

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
GLOBAL IMPORTS OUTLETS, INC. : DECISION
AND MOUSSA MARIZADEH, AS OFFICER : DTA No. 810617
: :
for Revision of Determinations or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period June 1, 1983 through November 30, 1989. :
:

Petitioners, Global Imports Outlets, Inc. and Moussa Marizadeh, as officer, 801 Broadway, New York, New York 10003, filed an exception to the determination of the Administrative Law Judge issued on February 9, 1995.

Petitioners appeared by Isaac Sternheim & Co. (Isaac Sternheim, CPA). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (John O. Michaelson, Esq., of counsel).

Petitioners filed a brief on exception. The Division of Taxation filed a letter stating it would not be filing a brief in opposition. This letter was received on April 19, 1995 and began the six-month period for the issuance of this decision. Petitioners' request for oral argument was denied.

Commissioner Koenig delivered the decision of the Tax Appeals Tribunal. Commissioners Dugan and DeWitt concur.

ISSUES

I. Whether the Division of Taxation properly determined additional sales and use taxes due from Global Imports Outlets, Inc. for the period at issue.

II. Whether Global Imports Outlets, Inc. has shown that its failure to obtain a certificate of authority, failure to file sales tax returns and failure to timely pay sales tax due was due to reasonable cause and not due to willful neglect.

FINDINGS OF FACT

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

1. On February 4, 1991, the Division of Taxation ("Division") issued to petitioner Global Imports Outlets, Inc. ("Global") two notices of determination and demands for payment of sales and use taxes due for the period June 1, 1983 through February 28, 1990 assessing a liability of \$409,101.37, plus penalty and interest. On the same date, the Division issued to Global two additional notices of determination and demands for payment of sales and use taxes due for the period June 1, 1985 through February 28, 1990 assessing a penalty liability in the amount of \$45,615.84, pursuant to Tax Law § 1145(a)(1)(i) and (3)(i). The penalty portion of the liability includes \$10,000.00 for conducting a business without a certificate of authority and \$950.00 for the failure to file required returns. In addition, on the same date, the Division issued identical notices to petitioner Moussa Marizadeh, as officer of Global, under Tax Law §§ 1131(1) and 1133.

2. The auditor commenced the audit by mailing an appointment letter to Global on January 8, 1990 which requested that all books and records pertaining to its sales tax liability for the audit period (the audit period was listed as 7/83 through 11/89) be made available for audit. The letter specifically requested journals, ledgers, sales and purchase invoices, register tapes, exemption certificates, as well as Federal returns and bank statements.

3. Global is involved in the sale of reproduction antiques and antique furniture. Its business operation began in July 1983 but it did not register as a sales tax vendor or file sales tax returns from 1983 until October 1989. When Global first began business it was registered with the Federal government. However, it was advised by its accountant not to register with New York State because it was in the wholesale business. Syrus Sedge was the president of the corporation and petitioner Moussa Marizadeh was its vice president.

4. At the scheduled appointment (at the place of business), the auditor received almost all the records relating to sales except for the records relating to nontaxable sales, such as sales for

resale, out-of-state sales and sales to nontaxable entities. After reviewing the records provided and determining that they were adequate, the auditor and Global executed an Audit Method Election form, dated April 18, 1990. The election form indicated that, for the audit period July 1983 through November 1989, a test period method audit would be used in the areas of sales and recurring expense purchases.

The auditor began by examining sales for the test period months of July 1987, April 1988 and November 1989. Total sales for the three-month period amounted to \$265,091.00, while sales determined to be taxable (that is, sales which lacked documentation indicating they were nontaxable sales) amounted to \$76,737.00, or 28.95% of taxable sales. Projecting these figures throughout the audit period resulted in taxable sales of \$4,830,621.00 and additional tax due of \$398,526.23. The auditor also determined that Global had accrued but not remitted sales tax in the amount of \$2,799.77 (a result of Global erroneously collecting tax on two occasions), that Global had purchased furniture and fixtures in the amount of \$53,450.00 but had not paid the sales tax due in the amount of \$4,409.62, and that Global did not pay sales tax on its recurring expense purchases of \$3,365.75. Total tax due on audit was \$409,101.37.

5. At the Bureau of Conciliation and Mediation Services ("BCMS") conference held on October 8, 1991, the tax liability portion of the assessment which was based upon the disallowance of nontaxable sales was reduced as a result of additional documentation presented by Global. The additional documentation presented by Global reduced the percentage of taxable sales to 21.11%. In addition, the final quarter ended February 28, 1990 was eliminated from the assessment. The conciliation order, dated January 31, 1992, issued to petitioners after the conference indicated that the amount now being assessed is \$287,536.93, consisting of tax on claimed nontaxable sales of \$277,125.09 and the tax collected, the tax on furniture and fixtures and the tax on recurring expense purchases of \$10,411.84. Global is only contesting the tax assessed of \$277,125.09 on claimed nontaxable sales.

6. During the course of the audit, the auditor verbally requested proof from Global's accountant that Global had made out-of-state shipments. According to the auditor, no proof

was provided which established that goods were shipped out of the State by Global. During his testimony, the auditor stated that shipments made by Bedco Trucking were disallowed because proper documentation was not presented. Furthermore, the auditor indicated that Bedco represented the purchaser, making the transaction subject to sales tax in that the transfer of title occurred in New York. With regard to another common carrier used by Global for out-of-state deliveries, F & R Antique Transport, Inc., the auditor stated that the carrier was contacted by Global but was the agent of the purchaser. According to the auditor, since the carrier was the agent of the purchaser, the sale of the goods occurred in New York and the transaction was subject to sales tax.

7. Global presented the testimony of Mr. Syrus Sedge, president, that when there was a sale to an out-of-state customer, Global would contact the trucker and would sign the bill of lading, which indicated "freight collect." Freight collect meant that Global remained responsible for the merchandise until it reached the purchaser. Most out-of-state sales were initiated by either the customers catalog shopping and calling in the order by telephone or the customers appearing and placing the order at Global's premises. If the merchandise arrived at the customer's location in a damaged state, Global did not get paid. Since the truckers were insured, and the particular item was damaged in transit, the insurance company paid the trucker, and the trucker and Global then reached a settlement. The customer was in no way involved because the damage occurred prior to delivery.

Global used Interstate Commerce Commission licensed carriers for its out-of-state shipments. Included within this group were Ben E. Daniels d/b/a Bedco Trucking, F & R Antique Transport, Inc. ("F & R"), P.J. Xpress ("P.J.") and Yellow Freight.

8. Bedco provided an affidavit from Mr. Daniels, dated December 19, 1991, which stated that Global called for the pick-up of the freight, that Global was the shipper of record and that all deliveries were freight collect. During the years at issue, Bedco was insured by Coastline Insurance Agency, Inc. Attached to a second affidavit of Mr. Daniels, dated March 15, 1994, was a list of Global customers and their addresses to which Bedco made deliveries in July 1987,

April 1988 and November 1989. In reaching the conclusions that the customers were located out of state and Bedco had made the deliveries in the months indicated, Mr. Daniels reviewed the related shipping documents supplied by Global. The customers, states and their months of delivery were as follows:

<u>JULY 1987</u>	
<u>Customer</u>	<u>State</u>
Allan Bottgie	Massachusetts
Ball and Claw Antiques	Georgia
J & J Oriental Rugs	Virginia
Stacey Savin Decor	Connecticut
Pink Parrot	Texas
Fidelity	New Jersey
Connie Sleight	New Jersey
Stephanie Mucciano	Florida

<u>APRIL 1988</u>	
<u>Customer</u>	<u>State</u>
Pedro Rodriguez	Illinois
Katrin Theodoli	California

<u>NOVEMBER 1989</u>	
<u>Customer</u>	<u>State</u>
Stephen Fornio	Georgia
J.L. Nyce/IMG Ltd.	Missouri
D. Todd	Florida

In an affidavit dated December 20, 1991, the president of F & R stated that Global contacted F & R directly to arrange shipments, that F & R was not contacted by the purchasers and that shipments were sent freight collect. A second affidavit dated February 24, 1994 of the president of F & R stated that Global had shown the bills of lading relating to the following shipments to F & R and F & R had picked up and delivered the shipments listed. The customers and their states were as follows:

<u>Customer</u>	<u>State</u>
Theodore Feder	California
Robert Lyons	Florida
Bernhard Antiques	Florida
Michael Rubin/Howard Art	Illinois
J. Lyons	Florida
Barbro Katof	New Jersey

Trudy Zink
Hastemi House Interiors
Claudia Ruger
Joseph Barocas Interiors
Susan Bines

North Carolina
Virginia
Connecticut
Virginia
Alabama

9. Petitioner also presented sales invoices, shipping orders and bills of lading for merchandise shipped by Bedco and Yellow Freight to Global's out-of-state customers. The dates of the transactions, customers, customers' locations, amounts of the sales and carriers were as follows:

<u>Date</u>	<u>Customer</u>	<u>Location</u>	<u>Amount</u>	<u>Carrier</u>
7/1/87	C. Sleight	New Jersey	\$ 60.00	Bedco
7/15/87	Fidelity	New Jersey	5,550.00	Bedco
7/20/87	Fidelity	New Jersey	3,590.00	Bedco
7/23/87	Fidelity	New Jersey	1,075.00	Bedco
7/30/87	S. Landman	Louisiana	80.00	Bedco
11/15/89	P.G. Foote	Ohio	950.00	Yellow Freight
11/17/89	L. Bafalis	Washington, D.C.	1,500.00	Yellow Freight
11/29/89	L. Bafalis	Washington, D.C.	540.00	Yellow Freight

OPINION

In the determination below, the Administrative Law Judge reviewed, in part, Tax Law § 1138(a)(1) relative to determining the amount of tax due from information available and the estimation of tax on the basis of external indices where verification of sales is a virtual impossibility due to the taxpayer's recordkeeping.

The Administrative Law Judge then reviewed court cases relating to procedural requirements placed on the Division relating to an audit of a taxpayer to properly reflect any tax due, which then places the burden on the taxpayer to establish by clear and convincing evidence that both the method used to arrive at the tax assessment and the assessment itself are erroneous.

In the matter at hand, the Administrative Law Judge held that:

"there is no challenge to the adequacy of the Division's request for and review of Global's books and records for the audit period. Rather, the Division made such request and reviewed the materials presented by Global. In fact, the Division's calculation of tax due is based on an agreed three-month test of Global's books and records because Global's books and records were deemed adequate. The Division assessed as taxable a percentage of Global's gross receipts, based on Global's inability to present

documentation as requested substantiating that such receipts were not taxable as claimed" (Determination, conclusion of law "C").

The Administrative Law Judge sustained that portion of the assessment conceded by Global relating to accrued sales tax, purchases of furniture and fixtures and purchases of recurring expenses, as well as the assessment issued to Mr. Marizadeh which was unchallenged as no evidence or argument was submitted regarding his liability as an officer of Global.

The Administrative Law Judge then held that the only real issue remaining was whether and to what extent Global established that the remaining claimed out-of-state sales of its goods were nontaxable, pointing out that:

"Tax Law § 1132(c) sets forth an initial presumption of taxability with regard to receipts such as those at issue herein, and places the burden of establishing nontaxability upon the person making such claim, i.e., Global (Matter of Sunny Vending Co. v. State Tax Commn., 101 AD2d 666, 475 NYS2d 896)" (Determination, conclusion of law "E").

The Administrative Law Judge reviewed what petitioners must do to meet such burden, discussed the evidence and testimony presented at hearing and held that, other than the direct documentary proof relating to the eight transactions listed in Finding of Fact "9" which established out-of-state deliveries and which are to be removed from the audit findings, "Global was unable to furnish any additional direct documentary evidence relating to any other sales of its merchandise" (Determination, conclusion of law "F"). The Administrative Law Judge found that the testimony of Mr. Sedge was unsupported by documentary evidence. In particular, the Administrative Law Judge found that the two affidavits from the shipping company executives:

"suggest their own weakness. Both affidavits contain a list of customers located outside New York State and a statement that the deliveries were made by the respective carrier. In addition, the affidavits state that Global showed the carrier the shipping documents that relate to the deliveries and customers listed. One affidavit was dated approximately one week prior to the initial hearing in this matter, while the other is dated approximately 10 days after such hearing. Unfortunately, except for the documents discussed in Finding of Fact "9," Global failed to place into the record of this matter the shipping documents relating to the customers referred to in the affidavits. No explanation for their unavailability was provided. Therefore, only those deliveries listed in Finding of Fact "9" which have been established to be out-of-state deliveries are to be removed from the audit findings" (Determination, conclusion of law "F").

The Administrative Law Judge also upheld the imposition of penalties.

On exception, petitioners argue that while petitioners initially failed to present documentation during the course of the audit relating to shipments made by Bedco, the auditor was presented with all but five bills of lading wherein he recorded the names of the shippers on his audit worksheets, same being part of the record representing proof that the auditor had examined the documentation. However, the auditor was under the mistaken impression that the shippers were acting for the purchaser.

Petitioners argue "[t]he fact that the shippers were agents of the petitioner was established by the two 1991 affidavits from the shipping companies" (Petitioners' brief, p. 1).

Petitioners also argue that: 1) each and every non-taxable sale was ultimately documented by Global; 2) as to the items disallowed and those allowed, the exact same proof was offered; 3) the shipping documents relating to the customers referred to in the affidavits were already in the record as they were in the auditor's worksheets in which he recorded his examination of same; and 4) the bills of lading which the auditor had examined previously were not put into the record in order not to clutter same, but this should not have deterred the Administrative Law Judge from allowing what were clearly non-taxable sales to be treated as such.

The Division did not submit a brief in opposition to the exception taken by petitioners, but submits its position is fully explained in its brief filed below.

We affirm the determination of the Administrative Law Judge.

The auditor, Mr. DeGeorge, when cross-examined by petitioners' representative, stated:

"I felt that the shipper was the agent of the purchaser because they acted on the behalf of the purchaser. I asked for clarification or documentation from the vendor that they, in fact, had paid the shipping companies. We were never provided with documentation that Global, in fact, paid the shipping company. If Global did not pay the shipping company, my interpretation that the shipping company was acting as agent for the purchaser, then I concluded that title and possession passed New York State by delivery of the furniture from Global Imports to the purchaser's agent, the trucking company" (Tr., p. 40).

The auditor further stated:

"I disallowed shipments out of state because proper documentation was not submitted in the first instance. In the second instance where it was submitted, it was not acceptable, it was not a completed document, it was not signed. There were deficiencies in the document. With regard to out-

of-state shipments, there were several reasons I disallowed the out-of-state shipments" (Tr., p. 64).

The auditor, on redirect examination by the Division's representative, when questioned regarding documentation to support petitioners' contention relating to shipped out-of-state sales on items that were disallowed, stated:

"Other than the name and address that was on the bill of sale, I don't remember seeing anything to support the taxpayer's contention that these were out-of-state shipments. This is a record to the disallowed out-of-state shipments" [and] "I remember reviewing copies of shipping documents. But in terms of proof that in fact they were shipped out of state and that in fact they were shipped by the seller, the disallowed sales didn't substantiate those facts" (Tr., pp. 67-68).

This testimony negates petitioners' contentions that adequate proof was submitted to the auditor to support each claimed nontaxable sale. Petitioners had the burden to prove that the claimed nontaxable sales were nontaxable (Tax Law § 1132[c]). We agree with the Administrative Law Judge that petitioners did not sustain this burden. The Administrative Law Judge correctly analyzed and weighed all the evidence presented in this case and correctly decided the relevant issues. We uphold the determination of the Administrative Law Judge for the reasons stated therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Global Imports Outlets, Inc. and Moussa Marizadeh, as officer is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Global Imports Outlets, Inc. and Moussa Marizadeh, as officer is granted to the extent indicated in conclusion of law "F" of the Administrative Law Judge's determination but is otherwise denied; and

4. The Division of Taxation is directed to modify the notices of determination and demands for payment of sales and use taxes due dated February 4, 1991 issued against Global

Imports Outlets, Inc. and Moussa Marizadeh, as officer in accordance with conclusion of law "H" of the Administrative Law Judge's determination, but such notices are otherwise sustained.

DATED: Troy, New York
September 7, 1995

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

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

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner