

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MALSON, LTD. AND	:	DECISION
JACK MALEH AND ALAN MALEH, AS OFFICERS	:	DTA No. 807007
	:	
for Revision of Determinations or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1983	:	
through February 28, 1987.	:	

Petitioners Malson, Ltd., formerly located at 436 5th Avenue, New York, New York 10018, Jack Maleh, 2902 Logan Road, West Deal, New Jersey 07712, and Alan Maleh, 2601 Avenue S, Brooklyn, New York 11229 filed an exception to the determination of the Administrative Law Judge issued on February 22, 1991 with respect to their petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1983 through February 28, 1987. Petitioners appeared by Isaac Sternheim, CPA. The Division of Taxation appeared by William F. Collins, Esq. (Lawrence A. Newman, Esq., of counsel).

Petitioners did not file a brief on exception. The Division of Taxation filed a letter in opposition to the exception. Oral argument was not requested.

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

ISSUE

Whether the notices of determination issued to petitioners were issued by the State of New York.

FINDINGS OF FACT

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

Malson, Ltd. (hereinafter "Malson"), during the period at issue, was a retailer of cameras, household electronic equipment and other general merchandise with a store located at 436 Fifth Avenue in Manhattan. It apparently went out of business in February of 1987. Malson has never notified the Division of Taxation of any new business address.

Jack Maleh and Alan Maleh were the president and vice-president, respectively, of Malson during the period at issue. They did not contest their status under Tax Law § 1133 as persons required to collect sales tax "imposed, collected or required to be collected" by Malson.

Malcolm Stokes, the tax auditor assigned to this matter, was employed by the New York City Department of Finance. He performed the audit, which took 82½ hours, on behalf of the Division of Taxation.¹ On or about December 23, 1985, the auditor sent a letter to Malson scheduling a field examination on January 13, 1986 and requesting the production for his review with regard to the audit period March 1, 1983 through February 28, 1986 of the following:

"All books and records pertaining to your Sales Tax liability.... This would include journals, ledgers, sales invoices, purchase invoices, cash register tapes, exemption certificates, etc. and all Sales Tax Records."

Subsequently, on or about January 13, 1986, the auditor made another written request for Malson to produce the following records for his review with regard to the audit period March 1, 1983 through February 28, 1986:

"copies [sic] of return filed for period ended November 30, 1985; corporation income tax returns for 1983 and 1984; general ledgers; cash receipts and cash disbursements books/records; daily cash register tapes; daily sales invoices to substantiate sales; evidence supporting any deductions claimed; purchase invoices; and bank statements and cancelled checks."

The auditor also noted in this second request that "additional information may be required subsequently and will be requested on like form." On or about June 4, 1986, the auditor made a third written request for Malson to produce the following records for his review with regard to the audit period March 1, 1983 through February 28, 1986:

¹Mr. Stokes had also conducted a prior audit of Malson for an earlier period.

"1983 corporate income tax return; general ledgers; sales books; daily cash register tapes; daily sales invoices; evidence to support any non-taxable sales claimed; purchase invoices; bank statements and cancelled checks; copy of or example of taxpayer's method of preparing quarterly sales tax returns; and schedule of any/all additions and or deductions to fixed asset account."

The records provided by petitioners to the auditor were limited. The auditor's log discloses that he was provided with only the following: sales book (cash receipts book), certain income tax returns including Federal returns, and cash disbursements book. Petitioners failed to provide, in particular, cash register tapes, daily sales invoices, bank statements and cancelled checks, general ledgers, and any evidence supporting alleged nontaxable sales.

For the period March 1, 1983 through November 30, 1986, the auditor increased Malson's gross sales by \$106,957.00, from the amount reported of \$2,114,725.00 to \$2,221,682.00. This increase, as explained in the narrative portion of the audit report, was calculated as follows:

"A comparison of total sales per records provided for period 3/1/83 - 2/28/86 of \$1,663,993.39 to gross sales reported for some [sic] period of \$1,583,593.00 resulted in an increase in sales of \$80,400.39, which amounted to a percentage of 5%. Application of the 5% to sales reported for period 3/1/86 to last return filed per computer of 11/30/86, resulted in an increase of sales by \$26,556.60. This amount added to the \$80,400.39 resulted in total increase in sales of \$106,956.99. This amount, in the absence of evidence to the contrary, was presumed taxable. Tax due on \$106,956.99 at 8¼% amounts to \$8,823.94."

For the period March 1, 1983 through November 30, 1986, Malson reported taxable sales of \$1,270,583.00. The difference between gross and taxable sales was claimed as exempt sales. The auditor disallowed Malson's exempt sales because they were unsubstantiated as exempt:

"The difference between gross and taxable sales of \$844,142.00, being unverifiable [sic], assessed at 8¼% results in additional tax due of \$69,641.72.

* * *

As result of the above, gross sales per audit of \$2,221,681.99...became taxable sales per audit. Taxable sales per audit were compared to taxable sales by quarter to arrive at additional taxable sales of \$951,098.99 and additional tax due of \$78,465.66."

The auditor extended his audit to Malson's final sales tax return:

"Subsequent to submission of audit, taxpayer's 'final' return appeared on computer. Auditor required to update assessment to include final return.

Auditor application of foregoing percentages to amounts reported per final return resulted in additional assessment for period 12/1/86 - 2/28/87 as follows:

	<u>Tax Due</u>
Gross sales increase [of] \$5,800.30	- \$ 478.53
Unsubstantiated exempt sales [of] \$48,233.00	- <u>3,979.22</u>
Total	\$4,457.75"

The Division of Taxation² issued nine notices of determination and demands for payment of sales and use taxes due. Two notices, both dated March 20, 1987, were issued against Malson showing tax due of \$68,635.31 plus penalty and interest for the period March 1, 1983 through August 31, 1986 and tax due of \$9,830.35 plus penalty and interest for the period September 1, 1986 through November 30, 1986, respectively. A third notice, dated May 20, 1987, was issued against Malson showing tax due of \$4,457.75 plus penalty and interest for the period December 1, 1986 through February 28, 1987.

Two notices, both dated March 20, 1987, were issued against Jack Maleh, showing tax due of \$68,635.31 plus penalty and interest for the period March 1, 1983 through August 31, 1986 and tax due of \$9,830.35 plus penalty and interest for the period September 1, 1986 through November 30, 1986 plus penalty and interest, respectively. A third notice, dated May 20, 1987, was also issued against Jack Maleh showing tax due of \$4,457.75 plus penalty and interest for the period December 1, 1986 through February 28, 1987. All three notices issued against Jack Maleh included the following explanation:

"You are personally liable as responsible officer of Malson Ltd. under Sections 1131 and 1133 of the Tax Law for the following taxes determined to be due in accordance with Section 1138(a) of the Tax Law."

Two notices, both dated March 20, 1987, were issued against Alan Maleh, showing tax due of \$68,635.31 plus penalty and interest for the period March 1, 1983 through August 31, 1986 and tax due of \$9,830.35 plus penalty and interest for the period September 1, 1986 through

²The nine notices of determination each reference the New York office of the New York State Department of Taxation and Finance as the office to which payment of New York State sales tax should be made promptly.

November 30, 1986 plus penalty and interest, respectively. A third notice, dated May 20, 1987, was also issued against Alan Maleh showing tax due of \$4,457.75 plus penalty and interest for the period December 1, 1986 through February 28, 1987. All three notices issued against Alan Maleh included the following explanation:

"You are personally liable as responsible officer of Malson Ltd. under Sections 1131 and 1133 of the Tax Law for the following taxes determined to be due in accordance with Section 1138(a) of the Tax Law."

At the conciliation conference conducted in this matter, petitioners' representative stated that he had additional records to substantiate nontaxable sales disallowed. The auditor reviewed such records and advised that tax due was reduced. The notices dated March 20, 1987 were reduced from \$68,635.31 plus penalty and interest to \$51,320.28 plus penalty and interest (for the period March 1, 1983 through August 31, 1986) and from \$9,830.35 plus penalty and interest to \$7,335.18 plus penalty and interest (for the period September 1, 1986 through November 30, 1986). The notices dated May 20, 1987 were reduced from \$4,457.75 plus penalty and interest to \$3,325.82 plus penalty and interest (for the period December 1, 1986 through February 28, 1987). Conciliation orders dated May 26, 1989 were issued in conformance with these reductions.

The Division of Taxation, by its representative at the hearing herein, conceded³ that the tax due for the period March 1, 1986 through February 28, 1987 should be cancelled because the Division of Taxation did not request for its examination Malson's records for such later period.

In the course of the audit, Malson was dilatory with regard to providing a properly completed power of attorney authorizing Mr. Sternheim to represent it. As early as January 1986, there is an indication in the auditor's log that he was having difficulty obtaining a power of attorney from Malson appointing Mr. Sternheim. The log shows that on February 18, 1986, the auditor received a "purported" power of attorney for Isaac Sternheim which, according to the auditor, was an "altered" copy of an earlier power. By a letter dated February 25, 1986, the auditor notified Jack Maleh that this "altered" power of attorney was rejected because it was not

³In making his concession, the representative cited Adamides v. Chu (134 AD2d 776, 521 NYS2d 826).

an original, it was an altered form, no specific individual representative was specified, and the period for representation shown on the power was not related to the period under audit. Mr. Sternheim was also notified by a separate letter dated February 25, 1986 that Malson's power of attorney was unacceptable. Subsequently, the auditor called Jack Maleh and told him that he would accept a letter from him concerning his desire to have Mr. Sternheim represent Malson. Apparently, a properly completed power of attorney by Malson appointing Mr. Sternheim was never provided to the auditor. In fact, properly completed powers of attorney by Malson and Alan Maleh were submitted late to the Division of Tax Appeals. On January 15, 1991, the Administrative Law Judge wrote to Mr. Sternheim as follows:

"I have also reviewed the Division of Taxation's Exhibit 'B' which consists of 3 powers of attorney. The corporate power of attorney remains defective in that Jack Maleh's signature was not properly notarized or witnessed. It has been nearly a year since this office requested that a properly notarized or witnessed power of attorney be provided. Please do so by January 31, 1991. If you do not, I may have to default the corporate taxpayer.

Further, the power of attorney appointing you to represent Alan Maleh, also part of Exhibit 'B', is not in proper form. The notary failed to note that 'Alan Maleh' personally came before her and Alan Maleh's signature is not dated. Consequently, please also submit a properly completed power of attorney for Alan Maleh by January 31, 1991. If you do not, I may have to default Alan Maleh."

It is noted that Jack Maleh filed a properly executed power of attorney appointing Mr. Sternheim which is dated May 17, 1989. Jack Maleh was also present at the hearing herein, although he did not testify. Alan Maleh was not present at the hearing.

In response to the Administrative Law Judge's letter of January 15, 1991, adequate powers of attorney authorizing Mr. Sternheim to represent Malson and Alan Maleh have finally been submitted.

OPINION

The Administrative Law Judge determined that the Division of Taxation (hereinafter the "Division") did not fail to serve the notices of determination on petitioners' representative because petitioners did not establish that they had an authorized representative at the time that the

notices were issued. The Administrative Law Judge also determined that the Division properly issued the notices to Malson to the corporation's last known address. The Administrative Law Judge also concluded that petitioners had not established that the assessment should be modified further and failed to prove that penalty and interest in excess of the minimum should be cancelled. Finally, the Administrative Law Judge found that the notices of determination were issued by New York State.

On exception, petitioners assert that the Administrative Law Judge erred in concluding that the notices of determination were issued by New York State. Instead, petitioner claims that the notices were issued by the City of New York Department of Finance and that section 1142(10) of the Tax Law does not authorize the City to issue assessments for sales and use tax. Thus, petitioners request that the notices be cancelled as having been illegally issued.

In response, the Division asserts that the notices were issued by the State of New York.

We conclude that petitioners have not established that the instant notices were issued in a manner that violated section 1142(10) of the Tax Law. The notices themselves indicate that they were issued by New York State: there is no mention of New York City on the document (Exhibit D). The only evidence that petitioners can be relying on to support their position is the testimony of the auditor that the assessments were sent out by the auditor's office which was the Metro Group, City of New York under the direction of the State (Tr., p. 31). While the Division has elected not to explain the relationship between the City and the State with respect to the issuance of the instant notices,⁴ we conclude that the fact that the auditor testified that the notices were mailed by the Metro Group office is not sufficient to establish that the notices were not issued by the State of New York.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

⁴In summation at the hearing, the Division's representative stated that "[t]here is an agreement between the New York State Department of Taxation and Finance and the New York City Department of Finance in that they are authorized to conduct audits and issue assessments based on those audits on behalf of the State of New York" (Tr., p. 37). The Division did not request an opportunity to put this agreement into evidence. The only explanation offered by the Division of the auditor's statements at the hearing was that the "testimony relating to the procedure was conceptual rather than organizationally precise" (post hearing letter to the Administrative Law Judge dated August 7, 1990).

1. The exception of Malson, Ltd. and Jack Maleh and Alan Maleh, as officers, is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Malson, Ltd. and Jack Maleh and Alan Maleh, as officers, is granted to the extent indicated in the Administrative Law Judge's conclusion of law "E", but such petition is otherwise denied; and
4. The Division of Taxation shall modify the notices of determination dated March 20, 1987 and May 20, 1987 in accordance with paragraph "3" above, but such notices are otherwise sustained.

DATED: Troy, New York
September 12, 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