

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**BRYANT TOOL & SUPPLY, INC.** :  
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 September 1, 1983 :  
through November 30, 1986 :

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DECISION  
DTA Nos. 807117  
and 807118

In the Matter of the Petition :  
of :  
EMIL DISIMONE, :  
OFFICER OF BRYANT TOOL & SUPPLY, INC. :  
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 September 1, 1983 :  
through November 30, 1986 :

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Petitioners Bryant Tool & Supply, Inc., 50-29 69th Place, Woodside, New York 11377 and Emil DiSimone, officer of Bryant Tool & Supply, Inc., 3 Libby Drive, Glen Cove, New York 11542 filed an exception to the determination of the Administrative Law Judge issued on March 21, 1991 with respect to their 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 September 1, 1983 through November 30, 1986. Petitioners appeared by Albert Lemishow, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Vera Johnson, Esq., of counsel).

Petitioners did not file a brief on exception. The Division of Taxation filed a letter brief. Oral argument, requested by petitioners, was denied.

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

***ISSUE***

Whether the method of audit used was reasonable in calculating the amount of sales tax due.

***FINDINGS OF FACT***

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

Petitioner Bryant Tool & Supply, Inc. is a corporation involved in the wholesale and retail sale of tools and hardware supplies as well as the rental of equipment. Petitioner Emil DiSimone is the president of the corporation.<sup>1</sup>

By letter dated, October 3, 1986, the tax auditor for the Division of Taxation (Division), Monir Saleh, informed petitioner Bryant Tool & Supply, Inc. (Bryant Tool) that he would be performing a tax audit of its sales tax returns for the period September 1, 1983 through August 31, 1986.<sup>2</sup> In that letter Mr. Saleh requested that petitioner make available to him all books and records pertaining to its sales tax liability for the period under audit including journals, ledgers, sales invoices, purchase invoices, cash register tapes, exemption certificates and all sales tax records. Mr. Saleh also stated in the letter that additional information might be required during the course of the audit. According to Mr. Saleh's testimony at hearing, he requested "additional information" to update the audit for the quarter ending November 30, 1986 (Tr. 14).<sup>3</sup>

On November 20, 1986, Mr. Saleh met with Emil DiSimone for the purpose of performing the audit. At that time petitioner's accountant, Albert Lemishow, requested that

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<sup>1</sup>Petitioners conceded that Emil DiSimone is a person required to collect tax pursuant to Tax Law § 1131(1) (Tr. 30). For the purposes of this determination, both petitioners will be referred to collectively as "petitioner."

<sup>2</sup>In the field audit report, the auditor noted that "[t]his case came down as a result of vendor's applying for N.Y. and N.J. registration which he subsequently withdrew" (Div. Exh. F).

<sup>3</sup>There is no indication in the record as to when, how or what "additional information" was requested of petitioner for this quarter; however, petitioner has not challenged the fact that such additional information was requested.

Mr. Saleh use a test period for the quarter ending November 30, 1985 instead of performing a full audit for the three-year period. Thereupon, Mr. Saleh left with Mr. DiSimone a list of documents needed to perform the test period audit and scheduled the audit for December 4, 1986. Among the documents requested were sales invoices for September, October and November of 1985, resale or exemption certificates to substantiate all nontaxable sales, sales tax returns and related workpapers for September, October and November 1985, copies of the Federal income tax returns for 1983, 1984 and 1985, all purchase bills for fixed asset purchases for the period September 1, 1983 through August 31, 1986, general ledger, purchase books, cash receipts and cash disbursements for the period September 1, 1983 through August 31, 1986, and purchase and expense bills for the period January 1, 1985 through November 30, 1985.

On December 4, 1986, petitioner consented to extend the period of limitation for assessment of sales tax for the audit period until June 20, 1987.

During the audit, Mr. Saleh determined that the books and records were inadequate because some sales invoices were unnumbered and others were numbered but were not used in sequential order. The auditor concluded that there was no way to reconcile the sales invoices. Furthermore, the auditor found that there were no cash deposits.

Using the bank deposits and cash receipts, the auditor determined the amount of gross sales for the quarters of the entire audit period with the exception of the last quarter ending November 30, 1986. Because there was no information available for the quarter ending November 30, 1986, the auditor estimated the gross sales for the last quarter to be the same amount determined for the quarter ending November 30, 1985. The amount of gross sales found by the auditor agreed with the amount of gross sales reported in the respective sales tax returns for the entire audit period.

In determining the percentage of taxable to nontaxable sales for the audit period, the auditor first examined the documents provided for the test quarter ending November 30, 1985. He found nontaxable sales to constitute approximately 17.2% of the gross sales. These

nontaxable sales were substantiated by exemption documents showing sales for resale and sales to exempt organizations. Of the gross sales, the auditor determined that 79.29% were to be taxed at the 8½% sales tax rate and 3.47% were to be taxed at the 4% sales tax rate.<sup>4</sup> The auditor compared these percentages to the workpapers attached to the sales tax return for the quarter ending November 30, 1985 and noted that taxable sales were estimated as 35% and nontaxable sales at 65%. With regard to the nontaxable sales, the workpapers estimated that 5% of the gross sales constituted out-of-state sales, 50% constituted sales for resale and 10% constituted capital improvements. The auditor concluded from this comparison, that petitioner had underreported its sales tax.

In response to petitioner's accountant's claim that the use of that particular test period may have resulted in too high a percentage of taxable sales, the Division agreed to examine a different quarter from a different year. However, after examining the records for the quarter ending August 31, 1986, the auditor determined that 86.61% of the gross sales were taxable, none of which were taxable at the 4% rate. Therefore, the auditor recomputed the percentage of taxable and nontaxable sales by treating the two quarters as a six-month test period -- that is, tallying the gross sales for the two quarters and then determining the percentage of taxable and nontaxable sales as well as the percentage of taxable sales at the 8¼% and 4% rate. The auditor determined that 83.23% of the gross sales were taxable at the 8¼% rate and 1.61% of the gross sales were taxable at the 4% rate. Applying these percentages to the gross sales for all the quarters, the auditor determined that adjusted taxable sales at the 8¼% rate were \$2,891,211.00 and adjusted taxable sales at the 4% rate were \$55,928.00. The total adjusted sales taxes were \$240,762.05. Subtracting the amount of taxes that petitioner reported and paid (\$83,121.58) from the amount of taxes due, the auditor found a tax deficiency of \$157,640.47.

By four notices of determination and demands for payment of sales and use taxes due, dated April 3, 1987, the Division assessed petitioners a total tax due for the entire audit period

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<sup>4</sup>Apparently, the auditor was shown exemption documents to support the finding that the sales should be taxed at the 4% rate.

in the amount of \$157,640.47, with penalties of \$34,584.97 and interest of \$33,101.18, and omnibus penalties for the period June 1, 1985 through November 30, 1986 in the total amount of \$9,694.96.

Petitioners requested a conciliation conference; however, a conciliation default order was issued sustaining the statutory notices. In their petitions to the Division of Tax Appeals, petitioners alleged that the conciliation conferee denied their request, made five days prior to the conference date, for an adjournment due to illness.

### ***OPINION***

In the determination below, the Administrative Law Judge found that there was uncontroverted evidence that petitioner requested that a test period audit be performed, that the auditor correctly determined that the sales invoices provided were unreliable for determining the amount of tax owing, and that the auditor's method in determining the total tax liability was reasonable under the circumstances. The Administrative Law Judge further found that there was no merit to petitioner's contention that the audit should not have been performed based on one sale to a New Jersey customer because the reason for petitioner's audit is irrelevant and petitioner has not provided any legal reasoning or authority to challenge the audit on this basis. Finally, the Administrative Law Judge held that, although advised during the course of the hearing, petitioner presented no evidence in the form of documentation or testimony to support or justify the amount of sales tax reported on the sales tax return for the quarter ending November 30, 1985 and, therefore, has not met its burden of demonstrating that the method of audit or amount of tax assessed was erroneous.

On exception, petitioner alleges the test period was invalid and not representative of the operation of Bryant Tool & Supply, Inc. for the period in question, and that therefore, the test period computation was inaccurate.

The Division agrees with the findings of fact and conclusions of law set forth in the determination of the Administrative Law Judge. The Division argues that in light of the uncontroverted evidence at the hearing that the corporation's accountant agreed to the utilization

of a test period audit, or, in the alternative, that the corporation's books and records were inadequate, the Division correctly resorted to the use of a test period audit method. Further, since petitioner produced no evidence indicating that the audit method was unreasonable or the tax at issue was erroneous, the Administrative Law Judge's determination should be affirmed and the exception of petitioner dismissed.

After reviewing the allegations presented to us on exception and the record before us, we find no basis for modifying the Administrative Law Judge's determination in any respect. The Administrative Law Judge adequately and correctly addressed the same allegations presented on exception to this Tribunal. Therefore, we affirm the determination of the Administrative Law Judge for the reasons stated in said determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioners Bryant Tool & Supply, Inc. and Emil DiSimone, officer of Bryant Tool & Supply, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of Bryant Tool & Supply, Inc. and Emil DiSimone, officer of Bryant Tool & Supply, Inc. are denied; and

4. The notices of determination and demand for payment of sales and use taxes due dated April 3, 1987 are sustained.

DATED: Troy, New York  
October 3, 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