 706, 552 NYS2d 929).

Applying these criteria to petitioner's circumstances, the facts indicate that petitioner did not enter into a written agreement with any of her clients authorizing her to act as an agent on their behalf; nor did petitioner inform any vendors from whom she purchased goods of this agency relationship; and, furthermore, petitioner has not submitted any evidence, except for her own testimony, which establishes that an agent-principal relationship existed. Therefore, we have no alternative but to agree with the Administrative Law Judge that petitioner has not met her burden of proving that an agency relationship existed between her and her clients at the time she purchased items at retail for them and, thus, the total amount of her billings to her clients, including her fee or commission, is a taxable receipt (Tax Law § 1101[b][3]).

The next issue which we must now address is whether the Administrative Law Judge erred when he determined that the two certificates of capital improvement submitted by petitioner did not prove that certain purchases by petitioner were excluded from tax.

Tax Law § 1101(b)(9) defines a capital improvement in pertinent part as:

> "[a]n addition or alteration to real property which:
>
> "(i) Substantially adds to the value of the real property, or appreciably prolongs the useful life of the real property; and
>
> "(ii) Becomes part of the real property or is permanently affixed to the real property so that removal would cause material damage to the property or article itself; and
>
> "(iii) Is intended to become a permanent installation."

A properly completed certificate of capital improvement from the customer, accepted in good faith by the contractor, establishes a basis for the contractor not to collect sales tax on the services of maintaining, servicing or repairing real property (otherwise taxable under section 1105[c][5] of the Tax Law) or on the services of installing tangible personal property (otherwise taxable under section 1105[c][3] of the Tax Law) (see, Matter of Saf-Tee Plumbing Corp. v. Tully, 77 AD2d 1, 432 NYS2d 409). With respect to purchases by a contractor, Tax Law

§ 1101(b)(4) provides that the sale of tangible personal property to a contractor for use or consumption in construction is a retail sale and subject to sales and use tax, regardless of whether tangible personal property is to be resold as such or incorporated into real property as a capital improvement or repair.

Since a certificate of capital improvement serves to exclude a service from sales tax, which would otherwise be imposed by Tax Law §§ 1105(c)(3) or 1105(c)(5), it is clear that such a certificate could not relieve petitioner from liability on her purchases of tangible personal property under Tax Law § 1101(b)(4).

The Administrative Law Judge also determined that the Goldstein certificate of capital improvement did not overcome the burden of proving the nontaxability of the transaction because it was undated and did not contain a description of the capital improvement made nor the materials provided. In order for a contractor to properly forego collecting sales tax on services that result in a capital improvement, the contractor must have received a properly completed certificate of capital improvement from the customer (see, Tax Law § 1132[c]). A certificate is considered to be properly completed when it contains the date prepared, the name and address of purchaser, name and address of vendor, the purchaser's identification number, the signature of the purchaser and any other information required to be completed on the particular form (20 NYCRR 532.4[c][2]). It is quite obvious that the Goldstein certificate does not establish that petitioner performed a service that resulted in a capital improvement and, in the absence of this necessary information, we conclude that petitioner could not have relied on this certificate to sustain her burden of proof on this issue even if this were a transaction where a certificate of capital improvement was appropriate.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner Mary Rinaldi Swet is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Mary Rinaldi Swet is denied; and

4. The notice of determination issued on June 11, 1986 is sustained.

DATED: Troy, New York
February 22, 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