STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ABDEL MUSTAFA AS OFFICER OF ADASSA MEAT CORPORATION	:	DECISION DTA No. 806367
	:	
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 March 1, 1983 through May 31, 1987	:	
	:	

Petitioner Abdel Mustafa, c/o Melvin L. Greenwald, 401 Broadway, New York, New York 10013, as officer of Adassa Meat Corporation, filed an exception to the determination of the Administrative Law Judge issued on February 28, 1991 with respect to his 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 March 1, 1983 through May 31, 1987. Petitioner appeared by Melvin L. Greenwald, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation filed a letter brief in response. Petitioner's request for oral argument was denied.

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

ISSUES

I. Whether the audit methodology used in arriving at the amount assessed against petitioner was unreasonable.

II. Whether there was reasonable cause to abate penalties imposed against petitioner.

III. Whether the cancellation of the assessment against the corporation by the Administrative Law Judge requires dismissal of the assessment against petitioner.

IV. Whether the Division of Taxation timely answered petitioner's petition.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and make additional findings of fact. The Administrative Law Judge's findings of fact and the additional findings of fact are set forth below.

Petitioner Adassa Meat Corporation ("Adassa") operates a supermarket. Petitioner Abdel Mustafa is president of that corporation. In February 1986, the Division of Taxation ("Division") began a field audit of Adassa's business operations and sales records for the period March 1, 1983 through November 30, 1985. This audit followed on the heels of a decision of the former State Tax Commission which modified certain factors employed by the Division in a purchase markup audit, but otherwise upheld an audit of Adassa conducted for the period December 1, 1979 through February 28, 1983.[1]

We find an additional finding of fact to read as follows:

> This prior audit itself followed a previous audit covering the period December 1, 1973 through November 30, 1977. Therefore, the current audit is the third for Adassa and petitioner, its president.

A letter dated February 19, 1986 was mailed to Adassa, scheduling a field audit appointment on March 10, 1986. Adassa's books and records were requested for the period March 1, 1983 through November 30, 1985, including journals, ledgers, sales invoices, purchase invoices, cash register tapes, and exemption certificates.

We find an additional finding of fact to read as follows:

> These were the same records requested during the prior audit for the period December 1, 1979 through February 28, 1983.

In response to the audit appointment letter, the Division received a phone call from a Mr. Liss who identified himself as Adassa's accountant and asked that the appointment be postponed. This request was granted, and Mr. Liss was asked to file a power of attorney. Following several contacts with the Division, Mr. Liss advised the Division that he was no longer representing

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[1]Matter of Adassa Meat Corp. and Abdel Mustafa and Ahmed Mustafa, as Officers, State Tax Commission, October 22, 1985 (TSB-H-85[243]S).

Adassa. In August 1986, the Division received a power of attorney from Robert Greenblatt, a certified public accountant, who then assumed the role of Adassa's representative. During the next several months, the Division attempted to schedule an audit appointment with Mr. Greenblatt and to obtain waivers of the statutory period of limitation for assessing tax.

An auditor went to Mr. Greenblatt's office on December 22, 1986 to review Adassa's books and records. The only records available were sales tax returns for the sales tax quarters ended May 31, 1986, August 31, 1986 and November 30, 1986, with workpapers for the last two quarters, and bank statements covering approximately 17 months of the period from April 1985 through November 1986. Mr. Greenblatt stated that he began preparing Adassa's sales tax returns as of the period ended May 31, 1986. He was informed of the Division's intention to extend the audit period to November 30, 1986.

The Division sent a letter, dated January 15, 1987 to Adassa, requesting the following books and records for the period March 1, 1983 through November 30, 1986: cash receipts journals, cash disbursements journals, purchase journals, journal entries, general ledgers, sales tax returns with workpapers, Federal tax returns, cash register tapes, purchase invoices, bank statements with deposit tickets and checkbooks. None of these records were provided except those previously made available to the Division as indicated.

In January 1987, the Division requested that Adassa begin saving its cash register tapes and purchase invoices for use in conducting a test period markup audit. Some of these records were kept for several months and given to the auditor; however, in July 1987, the Division was told that no cash register tapes were kept after April 1987. Apparently, the auditor used the records which were provided to calculate a ratio of taxable to nontaxable purchases.

By letter to Mr. Greenblatt dated December 3, 1987, the Division requested Adassa's Federal income tax returns for the years 1983 through 1986. Returns were provided for 1985 and 1986. On or about December 30, 1987, the Division sent workpapers to Mr. Greenblatt showing its estimate of tax due of approximately $170,000.00. The basis for this estimate is not in the record.

Several discussions between Mr. Greenblatt and the auditors followed after the Division's initial estimate of tax liability. On March 23, 1988, a meeting was held to discuss the audit results. Those present included representatives of the Division, Mr. Greenblatt and Mr. Mustafa. At the meeting, it was agreed that Adassa's sales tax liability would be estimated by a markup of purchases which used the following factors: purchases of $8,380,384.00 for the period March 1, 1983 through May 31, 1987, a taxable ratio of 18.5 percent and a markup percentage of 22.5. These factors were arrived at through negotiation; however, the parties made use of Adassa's Federal income tax returns for 1985 and 1986 and the decision of the State Tax Commission cited above in their calculations. Specifically, the dollar amount of purchases was derived from the Federal income tax returns and the State Tax Commission decision, and the markup figure was derived from the State Tax Commission decision. The use of these factors resulted in a sales tax liability of $60,221.00. The Division then prepared two statements of proposed audit adjustment, dated April 29, 1988, one showing tax due for the period March 1, 1983 through May 31, 1987 in the amount of $60,221.00 plus penalty of $15,614.20 and interest of $33,117.99 for a total due of $108,953.19, and another showing an additional, or Omnibus, penalty of $1,117.90 for the period September 1, 1985 through May 31, 1987.

We find an additional finding of fact to read as follows:

> The Mr. Mustafa who attended the March 23, 1988 meeting was, in fact, Abdel Mustafa (see, Exhibit "K," Auditor's Log, 3/23/88, wherein Abdel Mustafa is referred to as "Joe," the name by which he is known according to the findings of the State Tax Commission in its 1985 decision). We also find that on March 25, 1988, petitioner's accountant revealed to the auditor over the telephone that the taxpayer was in agreement with the assessment resulting from the negotiated figures. The auditor testified that taxpayer's accountant agreed to both the markup percentage and the taxable ratio used.

On May 25, 1988, Mr. Greenblatt and a Mr. Mustafa[2] went to the Division's offices, where Mr. Mustafa signed the statements of proposed audit adjustment (which will be referred to from

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[2]The documents in the record indicate that there are two Mr. Mustafas, Abdel (the petitioner here) who is identified as president of Adassa, and Ahmed Mustafa who is identified as secretary of Adassa. Apparently, it was Ahmed Mustafa who signed the statements of proposed audit adjustment.

this point on as the "consents") and paid $10,000.00 of the proposed assessment. Mr. Mustafa's signature appears under the following statement:

> "The Tax Law provides that a taxpayer is entitled to have tax due finally and irrevocably fixed by filing a signed consent with the State Tax Commission. Such consent, subject to review and approval, waives the ninety (90) day period for fixing tax due but does not waive the taxpayer's right to apply for a credit or refund within the time limit set forth by law. The agreement to and signing of this statement constitutes such a consent. YOU MAY CONSIDER AN APPROVAL OF THIS MATTER FINAL IF YOU ARE NOT NOTIFIED TO THE CONTRARY WITHIN 60 DAYS FROM THE DATE THE SIGNED CONSENT IS RECEIVED BY THE DEPARTMENT."

The following words are handprinted under Mr. Mustafa's signature: "Subject to request for reduction in penalty assessed. See attached letter." Identical statements appear on the consent summarizing the additional penalty.

The letter referred to on the consents is one addressed to the auditor by Mr. Greenblatt. In pertinent part, it states:

> "On behalf of our client we request consideration be given towards reducing the penalties assessed. Our client has signed the proposed audit adjustment and reluctantly has agreed to the tax deficiency determined.
>
> The basis for the request is as follows. The bulk of the tax deficiency determined is for the period of 3/1/83 to 5/31/86. During that period the company was serviced by another accountant who provided no guidance as to proper documentation of the companies [sic] financial activity. You yourself commented on the improvement found on the documentation for the subsequent period. The management of the company is still improving their administration of the paperwork and intends to be functioning properly.
>
> Based on the above facts, and the intent of management goals on improving their record keeping techniques I request, on behalf of Adassa Meat Corp. that the penalty assessed be abated or at least reduced."

In his final report, prepared by the auditor after his review of Mr. Greenblatt's letter of May 25, 1988, the auditor recommended that Adassa be assessed tax, penalty and interest. The Division did not contact Adassa to communicate its decision with regard to Adassa's request for abatement of penalties.

Mr. Greenblatt also sent a letter to the Division, dated May 25, 1988, which states:

> "With regard to your tax examination of our client.... As of this point in time the books and records subsequent to May 31, 1987 are not complete. I, therefore, request your audit go up to the period ended May 31, 1987."

On or about September 20, 1988, the Division issued to Adassa three notices and demands for payment of sales and use taxes due. The first notice and demand was for the period March 1, 1983 through August 31, 1986 and shows total tax due of $57,895.00 plus penalty and interest. The second notice and demand is for the period September 1, 1986 through May 31, 1987 and shows tax due of $2,326.00 plus penalty and interest. Taken together, the two notices and demands assess tax due of $60,221.00, as shown on the consents. The first notice states that $10,000.00 was paid on May 25, 1988, but the amount of tax shown as due was not reduced to reflect that fact. The third notice and demand shows a penalty due for the period September 1, 1985 through May 31, 1987 in the amount of $1,117.90.

The Division issued to Abdel Mustafa three notices of determination and demands for payment of sales and use taxes due, also dated September 20, 1988. These assessed tax, penalty and interest in identical amounts and for identical periods as those notices and demands issued to Adassa.

The notices of determination, unlike the notices and demands, informed Mr. Mustafa of his right to challenge the determination of tax, penalty and interest through the hearing process.

Adassa executed a series of consents which, as a group, extended the period of limitation for assessment of sales and use taxes for the period March 1, 1983 through May 31, 1985 to September 20, 1988.

Adassa filed a timely petition with the Division of Tax Appeals on November 29, 1988. Abdel Mustafa filed a timely request for a conciliation conference with the Division of Taxation. In November 1989, the Division issued a Conciliation Order sustaining the notices of determination issued to Mr. Mustafa who then filed a petition with the Division of Tax Appeals. These matters were consolidated by the Administrative Law Judge shortly before the hearing commenced and before the Division had an opportunity to file an answer to the petition of Abdel Mustafa.

We find an additional finding of fact to read as follows:

> Petitioner filed a new petition with the Division of Tax Appeals following receipt of the Conciliation Order, on January 2, 1990, twenty days before the hearing was to be held regarding Adassa. The matters were consolidated pursuant to a request of petitioner's representative, in a letter to the Administrative Law Judge, dated December 28, 1989.

OPINION

The Administrative Law Judge determined that because petitioners maintained no records of individual sales and failed to maintain a complete and accurate set of register tapes even when specifically requested to do so, the Division was required to select an audit method "reasonably calculated to determine the sales tax due." Further, the Administrative Law Judge concluded that petitioners presented no evidence to overcome their burden of proving by clear and convincing evidence that either the audit method or the amount of tax assessed was erroneous.

The Administrative Law Judge rejected as "frivolous" petitioners' arguments in support of their claim that the delay in payment of the taxes in question was "reasonable" on their part, such that it necessitated the abatement of penalties charged.

Finally, the Administrative Law Judge cancelled the assessment issued to Adassa because the Division ignored the conditional nature of the corporation's consent to the assessment and incorrectly issued notices and demands, rather than notices of determination. The Administrative Law Judge held, however, that cancellation of the corporate petitioner's liability had no bearing on that of the individual petitioner, Mr. Mustafa.

On exception, petitioner Abdel Mustafa[3] asserts that if the Division relied upon the prior audit to calculate the current assessment, it should have availed itself of the prior taxable ratio used as well. Petitioner argues, in addition, that there is no statutory authority permitting the Division to assess tax based solely on negotiations or settlement.

Petitioner further argues that his failure to pay the taxes in a timely fashion was done in good faith, was due to reasonable cause, and was not the result of willful neglect (see,

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[3]Only petitioner Abdel Mustafa is involved in this exception as the Administrative Law Judge cancelled the liability of Adassa and the Division did not take exception to this cancellation. Therefore, in the remainder of this decision "petitioner" shall refer only to Abdel Mustafa.

20 NYCRR 536.5[a][2][c][4]). Petitioner maintains that an exemption from penalty is necessary because both he and Adassa had a petition pending with the State Tax Commission (hereinafter the "Commission") when the audit period began, and the facts and circumstances surrounding the current audit are identical to those of the period covered by the petition (see, 20 NYCRR 536.5[a][2][c][4][iii]). In fact, petitioner notes, the current audit is based on the prior audit and decision. Petitioner claims that it was not until the Commission's decision was rendered regarding the prior audit, well into the current audit period, that Adassa "became aware of the various formula, equations and percentages to be used in determining the tax due" (Petitioner's brief, annexed portion, p. 3).

Petitioner challenges, as well, the notion that the cancellation of the notices and demands issued to Adassa has no bearing on the notices of determination issued to him. Petitioner asserts that just as the liability of Adassa directly implicates his own liability as a responsible officer, so should the conditional nature of the consent signed on behalf of Adassa -- in the form of a request for the reduction of penalties assessed -- inure to his benefit.

Finally, petitioner maintains that the Division failed to serve and file an Answer to petitioner's timely filed petition and is, therefore, in default. As a result of this failure, petitioner argues, the issues were never framed and the Division should be deprived of the right now to contest the content of and allegations in the petition.

In response, the Division asks that the Administrative Law Judge's determination be sustained.

First, the Division maintains that it was justified in resorting to external indices to calculate the taxes owed by Adassa and petitioner and, further, that petitioner failed to establish by clear and convincing proof that the audit methodology was erroneous. The Division points out that Adassa's failure to maintain adequate books and records to justify corporate taxable sales was a fact established by the Commission regarding the prior audit of petitioners.

Second, the Division insists that petitioner has not met his burden of establishing the absence of willful neglect and the existence of reasonable cause so as to justify the abatement of penalties.

Finally, the Division urges that the issue of the Division's failure to answer the petition of Abdel Mustafa may not be raised for the first time on appeal before this Tribunal. However, the Division asserts, the argument fails on the merits in any case.

We affirm the determination of the Administrative Law Judge.

First, we address petitioner's contention that the Division's audit methodology was unreasonable.[4]

When any one of a taxpayer's sales tax returns is either not filed or states an incorrect or insufficient amount of tax due, the Division, pursuant to statutory authority, may determine the actual amount of tax liability "from such information as may be available" (see, Tax Law § 1138[a][1]; Matter of Merrick Discount Center, Ltd., Tax Appeals Tribunal, June 27, 1991). The Division must first request the taxpayer's books and records (Matter of Christ Cella, Inc. v. State Tax Commn., 102 AD2d 352, 477 NYS2d 858) and must thoroughly examine these for adequacy (Matter of King Crab Rest. v. Chu, 134 AD2d 51, 522 NYS2d 978, 979-80), considering the entire period in question (see, Matter of Adamides v. Chu, 134 AD2d 776, 521 NYS2d 826, lv denied 71 NY2d 806, 530 NYS2d 109). If comprehensive books and records are produced, they must be used because the taxpayer has a right to rely on the fact that his adequately maintained records will be used in determining his ultimate tax liability (see, Matter of Chartair, Inc. v. State Tax Commn., 65 AD2d 44, 411 NYS2d 41).

If the taxpayer's records are found to be incomplete and inadequate, the Division may resort to external indices to determine the tax liability (see, Tax Law § 1138[a][1]; Matter of Sol Wahba, Inc. v. New York State Tax Commn., 127 AD2d 943, 512 NYS2d 542; Matter of Urban Liqs. v. State Tax Commn., 90 AD2d 576, 456 NYS2d 138) just as long as the audit method

[4] As the Administrative Law Judge found, Abdel Mustafa conceded that he was/is a person responsible for collecting and remitting Adassa's sales tax pursuant to Tax Law § 1131(1). Therefore, we need not address this issue.

chosen is "reasonably calculated to reflect the taxes due" (see, Matter of W. T. Grant Co. v. Joseph, 2 NY2d 196, 159 NYS2d 150, 157, cert denied 355 US 869; Matter of Ristorante Puglia, Ltd. v. Chu, 102 AD2d 348, 478 NYS2d 91, 93). Thus, "considerable latitude" will be given to the auditor's chosen methodology (see, Matter of Grecian Sq. v. New York State Tax Commn., 119 AD2d 948, 501 NYS2d 219, 221), i.e., the methodology need not result in absolute precision, for "fair and reasonable approximation[s]" are permitted where it was the taxpayer's own failure to maintain records which prevented exactitude in the first place (see, Matter of W. T. Grant Co. v. Joseph, supra, 159 NYS2d 150, 157; Matter of Markowitz v. State Tax Commn., 54 AD2d 1023, 388 NYS2d 176, 177, affd 44 NY2d 684, 405 NYS2d 454). In all cases, however, it is the taxpayer who carries the burden of proving by clear and convincing evidence that the audit methodology employed was unreasonable, or that the resulting assessment was erroneous (see, Matter of Meskouris Bros. v. Chu, 139 AD2d 813, 526 NYS2d 679; Matter of Surface Line Operators Fraternal Org. v. Tully, 85 AD2d 858, 446 NYS2d 451).

Although repeated requests were made by the auditor for Adassa's corporate records, the only records submitted were sales tax returns for three sales tax quarters in 1986, along with workpapers for two of these quarters, and bank statements covering 17 months of the period between April 1985 and November 1986. In addition, Adassa provided some cash register tapes and purchase invoices for a few months in the period between January 1987 and April 1987.

Based on the inadequacy of the records made available by Adassa to the auditor here, we find no basis to conclude that the auditor acted unreasonably in using, to the extent possible, the limited records made available and then turning to the prior audit figures[5] to complete the current audit.

We do not agree with petitioner's assertion that the audit here "cannot contradict those records that form the basis of the tax liability," i.e., that the taxable ratio of 18.5% used in the

[5]The latter were themselves derived from external indices by the auditor in charge of the December 1979 - February 1983 audit of Adassa. The audit methodology was found by the Commission, in its 1985 decision, to be rationally based and to have been necessitated due to the "clearly inadequate" records produced by Adassa, although the Commission decreased the taxable ratio and markup percentages (see, Matter of Adassa Meat Corp., State Tax Commn., October 22, 1985).

current audit has no basis, in fact, because the taxable ratio used in the prior audit on which the current audit is largely based was 16.5% (Petitioner's brief, annexed portion, p. 9). The auditor testified that the factors used in determining Adassa's tax liability, including inter alia, the taxable ratio, were all arrived at through mutual decision at a meeting involving petitioner, petitioner's accountant, Mr. Greenblatt, and the auditor, among others (see, additional findings of fact, supra). He specifically noted that petitioner's accountant agreed to the taxable ratio and markup percentages. In addition, his log which was entered into evidence reports that the accountant told the auditor over the telephone on March 25, 1988 that the taxpayer agreed with the assessment resulting from the negotiated figures (see, Exhibit "K"). Petitioner has offered no evidence to refute the fact that the figures were the result of negotiation between the parties. We conclude that petitioner's agreement to these figures indicates that they are reasonable, "notwithstanding the uncertainty as to [their] source" (Matter of West Gaiety Corp., Tax Appeals Tribunal, December 8, 1988). Thus, petitioner's contention that the record fails to evidence how the figures in question were calculated is irrelevant. It is not the burden of the Division to justify on the record how the figures agreed to by the parties in a pre-hearing conference were derived.

Next, we turn to the issue of whether there was reasonable cause to abate penalties against petitioner. Penalties were imposed against petitioner pursuant to section 1145(a)(1)(i) of the Tax Law, which penalizes the failure to file returns or to pay over taxes to the tax commission within the time specified by statute. Petitioner seeks to avail himself of subsection (a)(1)(iii) of that section, which allows for the remittance of this penalty by the tax commission in the event that the commission determines that the failure or delay was due to reasonable cause and not willful neglect.

What constitutes "reasonable cause" for the purposes of section 1145 is set forth in 20 NYCRR 536.5(c). To justify his assertion of reasonable cause, petitioner relies on subsection (c)(4) which holds, in pertinent part, that:

> "[a] pending petition to the Division of Tax Appeals . . . may constitute reasonable cause, until the time in which the taxpayer has exhausted its administrative . . . remedies . . . for a taxable period or periods the return or returns for which are due subsequent

> to the filing of the petition . . . with the Division of Tax Appeals . . . provided that:
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> * * *
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> (iii) the facts and circumstances for such taxable period or periods are identical or virtually identical to those of the taxable period or periods covered by the petition . . . ."

In addition, a determination of "reasonable cause" includes an analysis of such factors as whether the taxpayer had the capacity to understand and comply with its reporting duties, and whether he "exercised ordinary business care and prudence" (Matter of Norwest Bank Intl., Tax Appeals Tribunal, May 3, 1990, citing, inter alia United States v. Boyle, 469 US 241, 85-1 USTC ¶ 13,602; Matter of LT & B Realty Corp. v. New York State Tax Commn., 141 AD2d 185, 535 NYS2d 121).

The Administrative Law Judge deemed "frivolous" petitioner's position that neither petitioner nor the Division knew or could have known how to calculate and report taxable sales until the issuance, on October 22, 1985, of the Commission decision regarding the prior audit. We agree.

In order for a person responsible for the collection and remittance of taxes due by a corporation to avail himself of the statutory exemption from penalties for failure to comply with these duties, it is his burden to establish both reasonable cause for the noncompliance and the absence of willful neglect (see, 20 NYCRR 536.1[c]; 536.5[b]). Mr. Mustafa failed to carry this burden by merely asserting that he did not know how to calculate the tax prior to the 1985 decision. All that Mr. Mustafa could have gleaned from that decision would have been the taxable ratio or markup percentages used in the prior audit -- figures which would have been irrelevant to someone trying to calculate current taxes owed based on a set of accurately kept records.

According to 20 NYCRR 536.5[d][2], the most important ingredient in a finding that reasonable cause and good faith exist is "the extent of the taxpayer's efforts to ascertain the proper tax liability" (see, Matter of Gem Stores, Tax Appeals Tribunal, October 14, 1988). Contrary to petitioner's contention, we see no good faith efforts on his part to comply with the tax reporting statutes in any way. Adassa has had a long history of delinquency regarding the payment of sales and use taxes but after the prior audit was undertaken petitioner should have been well aware of what records the Division required Adassa to retain. Petitioner's failure to comply with these requirements manifested at best a "casual disregard" of the Tax Law (see, Matter of Plavcan, Tax Appeals Tribunal, December 15, 1988) and petitioner has failed to prove here that his actions were not conscious, deliberate or the product of willful neglect (see, United States v. Boyle, supra). In the opinion of this Tribunal, petitioner's actions are not reflective of a good faith effort even to maintain adequate records of sales, much less an effort to calculate sales taxes due pursuant to these sales.

The fact that petitioner now asserts his willingness to pay the taxes, once proven to be due, is irrelevant. Such a suggestion runs contrary to the self-reporting nature of the tax system. The reason the Tax Law provides for penalties is to emphasize the importance of the timely filing of returns and remittance of taxes due. We cannot tolerate a system where taxpayers are allowed "to ignore statutory requirements and decide on [their] own when to meet [their] tax reporting obligations" (Matter of Paramount Pictures Corp. & Subsidiaries, Tax Appeals Tribunal, March 14, 1991), only to be penalized if they refuse to pay when caught.

Our third issue concerns whether the dismissal of the assessment against the corporation requires dismissal of the assessment against Mr. Mustafa. The rules outlined in section 1138(a)(3)(B) of the Tax Law clearly distinguish the liability of the corporation assessed pursuant to section 1138(a)(1) of the Tax Law from that of its responsible officer(s). Section 1138(a)(3)(B) holds, in pertinent part, that the liability of the responsible officer "shall be determined by the tax commission," and such determination "shall finally and irrevocably fix the tax and liability for the tax with respect to such person unless such person . . . shall apply to the tax commission for a hearing" (emphasis added).

Case law similarly distinguishes between the liability of the corporate entity and that of its responsible officer(s). The Third Department in Matter of Yellin v. New York State Tax Comm. (81 AD2d 196, 440 NYS2d 382, 383-384) held that even though the Commission had failed to set off a certain claim against a bankrupt corporation's refund, it could still collect this amount from the individual petitioner (see also, Monday v. United States, 421 F2d 1210, 70-1 USTC ¶ 9205 at 82,833, cert denied 400 US 821; Spivak v. United States, 370 F2d 612, 614-615, 67-1 USTC ¶ 9158, cert denied 387 US 908). In another bankruptcy case, we applied Yellin's premise, holding that a corporate officer was not absolved of personal liability "by virtue of the corporation's bankruptcy," because "the general rule is that the liability of a responsible officer is separate and independent from that of the corporation" (Matter of Kadish, Tax Appeals Tribunal, November 15, 1990; see also, Matter of Halperin v. Chu, 134 Misc 2d 105, 509 NYS2d 692, affd 138 AD2d 915, 526 NYS2d 660 [issue of personal liability of individual petitioner cannot be reviewed in application of corporate petitioner for a redetermination of its tax liability]).

Accordingly, Mr. Mustafa cannot be absolved of liability merely because the assessments against the corporation have been cancelled. As the liability of the corporation was separate and distinct from that of petitioner here, and the notices to each party regarding its/his separate liability required separate responses, the response in the form of a conditional consent signed on behalf of Adassa had nothing to do with the status of the tax liability of Mr. Mustafa. Accordingly, the Division's actions following the signing of the consent did not in any way prejudice Mr. Mustafa individually. Indeed, Mr. Mustafa was granted a conciliation conference whereas the corporation's request for same was denied. In sum, because petitioner was not individually harmed by the Division's actions following the consent signing, petitioner cannot benefit from the remedy granted Adassa to account for harm done stemming from these actions.

Of course, had there been a substantive reason for a redetermination of the assessment and a subsequent decrease in the liability of the corporation, Mr. Mustafa would have seen a commensurate decrease in his individual assessment (see, Matter of Halperin v. Chu, supra; Matter of Kadish, supra [bankruptcy proceeding resulting in decrease of corporate liability or in payment by corporation of all or part of asserted deficiency results in decrease in individual petitioner's liability]; Matter of Yegnukian, Tax Appeals Tribunal, March 22, 1990). But here, where the assessment of the corporation has been cancelled due to procedural errors on the part of the Division -- errors which did not impact upon petitioner individually -- there is no reason to dismiss the assessment against petitioner.

Finally, we turn to petitioner's assertion that the Division failed to respond in a timely fashion to petitioner's January 2, 1990 petition.

Preliminarily, we reject the Division's position that such an issue cannot be raised for the first time before this Tribunal. While we concede that Civil Practice Law and Rules § 7803[3] and [4] force a rather restricted standard of review upon appellate courts, the Tribunal's enabling legislation does not contain such statutory limitations (see, Matter of Small, Tax Appeals Tribunal, August 11, 1988). Instead, pursuant to Tax Law § 2006.7, this Tribunal is given the broad directive to "issue a decision either affirming, reversing or modifying [the Administrative Law Judge's] determination, or . . . remand the case for additional proceedings." The companion regulations of this Tribunal are similarly broad, providing that "the Tribunal shall review the record and shall, to the extent necessary or desirable, exercise all power which it could have exercised if it had made the determination" (see, 20 NYCRR 3000.11[e][1]). Thus, as we held in Matter of Small:

> "[t]he Tribunal has the authority to determine what issues are properly before it on exception and to take appropriate action to insure that a just decision is reached in all cases (Tax Law section 2000; 20 NYCRR 3000.0). The enabling legislation provides ample authority and flexibility to the Tribunal to achieve this result - to assure that the correct law is applied and the law is applied correctly to the facts of the case as contained in the record at hearing - whether by the Tribunal sua sponte or upon urging of the parties on exception."

Thus, we do have jurisdiction to consider the timeliness issue; however, we dismiss it as meritless. Petitioner's petition was received by the Division of Tax Appeals on January 2, 1990. According to § 3000.4(a)(1) of the Rules of Practice and Procedure of this Tribunal, "[t]he Law Bureau shall serve an answer on the petitioner . . . within 60 days from the date the supervising Administrative Law Judge acknowledged receipt of a petition in proper form."

The hearing regarding Adassa and that regarding petitioner here were consolidated just prior to the hearing scheduled for Adassa on January 22, 1990, pursuant to a request by petitioner's representative (letter to Administrative Law Judge dated December 28, 1989). The effect of this was to expedite the hearing for petitioner to a date only 20 days after he filed his petition with the Division of Tax Appeals. Thus, the Division's time to answer had not expired at the time the hearing was held. Further, the Division received no objection from petitioner at the hearing regarding the proposal to treat the Division's answer to Adassa's petition as an answer to Mr. Mustafa's petition as well. This amendment of the Division's answer to the corporation's petition constituted a timely answer to the individual petition.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner Abdel Mustafa, as Officer of Adassa Meat Corporation, is denied;

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

3. The petition of Abdel Mustafa, as Officer of Adassa Meat Corporation, is granted to the extent indicated in conclusions of law "G" and "I" of the Administrative Law Judge's determination, but is otherwise denied; and

4. The Division of Taxation is directed to modify the notices of determination and demand for payment of sales and use taxes due dated September 20, 1988, in accordance with paragraph "3" above, but such notices are otherwise sustained.

DATED: Troy, New York
December 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