STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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| In the Matter of the Petition | : | |
| of | : | |
| **C & L SYSTEMS, INC./B & S APPLIANCES AND PHILIP HAFT AND PAUL SHUPACK, AS OFFICERS** | : | DECISION DTA NO. 810885 |
| for Revision of Determinations or for Refunds of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 1988 through August 31, 1990. | : | |

Petitioners C & L Systems, Inc./B & S Appliances, and Philip Haft, as officer, 190 Old Post Drive, Hauppauge, New York 11788, and Paul Shupack, as officer, 19 Shoreham Drive West, Dix Hills, New York 11746, filed an exception to the determination of the Administrative Law Judge issued on July 29, 1993. Petitioners appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Andrew S. Haber, Esq., of counsel).

Petitioners did not file a brief. The Division of Taxation filed a letter brief in opposition to the exception. Oral argument was not requested. The six-month period to issue this decision began on February 22, 1994, the date by which petitioners could submit a reply brief.

Commissioner Koenig delivered the decision of the Tax Appeals Tribunal. Commissioner Dugan concurs.

## *ISSUE*

Whether petitioners have shown error in the Division of Taxation's audit method or result.

## *FINDINGS OF FACT*

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

On February 28, 1991, following an audit, the Division of Taxation ("Division") issued notices of determination and demands for payment of sales and use taxes due to petitioners C & L Systems, Inc./B & S Appliances, Philip Haft, president of C & L Systems, Inc./B & S Appliances, and Paul Shupack, vice-president of C & L Systems, Inc./B & S Appliances. Each such notice assessed $8,650.25 in additional tax due, plus penalty and interest,for the period March 1, 1988 through August 31, 1990.[1] Also on February 28, 1991, the Division issued statutory notices to each of the aforementioned petitioners which assessed $865.02 in penalty due pursuant to Tax Law § 1145(a)(1)(vi) for the period March 1, 1988 through August 31, 1990.

Petitioner C & L Systems, Inc./B & S Appliances was engaged in the business of selling and installing central air conditioning systems and "through-wall" air conditioning systems. Petitioner also sold window air conditioners and "through-wall" air conditioner component parts. Petitioner went out of business in August 1990. The audit herein was conducted in January and February 1991.

On audit, the Division found tax due in two areas. The Division determined $4,956.60 in additional tax due resulting from an asserted underreporting of taxable sales and $3,693.65 in additional tax due resulting from an asserted failure to pay sales tax on purchases of materials incorporated into capital improvement projects.

The audit herein was commenced with a written Division request for records related to the audit period. In response thereto, petitioner advised that no such records were available. The Division therefore estimated petitioner's sales tax liability by first obtaining the information reported on petitioner's Federal income tax return for the fiscal year ended October 31, 1988. This information was obtained via the Division's access to the Internal Revenue Service's

[1]Inasmuch as petitioners Haft and Shupack have not protested the Division's assertion of personal liability as responsible officers of the corporate petitioner, all references to "petitioner," unless otherwise indicated, shall refer to C & L Systems, Inc./B & S Appliances.

Federal income tax computer system. Petitioner reported gross receipts of $618,885.00 for the fiscal year ended October 31, 1988.

Next, the Division calculated petitioner's gross sales as reported on its quarterly sales tax returns for the same period. The Division reconciled the sales tax quarters that overlapped petitioner's fiscal year by apportioning the gross sales reported for those quarters pro rata. The Division thus calculated petitioner's reported gross sales for sales tax purposes for the fiscal year ended October 31, 1988 to be $544,660.68.

The Division then determined an error rate in petitioner's gross sales reported for sales tax purposes based upon the difference between gross receipts on its Federal income tax return ($618,885.00) and gross sales as reported on the sales tax returns ($544,660.68). The Division took this difference of $74,224.32 and divided it by gross sales reported of $544,660.68 to reach an error rate of 13.628%.

Next, the Division applied this error rate to petitioner's reported gross sales for each of the quarterly periods comprising the audit period. This computation resulted in adjusted gross sales per audit of $1,321,753.84. The Division determined that 5% (.05) of such adjusted gross sales constituted additional taxable sales. This computation resulted in additional taxable sales of $66,087.68 and additional tax due on sales in the instant matter of $4,956.60.

The 5% figure used to calculate additional taxable sales was derived from a previous audit of petitioner covering the period September 1985 through February 1988. In that audit, the Division determined that petitioner had failed to collect tax and failed to report as taxable sales of components for "through-wall" air conditioning systems.[2] The Division determined that petitioner purchased such components without payment of sales tax and had been selling such components to contractors and recording such transactions as "other income." From a review of the audit report in this previous audit, which was entered into evidence herein, it appears that the 5% figure was calculated using petitioner's records by dividing "through-wall" component sales for the period March 1, 1987 through May 31, 1987 by petitioner's gross sales for the same

[2]A "through-wall" air conditioning system is an air conditioning unit installed in a wall.

period. This resulted in the 5% figure which was used to compute additional taxable sales in the previous audit in a similar manner as that employed herein. Petitioner consented to the Division's determination of additional tax due in the audit of the period September 1985 through February 1988.

As noted previously, the assessment herein also consisted of tax due on certain materials purchased by petitioner incorporated into capital improvement projects. With respect to this component of the assessment, the Division multiplied adjusted gross sales (see, above) by 8.1%. This figure was determined on the previous audit (for the period September 1985 through February 1988) to be the percentage of gross sales constituting receipts from capital improvement projects where no tax was paid on material purchases.

The audit report for the previous audit indicated that the Division reviewed petitioner's purchase invoices for materials used in its capital improvement jobs. This review indicated that petitioner had not paid sales tax on purchases of materials used in its installation of "through-wall" air conditioning units. Using petitioner's records, the Division totaled petitioner's receipts from its "through-wall" installation jobs for the period March 1, 1987 through May 31, 1987 and divided that amount by petitioner's total gross sales for the same period. This calculation resulted in the 8.1% figure. As noted previously, petitioner consented to the Division's determination of additional tax due on the previous audit.

Having determined that $107,062.06, or 8.1%, of petitioner's adjusted gross sales of $1,321,753.84 constituted capital improvement sales where no tax was paid on material purchases, the Division next determined that 46% of this $107,062.06 in capital improvement sales (or $49,248.68) constituted material purchases. The Division assessed tax due of $3,693.65 on this $49,248.68.

The 46% figure used by the Division to reach the amount of material purchases comprising the "through-wall" installation receipts was derived from an audit of petitioner for the period December 1982 through November 1984. In that audit, the Division examined petitioner's "through-wall" installation contracts and determined that material costs constituted

about 46% of the total amount of such contracts. Petitioner consented to the additional tax due as determined by the Division on audit for the period December 1982 through November 1984.

Attached to the petition in the instant matter was a Bureau of Conciliation and Mediation Services ("BCMS") consent form by which BCMS proposed a resolution to the instant matter. Petitioner rejected this proposed resolution. At hearing, petitioner questioned the manner by which BCMS calculated the tax liability set forth in the consent. No evidence was presented regarding such calculations.

***OPINION***

In the determination below, the Administrative Law Judge held that petitioner did not dispute that it failed to maintain and/or make available records sufficient to verify its taxable sales, but that petitioner did take issue with the audit method employed by the Division and the audit result.

The Administrative Law Judge held that "given the absence of records available and considering that the business had ceased operations at the time of the audit, the Division's use of the prior audits and the Federal income tax return in determining petitioner's tax liability was rational and reasonable" (Administrative Law Judge determination, conclusion of law "C").

While petitioner contends that the assessment was erroneous in that the nature of its business had changed following the previous audit, the Administrative Law Judge rejected such contention holding that the only evidence presented in support of petitioner's contention was the testimony of Mr. Shupack and the absence of any evidence in the record corroborating said testimony leads to the conclusion that petitioner failed to show "by clear and convincing evidence" that the assessment was erroneous.

Finally, the Administrative Law Judge held that since petitioner chose to reject the proposed resolution made by the BCMS, said document has no relevance to this determination.

On exception, petitioner argues: 1) there was no justification for the audit; 2) the entire audit that was originally performed was done without any basis, facts or any papers to go by;

3) that there was no basis for the computation of the redetermined figures and the time limit for accepting them; and 4) rather than dragging this case on, it should be settled.

The Division argues that the Administrative Law Judge properly determined the issue of whether the audit method was proper and, further, the Division was authorized to estimate the tax from such information as was available including external indices. The Division also argues that since petitioner rejected the settlement offer by the BCMS conferee, the matter is irrelevant.

We affirm the determination of the Administrative Law Judge.

In addition, because we find that the Administrative Law Judge completely and adequately addressed the issues before him, we see no reason to analyze these issues further and, therefore, affirm the Administrative Law Judge based on his determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of C & L Systems, Inc./B & S Appliances and Philip Haft and Paul Shupack, as officers is denied;

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

3. The petition of C & L Systems, Inc./B & S Appliances and Philip Haft and Paul Shupack, as officers is denied; and

4. The notices of determination and demand for payment of sales and use taxes due, dated February 28, 1991, are sustained.

DATED: Troy, New York
August 11, 1994

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

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