

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
SAM & RAJ APPLIANCE DISCOUNT CENTER, 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 December 1, 1981 :
through February 28, 1986. :

In the Matter of the Petition :
of :
SUBHASH K. KAPADIA, AS OFFICER OF : DECISION
SAM & RAJ APPLIANCE DISCOUNT CENTER, INC. : DTA NOS. 808994,
for Revision of a Determination or for Refund : **812102 and 812103**
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period December 1, 1981 :
through February 28, 1986. :

In the Matter of the Petition :
of :
NITIN VORA, AS OFFICER OF
SAM & RAJ APPLIANCE DISCOUNT CENTER, 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 December 1, 1981 :
through February 28, 1986. :

Petitioners Sam & Raj Appliance Discount Center, Inc., Subhash K. Kapadia and Nitin Vora, as officers, 37-08 74th Street, Jackson Heights, New York 11372, filed an exception to the determination of the Administrative Law Judge issued on April 4, 1996. Petitioners appeared by Arnold D. Roseman, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (James Della Porta, Esq., of counsel).

Petitioners filed a brief and a reply brief in support of their exception. The Division of Taxation filed a letter brief in opposition. Oral argument was heard on February 20, 1997.

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

ISSUES¹

I. Whether the Division of Taxation properly determined additional sales and use taxes due from Sam & Raj Appliance Discount Center, Inc. for the period at issue.

II. Whether Sam & Raj Appliance Discount Center, Inc. has shown that its failure to pay sales tax due was due to reasonable cause and not due to willful neglect.

III. Whether the notices of determination issued by the Division of Taxation to the officers should be canceled because they were not received by such officers.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except findings of fact "2," "3" and "4" which have been modified. We have also made additional findings of fact. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional findings of fact are set forth below.

Petitioner Sam and Raj Appliance Discount Center, Inc., operated a business which sold appliances and electronic equipment at retail. Subhash Kapadia and Nitin Vora were the president and vice-president of the corporation, respectively.

We modify finding of fact "2" of the Administrative Law Judge's determination to read as follows:

On August 10, 1984, the initial auditor assigned to this case mailed an appointment letter to the corporation requesting that all books and records pertaining to the corporation's sales tax liability for the period under audit be available on the appointment date. The books and records were to include journals, ledgers, sales invoices,

¹As stated by the Administrative Law Judge.

purchase invoices, cash register tapes, exemption certificates, etc., and all sales tax records. The appointment letter stated the audit period to be September 1, 1981 through May 31, 1984.

On August 22, 1984, Mr. Seymour Finder, the taxpayers' representative and the corporation's accountant, informed the auditor that a prior audit was still ongoing and he would prefer to wait for the completion of that audit before commencing this new audit. A new auditor who would eventually complete the audit was assigned to this matter on April 22, 1986. Little had been accomplished on the audit to this point in time except the signing of two consents extending the period of limitations for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law. Collectively, the consents extended the period of limitation for the period December 1, 1981 through February 28, 1983 to June 20, 1986. Upon contacting the representative, the new auditor received the same message, that the representative still insisted that the audit should be placed on hold pending the completion of the earlier audit.

Finally, on February 14, 1989, the auditor was provided with and examined some of the books and records of the corporation and requested again that certain records be provided. The records made available for review included the sales and use tax returns and the related worksheets, Federal income tax returns, State income tax returns and related worksheets, depreciation schedules, general ledger, cash receipts journal, purchase journal and cash disbursements journal. All were available for the entire audit period.

Records originally requested for the entire audit period but not made available included the sales journal, sales invoices, purchase invoices, canceled checks, bank deposit slips, monthly bank statements, resale certificates, exempt organization certificates and shipping records. Mr. Finder again requested that the audit be delayed until May when the tax season would be over.

The next meeting of the auditor and the corporation's accountant was May 24, 1989. The period of the audit was extended from December 1, 1981 through November 30, 1988. The auditor completed a schedule of the sales tax returns filed by the corporation and transcribed the sales from the business's general ledger. In addition, the auditor and Mr. Finder discussed the sales and purchase records that had not as yet been provided or examined. The representative told the auditor that the business had maintained all its purchase invoices for the audit period. Mr. Finder testified that, after informing the auditor that the business had between 15,000 and 20,000 sales invoices for the audit period, the auditor stated that was too many invoices to examine and decided to pick a test period instead. The Division of Taxation's ("Division") auditor strongly denied ever stating that petitioners had too many records to examine or that he had decided to do a test period audit.²

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We modify finding of fact "3" of the Administrative Law Judge's determination to read as follows:

On the auditor's workpaper which detailed the business's quarterly sales and use tax returns filed, the auditor had placed an "X" next to the quarter June 1, 1986 through August 31, 1986 and a check next to the quarter March 1, 1988 through May 31, 1988. On the bottom of the page the auditor had placed another "X" followed by the words "sales (test)" and another check followed by the words "purchases (test)". According to the testimony of Mr. Finder, this signified that the auditor had agreed to do a test period audit using these two quarters. However, the auditor testified that he agreed to use the two quarters as test periods only if the corporation's books and records were examined and were found adequate and complete for the entire audit period. He needed to review all the purchase and sale invoices for the entire audit period before agreeing to do a test period audit. At no time during the audit was a test period audit method election form executed by petitioners and the Division.³

We modify finding of fact "4" of the Administrative Law Judge's determination to read as follows:

On September 1, 1989, the auditor telephoned the representative and was told that petitioners were attempting to gather the requested invoices. The representative telephoned the auditor on October 19, 1989 and advised him that petitioners were still gathering the records. The auditor received the same message from the representative in a telephone conversation of November 22, 1989. The auditor met with petitioners' representative on February 22, 1990 and was advised that the officers were still gathering the invoices.

On March 9, 1990, the auditor sent a second appointment letter to petitioner's representative which stated, in part, as follows:

"As per our meeting on February 22, 1990, it has been determined that an actual audit will be performed on the above mentioned taxpayer. Therefore, we request the following records in order to continue the ongoing audit:

1. All sales invoices for the entire audit period;

the last paragraph that the auditor denied Mr. Finder's allegations.

We modified finding of fact "3" of the Administrative Law Judge's determination to more completely reflect the record.

2. All purchases invoices for the entire audit period;

These records should be delivered to our office . . . by March 30, 1990."

On March 29, 1990, six years after the original written request for records, Mr. Finder again telephoned the auditor to inform him that the invoices for the entire audit period would not be available as requested but the invoices for the test period would be. The auditor advised Mr. Finder to bring in the invoices that were available. The auditor, Mr. Finder and Mr. Vora spent April 2, 1990 in the auditor's office photocopying the records of the corporation. Mr. Finder testified that there were 3,000 to 4,000 documents including sales invoices, exemption certificates, resale invoices, shipping documents, United Parcel Service ("UPS") books and purchase invoices for the other test period. However, the auditor testified that petitioner brought in only 754 sales invoices and the corresponding UPS documents in a single box.

The auditor determined that the shipping records (UPS books) appeared to have been altered. Questionnaires were mailed out to petitioners' customers to verify some of the claimed shipments. Some of the responses to these questionnaires indicated that the particular customer never purchased the item. In others, the customers had taken the items from the store personally. The auditor concluded that the shipping records provided by petitioners were unreliable. This determination was made by the auditor as well as his supervisor and the sales tax unit head. On June 6, 1990, the auditor referred the case to the Office of Tax Enforcement for criminal fraud review by completing an Audit Referral for Fraud form. The auditor indicated on the form that the tax liability was understated through unreported receipts and the UPS books. At this point in time, the auditor stopped all contact with the taxpayers' representative, as required by the Office of Tax Enforcement and the Manhattan District Attorney's Office, except for the limited purpose of requesting an extension of the period of limitations, *infra*. On July 16, 1990, a fraud investigator informed Mr. Finder that the corporation had been referred to the Office of Tax Enforcement. It is noted that at this point in time, no criminal prosecution had been initiated against the corporation or its two officers. On July 3, 1990, while the case was pending criminal investigation, the auditor mailed a letter and consent extending the period of limitations to Mr. Finder (tr., p. 47). Mr. Finder refused to sign the extension. Since the period of limitations for assessment was about to expire, the auditor concluded that he must issue assessments for a portion of the audit period without waiting for the criminal investigation to be completed.⁴ The auditor did not give prior notice to

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Although the assessments were issued for the period December 1, 1981 through February 28, 1986, the audit period ran until November 30, 1988. The audit file was kept open for the remainder of the period pending conclusion of the criminal investigation. Ultimately, the audit

petitioners of his intention to issue the assessments because the case was then pending a criminal investigation. Once the case had been referred for possible criminal action, the auditor testified he was advised by the Office of Tax Enforcement and the Manhattan District Attorney's Office not to have contact with petitioners (tr., pp. 106, 143). Shortly after the assessments had been issued, Mr. Roseman, petitioners' attorney, contacted the auditor and requested a copy of the audit file. The auditor said he could not provide any information while the case was pending an investigation, but gave Mr. Roseman the name of the attorney in the prosecutor's office he could call to obtain the file. Mr. Roseman refused to call the attorney (tr., p. 103). While then Commissioner Wexler of the Department of Taxation and Finance recommended the case for criminal prosecution, ultimately no criminal prosecution resulted. On October 13, 1993,⁵ the auditor had a meeting with Mr. Roseman in which he was provided with an explanation of the notices of determination that had been issued to petitioners and a copy of the audit papers (tr., p. 111). Petitioners disagreed with the assessments. On the day following this meeting, the determination was made that no further documents were going to be provided by petitioners and the case would be closed.⁶

Between April 22, 1986 and January 8, 1990, the corporation, by Mr. Vora, as secretary and vice-president and Mr. Kapadia, as president, executed seven consents extending the period of limitation for assessment of sales and use taxes due under Articles 28 and 29 of the Tax Law for the period December 1, 1981 through May 31, 1987 to September 20, 1990.

As the corporation failed to provide the auditor with the sales invoices and corresponding shipping documents and exemption certificates for the entire audit period to substantiate its reported exempt sales, the auditor disallowed all claimed nontaxable sales for the period December 1, 1981 through February 28, 1986. This resulted in assessing additional taxable sales of \$11,407,488.00 and additional sales tax due of \$941,117.77. A 25% under reporting of tax penalty was also assessed.

file was not closed until 1993 and no further assessments were issued.

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Presumably, at this point, the criminal investigation had been concluded.

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We modified finding of fact "4" of the Administrative Law Judge's determination to more completely reflect the record.

On September 19, 1990, the Division issued to petitioner, Sam & Raj Appliance Discount Center, Inc., two notices of determination and demands for payment of sales and use taxes due covering the period December 1, 1981 through February 28, 1986 assessing a total liability of \$941,117.77, plus penalty and interest. On the same date, the Division issued to petitioner an additional Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the same period assessing a penalty liability in the amount of \$21,279.06, pursuant to Tax Law § 1145(a)(1)(vi). Identical notices were issued to Nitin Vora and Subhash K. Kapadia, as responsible officers of Sam & Raj Appliance Discount Center, Inc.

The notices of determination issued to Nitin Vora were mailed to 56-01 Blvd. East, West New York, NJ 07093. The notices of determination issued to Subhash Kapadia were mailed to 216 Nassau Blvd., Garden City Park, NY 11040. The addresses for the two officers were obtained from Mr. Finder. On September 26, 1990, the envelopes containing the officers' notices were returned to the Department of Taxation and Finance with the indications that the officers had moved and their forwarding addresses had expired.

We make the following additional findings of fact:

The corporation filed a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS") with respect to the assessments issued to it. By conciliation order (CMS No. 110887), dated January 21, 1994, the statutory notices issued to the corporation were sustained.⁷

Petitioners filed petitions with the Division of Tax Appeals. Paragraph 21 of said petitions raise the issue of jurisdiction.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge concluded that: i) the auditor made two proper, written requests for petitioners' books and records and that, despite these requests, petitioners never supplied the invoices, exemption certificates and other source documents for the audit period; ii) the auditor reviewed the records that were made available and determined that they were

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The two officers apparently did not file a request for a conciliation conference, but did file petitions in the Division of Tax Appeals.

inadequate; iii) a test period was neither performed nor agreed to in this matter; rather, a test period was only to be performed once the auditor had reviewed all of the corporation's books and records and was satisfied that they were adequate for a detailed audit; iv) petitioners' books and records were inadequate in that they failed to maintain and produce necessary source documents for the audit period (sales invoices, exemption certificates, shipping records) to substantiate their claimed nontaxable sales as required by Tax Law § 1135(a)(1); and v) under these circumstances, it was proper for the Division to rely on the presumption of taxability contained in Tax Law § 1132(c) with respect to the unsubstantiated, claimed exempt sales.

The Administrative Law Judge also concluded that the corporation submitted no direct documentary proof in an attempt to establish that the sales were exempt from sales tax. The only evidence submitted by petitioners was the testimony of Mr. Finder to the effect that approximately 80% of the corporation's sales were exempt from the imposition of sales tax. Mr. Finder's testimony was unrelated to any specific transaction and unsupported by documentary evidence. Not a single sales transaction was shown to be exempt. Sales invoices were not placed into the record, nor were they provided to the auditor. There being no proffered explanation for the absence of the invoices, the Administrative Law Judge concluded that no adjustments to the audit findings were warranted.

The Administrative Law Judge concluded that petitioners had failed: i) to show reasonable cause for abatement of penalty; and ii) to offer proof that Subhash Kapadia and Nitin Vora were not liable for the sales and use taxes due as officers of the corporation.

The notices of determination issued to Subhash Kapadia and Nitin Vora were returned to the Division as undeliverable.⁸ In the absence of proof by the Division as to the mailing procedure followed in this case, the Administrative Law Judge concluded that there could be no presumption of receipt. In this situation, since there is no issue with respect to the timeliness of the petitions, the Administrative Law Judge concluded that the prescribed remedy was to grant

⁸In both cases, the envelopes were stamped with the indication that the parties had moved and the forwarding address had expired.

the two officers a hearing. The Administrative Law Judge thereupon denied the petitions and sustained the notices of determination issued to the corporation and the two officers.

ARGUMENTS ON EXCEPTION

The exception is prepared in such a way as to make it unclear which specific findings of fact of the Administrative Law Judge petitioners disagree with, since references are made primarily to the transcript rather than to findings of fact in the determination.

Petitioners disagree with all of the conclusions of law of the Administrative Law Judge. Petitioners also disagree with the manner in which the Administrative Law Judge stated the issues.

Petitioners view the issues as follows:

(i) Whether petitioners' books and records for the audit period were complete and made available to the auditor on May 24, 1989;

(ii) Whether the auditor's letter of March 9, 1990 requesting all books and records was sent out of pique and anger at petitioners' failure to provide the books and records at the earlier scheduled February 1990 meeting;

(iii) Whether the auditor's agreement to do a test period audit was an express admission that the entire set of records was too burdensome for him to audit;

(iv) Whether petitioners' production of the records for "the test period" quarter complied with the intent of the auditor's March 9, 1990 letter requesting all books and records;

(v) Whether the auditor's acceptance of the test period records on April 2, 1990 constituted a waiver of any requirement to produce all books and records;

(vi) Whether the auditor was required to give petitioners prior notice that he regarded the "test period" records as unreliable or of his intent to issue the notices of determination;

(vii) Whether the auditor's failure to give petitioners prior notice of his intent to reject the "test period" records deprived petitioners of the right to a detailed audit and also deprived them of their due process rights;

(viii) Whether the estimated assessments were erroneous, improper, etc. based on the non-production of records for an entire audit period when the auditor had agreed to do a test period audit;

(ix) Whether the auditor deceived and misled petitioners in agreeing to do a test period audit, examining the "test period" records, rejecting those records and then using an arbitrary method to make the assessments;

(x) Whether the Administrative Law Judge furthered the deception and misleading of petitioners by omitting from his findings of fact a comment that was written in the audit report by the auditor's supervisor, i.e., "[t]axpayer refused to produce books and records."

(xi) Whether the Administrative Law Judge "omitted, failed and neglected" to mention that petitioners had a right to a detailed audit;

(xii) Whether the Administrative Law Judge ignored the fact that petitioners "demonstrated, beyond cavil," that they had met their burden of proof and also overlooked "the sound assertions" of petitioners that the Division had not met its burden;⁹ and

(xiii) Whether the Administrative Law Judge failed to "discuss, analyze or determine the important issues" that petitioners' statutory, legal and constitutional rights were violated.

OPINION

Petitioners' representative, upon oral argument, but not in the exception, urged that the assessments against the two officers should be cancelled based on our decision in ***Matter of Bleistein*** (Tax Appeals Tribunal, July 27, 1995 [a consent signed on behalf of the corporation to extend the period of limitations within which to assess such corporation does not extend the period within which to assess an officer of such corporation]).

Petitioners also urge that the officer assessments are jurisdictionally infirm based on the fact that the two officers never received their respective statutory notices. Therefore, petitioners argue, the officer assessments are untimely. This argument appears to be that since the period

⁹Notice of Exception, p. 13.

of limitations was about to expire when the notices were issued and the two officers never received the notices, by the time the notices could have been re-sent to the officers and received, the statute would have expired. Therefore, the officers urge, the notices are untimely. This inartfully presented argument notwithstanding, we believe by raising the issue of "timeliness" petitioners have raised a question of jurisdiction that must be addressed.

We note that the Administrative Law Judge concluded that the Division offered no proof of the fact and date of mailing of the two officers' notices of determination (Determination, conclusion of law "N").

Because we believe it is important for us to receive the full benefit of our two-stage hearing and exception process which "gives the Tribunal, and ultimately the courts, the benefit of the Administrative Law Judge's research and analysis as well as the parties' research and analysis in response to the Administrative Law Judge's determination" (*Matter of United States Life Ins. Co. in the City of New York*, Tax Appeals Tribunal, March 24, 1994), we remand this matter to the Administrative Law Judge for further proceedings so that additional evidence may be submitted and argument made concerning whether the notices of determination issued to the two officers are a nullity based on *Matter of Bleistein (supra)* and whether the Division can establish timely and proper mailing of the notices of determination to the two officers.

We retain jurisdiction of this case, but withhold decision pending a determination by the Administrative Law Judge on these two additional issues. Upon said determination being issued, which should be on an expedited basis, the full record will be returned to us for a combined decision on all of the issues on appeal.

Accordingly, it is ORDERED, ADJUDGED and DECREED that this case be remanded to the Administrative Law Judge for further proceedings.

DATED: Troy, New York
August 14, 1997

Donald C. DeWitt
President

Carroll R. Jenkins
Commissioner

Joseph W. Pinto, Jr.
Commissioner