

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
JOHN MERA ASSOCIATES, INC. :
T/A COUP-PAK :
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, 1976 :
through November 30, 1985. :

In the Matter of the Petition :
of :
J.T.M. GROUP, INC. :
T/A COUP-PAK :
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, 1985 :
through May 31, 1987. :

DECISION
DTA Nos. 808472,
808473, 808474
and 808475

In the Matter of the Petition :
of :
JOHN MERA, OFFICER OF :
JOHN MERA ASSOCIATES, INC. T/A COUP-PAK :
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, 1976 :
through November 30, 1985. :

In the Matter of the Petition :
of :
JOHN MERA, OFFICER OF :
J.T.M. GROUP, INC. T/A COUP-PAK :
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, 1985 :
through May 31, 1987. :

Petitioners John Mera Associates, Inc. T/A Coup-Pak, John Mera, officer of John Mera Associates, Inc. T/A Coup-Pak, J.T.M. Group, Inc. T/A Coup-Pak, and John Mera, officer of J.T.M. Group, Inc. T/A Coup-Pak, 585 Stewart Avenue, Garden City, New York 11530 filed an exception to the determination of the Administrative Law Judge issued on March 26, 1992 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 periods September 1, 1976 through November 30, 1985 and December 1, 1985 through May 31, 1987, respectively. Petitioners appeared by Daniel H. Link, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Carroll R. Jenkins, Esq., of counsel).

Petitioners did not file a brief in support of their exception. The Division of Taxation filed a brief in opposition to petitioners' 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 the hearing was properly noticed and the Administrative Law Judge's refusal to adjourn in error.

II. Whether the Division of Taxation's auditor was in error in not requesting invoices and testimony from petitioners' suppliers to determine whether sales tax was paid on purchases, and whether the imposition of use tax was proper.

III. Whether the change of venue constituted an undue hardship on petitioners, and whether petitioners received a fair hearing.

FINDINGS OF FACT

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

On January 20, 1989, the Division of Taxation ("Division") issued to petitioner John Mera Associates, Inc. T/A Coup-Pak ("Coup-Pak"), four notices of determination and demands for

payment of sales and use taxes due as follows: a notice of determination was issued for the period September 1, 1976 through February 28, 1980, assessing tax of \$17,838.96 plus penalty and interest; a notice of determination was issued for the period March 1, 1980 through August 31, 1983, assessing tax of \$28,080.26 plus penalty and interest; a notice of determination was issued for the period September 1, 1983 through November 30, 1985, assessing tax of \$34,187.76 plus penalty and interest; and a notice was issued for the period June 1, 1985 through November 30, 1985, assessing an additional penalty of \$991.29. On the same date, four notices of determination and demands for payment of sales and use taxes due were issued to petitioner John Mera, officer of John Mera Associates, Inc., assessing identical amounts of tax, penalty and interest as that assessed against Coup-Pak for the same periods.

On January 20, 1989, the Division issued to petitioner J.T.M. Group, Inc. ("J.T.M.") two notices of determination and demands for payment of sales and use taxes due. The first notice was for the period December 1, 1985 through May 31, 1987 and assessed tax of \$26,979.78 plus penalty and interest. The second notice was for the period December 1, 1985 through February 28, 1987 and assessed additional penalty of \$2,739.00. On the same date, the Division issued two notices of determination and demands for payment of sales and use taxes due to petitioner John Mera, officer of J.T.M. Group, Inc., assessing identical amounts of tax, penalty and interest for the same periods as that assessed against J.T.M.

During the period September 1, 1976 through November 30, 1985, Coup-Pak operated a direct mail advertising business. Coup-Pak solicited clients to take part in an advertising campaign which consisted primarily of the distribution by mail of advertising brochures, pamphlets and discount coupons. It advised its clients, designed or helped in the design of the items to be mailed, maintained or rented mailing lists and supervised the printing and mailing of the items. It hired a printer and direct mail company to actually produce and mail the advertisements and coupons. Coup-Pak was not registered as a vendor and did not collect sales tax on charges for its services. J.T.M. operated the advertising business from December 1, 1985

through May 31, 1987, and it was registered as a sales tax vendor during that period. In June 1985, J.T.M. began trading as American Barter Exchange. It sold products to participants in the Barter Exchange through two entities, American Business Products and American Carpet Exchange.

The Division's audit of Coup-Pak began in 1986. A letter dated May 12, 1986 was sent by the Division to Coup-Pak advising that a routine sales tax examination was to begin on June 26, 1986 at Coup-Pak's offices. Coup-Pak was asked to have available all books and records pertaining to its sales tax liability for the period June 1, 1983 through February 28, 1986. A second letter, dated September 19, 1986, was sent to Coup-Pak c/o John Mera, confirming the scheduling of an audit appointment at the office of Steven Bellask on October 15, 1986.¹ Coup-Pak was again asked to make available all books and records pertaining to its sales tax liability for the audit period. A memorandum dated September 22, 1986 was sent to Mr. Bellask by the Division's auditor, confirming the audit appointment and providing a copy of the letter sent to Coup-Pak.

The auditor finally met with Mr. Bellask on November 7, 1986. At that time the only records provided were incomplete cash receipts records and copies of some contracts between Coup-Pak and its clients.

By letter dated April 17, 1987, the Division made a third request for books and records, including: copies of New York State corporation franchise tax returns for whatever years filed; the Federal tax identification numbers of Coup-Pak and J.T.M.; New York State corporation franchise tax returns for J.T.M. if filed; cash receipts records for Coup-Pak, beginning in 1977, including bank statements; cash and check disbursement records for the years 1977 through 1987 showing all purchases of Coup-Pak and J.T.M.; bills showing purchases of fixed assets made by either Coup-Pak or J.T.M. by cash, check or barter; expense purchase invoices for Coup-Pak and

¹A power of attorney appointing Mr. Bellask to represent Coup-Pak in the audit was executed by Mr. Mera on October 8, 1986 and provided to the Division.

J.T.M.; and bills for mailing list rentals, purchases of graphics and other purchases. The letter also requested the names of participants involved in American Barter Exchange in the years 1984 through 1986 and the billing records of American Barter Exchange. The letter indicates that the auditor had previously reviewed bank statements for the period 1983 through August 1986.

The only records made available in response to these requests were cancelled checks and bank statements for the period May 1976 through May 1987. Initially, the Division attempted to determine petitioners' tax liability by analysis of these records. The auditor determined that petitioners' direct mail business was in essence an advertising agency; therefore, charges made to its customers were deemed to be exempt from sales tax. Petitioners' purchases of tangible personal property and taxable services were considered to be subject to sales tax. Petitioners' gross purchases were calculated by reference to the cancelled checks. All disbursements not obviously made for nontaxable purchases (such as salaries, utility bills, etc.) were treated as purchases subject to sales tax. Since petitioners submitted no purchase invoices showing tax paid on purchases, it was assumed that petitioner failed to pay sales tax on the total amount of these purchases. Using the cancelled checks, the auditor computed total purchases of \$1,487,821.81, with a tax due on that amount of \$114,783.74. The Division also determined that J.T.M., trading as American Barter Exchange, failed to report sales tax due during the audit period in the amount of \$526.23.²

On or about September 20, 1987, the Division issued several statements of proposed audit adjustment to Coup-Pak and J.T.M. which, taken together, asserted a tax liability of \$115,309.97. Mr. Mera returned these statements with the following notation made on each page:

"I disagree on the following basis:

1. The figures are totally inaccurate.

²J.T.M. filed a single sales tax return for the quarter ended May 31, 1987 where it reported sales made by American Barter Exchange during the period June 1, 1985 through May 31, 1987. The Division determined that the total amount of taxable sales reported was accurate, but the amount of tax due was incorrect due to the fact that J.T.M. applied an 8 percent sales tax to the total. The correct tax rate was 8 1/4 percent for the period June 1, 1985 through December 31, 1985 and 8 percent thereafter.

2. No tax is due under any circumstances.

The mailing service was performed for a third party for whom it is ilegal [sic] to pay the tax. (Check your last bulletin)."

The auditor's log for the period following the issuance of the statements of proposed audit adjustment indicates that the Division was hesitant to proceed with the issuance of notices of determination without seeking more documentation. Consequently, by letter to Mr. Mera dated January 29, 1988, the Division repeated its request for the books and records of Coup-Pak and J.T.M. The letter stated that the period under audit was September 1, 1976 through May 31, 1987 and essentially requested cash receipts journals, cash disbursements journals, purchase invoices and Federal and State tax returns for both corporations for the period under audit. It also repeated the Division's request for the names of those persons participating in American Barter Exchange. No records were made available in response to this request.

On July 28, 1988, two subpoenas were served upon Mr. Mera, requesting him to appear at the offices of the Division on August 10, 1988 and to produce all records of Coup-Pak and J.T.M. for the period September 1, 1976 through November 30, 1985 required to be kept pursuant to 20 NYCRR 533.2, including general ledgers, sales and purchase journals, sales and purchase invoices, Federal and State corporation tax returns and a description of the accounting system employed by the corporations.

In response to the subpoena, Mr. Mera telephoned the auditor and requested that the auditor come to his business premises to review the books and records. The auditor complied with this request. On August 10, 1988, Mr. Mera allowed the auditor to review several cartons of purchase invoices, filed alphabetically. These were the only records produced in response to the Division's subpoenas.

The auditor attempted to correlate the purchase invoices to the cancelled checks she had previously reviewed and listed on worksheets. Whenever an invoice showed sales tax paid, she eliminated the amount of the receipt from her earlier calculations. Using this methodology, the

auditor reduced total purchases subject to sales tax to \$1,382,348.00, with a tax due on that amount of \$106,560.53.

Petitioners requested and were granted a conciliation conference to challenge the statutory notices of determination. A conference was held on February 23, 1990. Mr. Mera appeared on behalf of petitioners. As a result of the conference, the Division issued four conciliation orders, dated May 4, 1990, sustaining the notices of determination.

On August 1, 1990, petitioners each filed a petition protesting the Division's conciliation orders. Each of the petitions was signed by Mr. Mera, and there was no indication that petitioners were represented by anyone other than Mr. Mera.

The Division served its answer to the petitions on, or about, January 25, 1991. In a cover letter to Mr. Mera, the Division's attorney stated:

"This matter will be scheduled for hearing at the New York City offices of the Division of Tax Appeals. The Division of Tax Appeals will advise the parties of the time and place for the hearing."

The Division of Tax Appeals scheduled a hearing in Troy, New York on May 22, 1991. That hearing was adjourned at Mr. Mera's request. In a letter to Mr. Mera dated May 7, 1991, Assistant Chief Administrative Law Judge Daniel J. Ranalli stated:

"Since you have just retained an attorney to represent you in the above matters I will adjourn the hearing until Monday, July 17, 1991 at 1:15 p.m.³ You should be prepared at that time since no further adjournments will be granted. Your attorney will also need to execute powers of attorney for you and the two corporations in order to appear. I have enclosed the forms for your convenience. Please have him return them to me as soon as possible."

On June 10, 1991, the Division of Tax Appeals mailed formal notices of hearing to petitioners at the address shown on all of the petitions, 585 Stewart Avenue, Garden City, New York 11530. At that time the Division of Tax Appeals had not yet received powers of attorney appointing anyone other than Mr. Mera to represent petitioners in proceedings conducted in the

³July 17, 1991 actually fell on a Wednesday, rather than a Monday.

Division of Tax Appeals. The notices accurately stated that a hearing was scheduled on Wednesday, July 17, 1991 at 1:15 PM in Troy, New York. The notices also contained the following statement:

"An adjournment may be requested but will be granted only for good cause and only if the request is received in writing at least 15 days prior to the hearing date, and only to such time and place as the Division of Tax Appeals finds appropriate." (Emphasis in original.)

On July 3, 1991, Judge Ranalli received a letter from Daniel H. Link, an attorney and certified public accountant, and four powers of attorney executed by Mr. Mera appointing Mr. Link to represent petitioners. The letter stated in relevant part:

"I am in receipt of a copy of your letter to John Mera dated May 7, 1991.

"I am uncertain whether you mean Monday July 15, 1991 or Wednesday July 17, 1991. In either case, I will be out of town for most of July and will be unable to make either date.

"In addition, the issues in the case will require some time to research and with tax return filing deadlines in August, I will be unable to make an appearance until late August or September. Further the requirement to appear in Troy rather than a local regional office imposes an additional financial and logistics burden. I understand that this latter requirement is under appeal by the New York State CPA Society and I would appreciate awaiting that outcome rather than incur an unnecessary expense for my client.

I will call you mid July to discuss rescheduling."

Judge Ranalli denied Mr. Link's request for an adjournment by letter dated July 11, 1991.

It states:

"Your request for an adjournment of the hearing on the above matters is denied. Mr. Mera was granted an adjournment in May as you are aware, because you had just been retained and needed time to prepare. You have now had two months, and no further extensions will be granted.

"The hearing notice sent to Mr. Mera on June 10, 1991 accurately reflects the correct hearing date of Wednesday, July 17, 1991 at 1:15 p.m. Failure to appear will result in a default order."

A hearing was held on July 17, 1991 as scheduled. Mr. Mera appeared on behalf of the petitioners. He made a motion for an adjournment of the proceedings which was opposed by the Division. Mr. Mera sought the adjournment for several purposes. First, he wanted time for his representative to prepare his case, and he wanted the hearing scheduled at a date and time when his representative would be able to appear. In addition, he wanted to adjourn and continue until such time as the Division of Tax Appeals ruled "on the New York State CPA Society's appeal to rescind the requirement to appear in Troy."⁴

The administrative law judge denied petitioners' motion for an adjournment. In response, Mr. Mera stated his objection to going forward with the hearing and to the decision of the Division of Tax Appeals to schedule all hearings in Troy, New York. He also stated that by denying an adjournment the Division of Tax Appeals was denying him the constitutional right to representation. He refused to submit evidence or testify on his own behalf.

The administrative law judge left the record open until September 17, 1991 to enable petitioners' attorney to review the record and to submit evidence or a brief or take whatever other action he deemed appropriate. This date was later extended to November 15, 1991.

Petitioners' attorney filed a brief which contained both allegations of fact and arguments of law. No documentary evidence or affidavits were submitted on petitioners' behalf after the hearing.

Each of the petitions filed alleged the same error by the Commissioner of Taxation, namely the following:

"All services offered by the petitioner were offered for re-sale.
Therefore, the levy of a compensating use tax is invalid and should
be rescinded."

⁴There is no evidence in the record of such an appeal being made to the Division of Tax Appeals by the CPA Society or any other entity.

OPINION

In the determination below, the Administrative Law Judge held that petitioners had misapprehended the law and, further, that since petitioners submitted no evidence whatsoever, the only description of petitioners' services available in arriving at a determination was that provided by the Division.

The Administrative Law Judge further held that: 1) the Division's evidence was sufficient to establish that petitioners made purchases of goods and services subject to sales tax and that the purchases of these goods and services were for use in performing a nontaxable service, therefore, they were not purchases for resale and were subject to sales tax; 2) the Division's audit established that petitioners did not pay sales tax due on all of their purchases of taxable goods and services and did not file sales tax returns reporting the tax due on their purchases; 3) the Division was authorized by section 1138(a)(1) of the Tax Law to determine petitioners' tax liability from the information available and that the Division calculated the tax liability using petitioners' cancelled checks and purchase invoices; 4) inasmuch as the burden of proof was upon petitioners to show any error in the auditor's calculations, the Division had no obligation to subpoena or review the books and records of petitioners' vendors to determine whether sales tax due from petitioners had been collected or paid over by those vendors; 5) petitioners offered no evidence to show that the assessed tax was paid by petitioners or their vendors and that, therefore, they failed to carry their burden of proof; 6) without evidence, petitioners' claims that the notices of determination were untimely and that petitioners are not liable for the taxes due on the ground that they were merely acting as agents for their clients must fail; 7) petitioners have produced no evidence to show that they purchased services from tax exempt organizations; and 8) Mr. Mera has not contended that he was not a person required to pay tax on behalf of Coup-Pak or J.T.M. and that, as such a person, he is liable for the penalties and interest imposed.

Finally, the Administrative Law Judge rejected petitioners' contention that the hearing in this matter was conducted in violation of their rights to a fair hearing. The Administrative Law

Judge concluded that petitioners had not supported their second adjournment request with a good cause justification and, therefore, that the request had been properly denied. The Administrative Law Judge also rejected petitioners' request that the hearing be adjourned to the New York City area.

Petitioners' representative, while not submitting a brief, but pointing to the record as a whole, urges the Tax Appeals Tribunal to hold that: 1) the hearing was not properly noticed and the refusal to adjourn was in error; 2) the request for adjournment was in writing and timely mailed and received by the Division of Tax Appeals; 3) the change of venue constituted undue hardship on petitioners and that the sole purpose in changing the venue was to discourage taxpayer appeals; 4) the Division's auditor was in error in not requesting invoices and testimony from petitioners' suppliers to determine whether sales tax was paid on purchases and whether the imposition of use tax was improper; and 5) petitioners are entitled to a fair hearing and that this did not constitute same.

The Division argues that petitioners' exception consists of little more than conclusory statements without evidence from the record or legal authority to support it. The Division further argues that Mr. Mera's right to a fair hearing was at all times preserved; issues not raised and evidence not submitted at the evidentiary stage should not be permitted to be offered or raised for the first time in petitioners' brief; petitioners did not meet their burden of going forward or the burden of proof; and the determination of the Administrative Law Judge should be affirmed and the assessments sustained in full, together with applicable penalty and interest.

We find no basis in the record before us for modifying the determination of the Administrative Law Judge in any respect. 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 John Mera Associates, Inc. T/A Coup-Pak, John Mera, officer of John Mera Associates, Inc. T/A Coup-Pak, J.T.M. Group, Inc. T/A Coup-Pak, and John Mera, officer of J.T.M. Group, Inc. T/A Coup-Pak is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of John Mera Associates, Inc. T/A Coup-Pak, John Mera, officer of John Mera Associates, Inc. T/A Coup-Pak, J.T.M. Group, Inc. T/A Coup-Pak, and John Mera, officer of J.T.M. Group, Inc. T/A Coup-Pak are denied; and
4. The notices of determination and demand for payment of sales and use taxes due, dated January 20, 1989, are sustained.

DATED: Troy, New York
November 25, 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