

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
M & B APPLIANCE, INC. AND MAN M. MUNJAL AND INDER S. BINDRA, AS OFFICERS	:	DECISION DTA Nos. 807626, 807628 and 807631
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 1983 through February 28, 1987.	:	

Petitioners M & B Appliance, Inc. and Man M. Munjal and Inder S. Bindra, as officers, 83-15 Broadway, Elmhurst, New York 11373 filed an exception to the amended determination of the Administrative Law Judge issued on November 7, 1991 with respect to their petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1983 through February 28, 1987. Petitioners appeared by John R. Serpico, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Andrew S. Haber, Esq., of counsel).

Petitioners did not file a brief on exception. The Division of Taxation submitted a letter in lieu of a formal brief in response. Neither party requested oral argument.

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

ISSUES

I. Whether petitioners substantiated that all or part of the \$26,660.33 of sales found to be taxable by the auditor were sales for resale and, thus, exempt from sales tax.

II. Whether the auditor properly included the \$26,660.33 amount in each of the quarters of the audit period ending February 28, 1985, February 28, 1986 and February 28, 1987.

FINDINGS OF FACT

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

On December 18, 1987, the Division of Taxation ("Division") issued identical notices of determination and demands for payment of sales and use taxes due to petitioners, M & B Appliance, Inc. ("M & B") and Man M. Munjal and Inder S. Bindra, as officers of M & B, assessing sales tax due in the amount of \$46,192.50, plus penalty and interest, for a total amount due of \$77,990.49 for the period September 1, 1983 through February 28, 1987.

Petitioner M & B, by one of its officers or appointed representatives, executed two consents which, by virtue thereof, extended the period of limitation on assessment for the period September 1, 1983 through August 31, 1984 to anytime on or before December 20, 1987.

On July 7, 1986, the auditor sent a letter to M & B advising such petitioner that a field examination of its books and records would be conducted on July 25, 1986. This letter stated, in pertinent part, as follows:

"[a]ll books and records pertaining to your Sales Tax liability for the period under audit should be available. This would include journals, ledgers, Sales invoices, purchase invoices, cash register tapes, exemption certificates and all Sales Tax records. Additional information may be required during the course of the audit."

The period under audit, as set forth in the letter, was September 1, 1983 through May 31, 1986. During the course of the audit, the auditor met with M & B's accountant, Ramesh Sarva, C.P.A. The auditor states that he made oral requests to Mr. Sarva for books and records of M & B for the remaining period at issue herein, i.e., June 1, 1986 through February 28, 1987. At the hearing, Mr. Sarva testified that he did not recall whether or not the auditor had requested books and records for the period after May 31, 1986.

During the period at issue, M & B was in the business of selling appliances, both at wholesale and retail. Petitioner Inder S. Bindra was the president and a shareholder of M & B, while petitioner Man M. Munjal was the vice-president and was also a shareholder. Neither of these petitioners disputes the Division's contention that each, as an officer, was personally liable

for the collection of sales and use taxes due from M & B pursuant to the provisions of Tax Law §§ 1131(1) and 1133(a).

The following books and records were made available to the auditor by M & B: sales tax returns and related worksheets; Federal income tax returns; sales workpapers; some sales invoices (test period); a printout of the general ledger; and some resale certificates and other exemption certificates. Upon his examination of sales invoices, the auditor found that such invoices were not in numerical order and that some invoices contained no number at all. Based upon the foregoing, the auditor determined that M & B's books and records were not complete and, therefore, that a detailed audit could not be conducted.

The auditor compared M & B's gross sales per the general ledger printout to gross sales per Federal income tax returns and sales tax returns and found gross sales figures to be in substantial agreement. As a result, M & B's gross sales were accepted as filed.

The auditor thereupon decided to utilize a test period audit method to determine whether or not M & B's claimed nontaxable sales were properly substantiated by resale certificates, shipping documents and other exemption documents. The period selected by the auditor was December 1, 1984 through February 28, 1985. It was the testimony of the auditor that M & B's accountant, Mr. Sarva, stated that it would be too difficult and time consuming to assemble and produce invoices for the entire audit period and that he, therefore, asked the auditor to do a test period analysis. In addition, the auditor testified that Mr. Sarva did not object to the test period selected.

For the test quarter selected, M & B claimed nontaxable sales in the amount of \$586,348.00. Upon the auditor's review of available invoices and exemption documents, he determined that M & B was unable to substantiate claimed nontaxable sales totalling \$52,424.00, or 8.94 percent thereof. He then applied this percentage to claimed nontaxable sales for each quarter during the audit period, totalling \$6,262,962.00, which resulted in disallowed nontaxable sales in the amount of \$559,909.00 with resulting tax due (at the statutory rate of 8¼ percent) of \$46,192.50.

On December 14, 1988 and again on June 22, 1989, conciliation conferences were held by the Bureau of Conciliation and Mediation Services ("BCMS"). At the second conciliation conference, additional documentation substantiating claimed nontaxable sales was produced. Based upon such documentation, the following adjustments to the assessment were made:

(a) Upon his examination of invoices for the test quarter, the auditor found that alleged sales for resale had been made by M & B to ABC Electronics World ("ABC"), the payment to M & B having been made by ABC using individual credit cards from ABC's retail customers. For the test quarter, such sales totalled \$26,660.33. M & B's attorney, Mr. Serpico, claimed that these sales occurred only during the Christmas season and substantiated this claim through the presentation of documentation. As a result thereof, the conferee determined that the auditor's original calculation, which, utilizing his test period analysis, factored in the \$26,660.33 for each quarter, should be modified to subject the \$26,660.33 to tax for only one quarter per year.

(b) Based upon documentation presented at the conference, additional nontaxable sales were allowed for the test quarter which, along with the recalculation resulting from the credit card sales referred to above, resulted in the unreported taxable percentage being reduced from 8.94 percent (as originally determined upon audit) to 2.945 percent. The revised percentage was determined as follows:

Gross sales (QE 2/85)	\$714,148
Allowed nontaxable sales (revised)	557,112
Taxable sales (incl. sales tax)	157,036
Adjusted taxable sales (excl. sales tax)	145,068
Reported taxable sales	127,800
Unreported taxable	17,268
% Unreported Taxable (unreported taxable divided by claimed nontaxable [\$586,348])	0.02945

By applying this revised percentage to reported nontaxable sales for each of the sales tax quarters at issue, additional tax due was reduced from \$46,192.50 to \$21,815.09, plus applicable penalties and interest.

At the hearing, M & B offered 26 invoices for sales made during the test quarter all of which, it maintains, should have been allowed as nontaxable sales. The testimony of M & B's

accountant, Ramesh Sarva, was that these invoices were obtained and furnished to M & B's attorney for presentation at the conciliation conference. Said attorney, Mr. Serpico, testified that the conferee allowed some, but not all, of these invoices in recomputing M & B's allowed nontaxable sales from \$519,056.00 (as determined by the auditor) to \$557,112.00. An examination of the Conciliation Order, the Report of Tax Conference and documents attached thereto does not disclose which of these 26 invoices were allowed and which were not.

OPINION

In his determination below, the Administrative Law Judge concluded that M & B failed to provide complete books and records and that, therefore, the Division properly resorted to an external index in order to calculate estimated tax due. Moreover, the Administrative Law Judge found that the auditor properly requested M & B's books and records for the period beyond the May 31, 1986 date stated in the initial appointment letter to cover the period from June 1, 1986 through February 28, 1987.

The next issue addressed by the Administrative Law Judge concerned claimed sales for resale. The Administrative Law Judge found that since petitioners agreed to a test period audit as a proper method, they cannot now object to such method employed because they did not agree with the resulting assessment. The Administrative Law Judge stated that petitioners had the burden of proving by clear and convincing evidence that both the method employed and the assessment were erroneous, which burden they failed to sustain in this case.

With respect to the credit card sales, the Administrative Law Judge concluded that such sales were not sales for resale as petitioners contended. The Administrative Law Judge determined that based on the fact that: (1) no resale certificates were presented, (2) there was no testimony, affidavits or any other type of evidence submitted from ABC or from any of the ultimate customers which would substantiate petitioners' allegations and (3) there were differing explanations offered at various stages of these proceedings by petitioners and their representatives, such credit card sales were properly included in one quarter for each of the years under audit.

In reviewing the 26 invoices produced by petitioners as proof of nontaxable sales, the Administrative Law Judge accepted 18 of the invoices as proof of nontaxable sales. Therefore, by increasing the amount of nontaxable sales, the Administrative Law Judge further reduced the percentage of unreported taxable sales and reduced the assessment to \$14,859.00 plus penalty and interest.

On exception, petitioners object to the Administrative Law Judge's determination that the credit card sales were not sales for resale and that resale certificates were not presented for all sales to ABC. Petitioners also argue that the \$26,660.33 in credit card sales occurred only one time during the Christmas season of 1984 which, coincidentally, was the same quarter chosen for the test period audit. Therefore, petitioners argue that the \$26,660.33 amount should only be included in that one quarter instead of the same quarter for each of the years in issue.

Lastly, petitioners argue that:

"[t]he position of the Division is not based on fact (see, 10[c] of Administrative Law Judge's determination) but that 'M&B failed to prove . . . that it did not make sales to customers procured by ABC'" (Petitioners' exception, p. 3).

In response, the Division argues that the credit card sales were disallowed because it was not shown that such sales were sales for resale to ABC and because the tax paid by the customer was actually paid to petitioners. Further, the Division alleges that there was no supporting evidence submitted to demonstrate that these sales were made to ABC from either the customers by whom the charges were made or by persons related to ABC. Moreover, there was no evidence from the bank that petitioners were authorized to lend their merchant's number to ABC.

Lastly, the Division states that petitioners have failed to demonstrate that including the amount of credit card sales in the third quarter of each year was erroneous. Therefore, the Division respectfully requests that the assessments against petitioners be sustained as modified by the Conciliation Conferee and the Administrative Law Judge.

We affirm the determination of the Administrative Law Judge for the reasons set forth below.

The first issue disputed on exception by petitioners concerns the disallowance of credit card sales to ABC as sales for resale.

Every retail sale of tangible personal property is subject to sales tax, unless otherwise exempted or excluded (Tax Law § 1105[a]). A "retail sale" is defined as "[a] sale of tangible personal property to any person for any purpose, other than . . . for resale as such or as a physical component part of tangible personal property . . ." (Tax Law § 1101[b][4][i][A]). All receipts from the sale of property or services are presumed to be subject to sales tax pursuant to Tax Law § 1105. The burden is on the taxpayer to prove otherwise (Tax Law § 1132[c]; see, Matter of Sunny Vending Co. v. State Tax Commn., 101 AD2d 666, 475 NYS2d 896).

Petitioners argue that the \$26,660.33 amount was payment for merchandise sold by M & B to retailers who, in turn, sold the merchandise to their customers. Further, petitioners assert that the sales to ABC for resale were paid for by credit cards of ABC's customers and that the credit card sales could not have been made to individual consumers since the auditor determined that the amount of gross sales was correct. Moreover, petitioners allege that taxing M & B for these additional sales is, in effect, increasing total sales.

Addressing the last two contentions together, petitioners assert in their exception that:

"the credit card sales could not have been made to individual consumers since the auditor determined gross sales were correct. By taxing the petitioner on this item, the examiner is increasing total sales" (Petitioners' exception, p. 2).

We agree that the auditor in this case accepted petitioners' amount of gross sales (Tr., p. 29; Exhibit "E"). However, accepting the amount of gross sales is not the same thing as accepting the total amount of taxable sales. If the auditor accepted petitioners' total taxable and nontaxable sales, the Division would not have issued an assessment against petitioners. The auditor's determination regarding the disallowance of some nontaxable sales reported does not contradict his acceptance of the amount of gross sales.

Pursuant to section 1132(c) of the Tax Law, unless a vendor obtains a properly completed resale certificate, a sale of tangible personal property is deemed to be a taxable sale at retail (see

also, 20 NYCRR 532.4[d]). In the case herein, M & B has not introduced any evidence to establish that the instant sales were for resale.

The credit card slips do not establish resales because these slips do not establish that the merchandise M & B sold to ABC was, in fact, the same merchandise ABC sold to its customers.

At hearing, petitioners' accountant, Mr. Sarva, testified on cross-examination that:

"Q. You [M & B] are the only distributors [for Panasonic]?"

"A. We are one of the three in the region . . .

"Q. They [ABC, the retailer] give you these credit cards. Your contention is that you do not know what the credit card is for and you will just take money from anyone on their credit cards?"

"A. In a different form, that's it.

"Q. From the purchaser, you don't know what the purchaser is doing. They are using your merchant card which is your relationship with the bank?"

"A. Right.

"Q. And you don't know that they [the retailer's customers] are purchasing your items. All you know is that, is that what you're saying?"

"A. We have no way of knowing this item [which M & B sold to the retailer, ABC] is bought by the same person who is buying [with] the credit card. It is impractical for us" (Tr., p. 55).

Without knowing what ABC was selling to its customers, we cannot determine that M & B's sales to ABC were for resale. As stated in the above quoted language, M & B was one of three wholesalers in the region. From the evidence submitted at the hearing, we cannot determine that all merchandise sold by ABC to its customers was the same merchandise that ABC bought from M & B. Therefore, petitioners have not demonstrated that their sales to ABC were sales for resale and, thus, nontaxable.

At this point, we wish to address petitioners' statement on exception that:

"the examiner received a resale certificate for ABC but did not accept it due to his erroneous belief that the sales were directly to ABC's customers (Tr. pg. 23, lines 3-9)" (Petitioners' exception, p. 2).

Petitioners interpretation of the testimony located at lines 3-9 on page 23 in the transcript is erroneous. The pertinent testimony by the auditor, as questioned on direct examination, is as follows:

"MR. HABER: Did you, when you were presented had [sic] with exemption certificates did you accept any that were presented to you?"

"THE WITNESS: Every single one was -- that was presented was allowed. The only one I took exemption [sic] to is the one that was charged to individual consumers.

"MR. HABER: Thank you.

"Q. At the conference, the reduction was made from approximately \$46,000 to approximately \$21,000. What was presented to you at the conference which resulted in this reduction in addition to these particular resales?"

"A. Mr. Serpico presented bills, more bills backed up by shipping out of New York, and some exempt sales" (Tr., p. 23, lines 3-19).

The first question asked by Mr. Haber concerned exemption certificates which represented exempt sales of equipment to diplomats and consulars (see, Exhibit "1"). The second question asked by Mr. Haber concerns the reduction made to the assessment that occurred at the second conciliation conference (see, Exhibit "B"). The conferee reduced the sales tax owed from \$46,192.50 to \$21,815.09 based upon petitioners' submission of the exemption certificates and evidence of export sales (see, Exhibit "B"). The exemption certificates are not the same as resale certificates that M & B would have on file as evidence of sales for resale to ABC. Although Mr. Haber inartfully refers to "resales" in his second question to the auditor, he was clearly referring to the exemption certificates and export sales and mistakenly used the incorrect term in his question to Mr. Saleh.

Further, there is no evidence that the auditor was presented with resale certificates. If petitioners are now alleging that resale certificates from ABC exist, the burden was upon petitioners to introduce such certificates into evidence at the hearing (Matter of Continental Arms Corp. v. State Tax Commn., 72 NY2d 976, 534 NYS2d 362, 363).

The next issue concerns the inclusion of the \$26,660.33 in each of the quarters ending February 28, 1985, February 28, 1986 and February 28, 1987. Petitioners argue that such amount should only be included in the quarter ending February 28, 1985 because such credit card transactions only occurred during this particular quarter.

When estimating sales tax due, the Division must adopt an audit method that will reasonably calculate the amount of taxes due (see, Matter of W. T. Grant Co. v. Joseph, 2 NY2d 196, 159 NYS2d 150, cert denied 355 US 869). The burden is then on the taxpayer to demonstrate, by clear and convincing evidence, that the audit method employed or the tax assessed was unreasonable (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).

However, unreasonable is not the same as imprecise. The fact that an estimation of sales tax due is required negates any demand for exactness on the part of the auditor (Matter of Meskouris Bros. v. Chu, supra). Accuracy was sacrificed in the first instance by the failure of the taxpayer to maintain adequate records. This initial failure cannot later inure to the taxpayer's benefit. Therefore, the audit method utilized must only be reasonable (see, Matter of W. T. Grant Co. v. Joseph, supra; Matter of Alde Taxi Meter Serv., Tax Appeals Tribunal, January 2, 1992).

Petitioners have failed to sustain their burden of proving that the audit methodology was unreasonable or that the tax assessed was erroneous. Petitioners state in their exception that:

"if the examiner's determination is correct, only \$26,660.33 should be taxed as the examiner did nothing to determine if accepting credit cards was a common occurrence and whether or not it occurred other than in December, 1984. Petitioner testifies it occurred once (Tr. pg. 68, lines 17-23)" (Petitioners' exception, p. 2).

As stated above, the burden of proof is upon the taxpayer to demonstrate that the assessment is erroneous. Further, although petitioners contend that the credit card transactions occurred only once, petitioners have not proven that such transactions, or other unsubstantiated sales for resale, did not occur during the other two Christmastime quarters. As stated in Meskouris Bros., petitioners failed to keep adequate books and records and, thus, by requiring the Division to estimate taxes, cannot now demand exactness in arriving at an assessment (Matter of

Meskouris Bros. v. Chu, supra). Therefore, we sustain the assessment as modified by the Conciliation Conferee and the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of M & B Appliance, Inc. and Man M. Munjal and Inder S. Bindra, as officers is denied;
2. The determination of the Administrative Law Judge is sustained;
3. The petitions of M & B Appliance, Inc. and Man M. Munjal and Inder S. Bindra, as officers are granted to the extent indicated by finding of fact "7" and conclusion of law "D" of the Administrative Law Judge's determination, but are otherwise denied; and
4. The Division of Taxation is hereby directed to modify the notices of determination and demand for payment of sales and use taxes due in accordance with paragraph "3" above.

DATED: Troy, New York
August 20, 1992

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner