

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

---

In the Matter of the Petition	:	
of	:	
<b>LANCASTER AUTO COLLISION</b>	:	DECISION
for Revision of a Determination or for Refund	:	DTA No. 812249
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period December 1, 1980	:	
through February 29, 1992.	:	

---

Petitioner Lancaster Auto Collision, 70 St. Mary's Street, Lancaster, New York 14086 filed an exception to the determination of the Administrative Law Judge issued on February 9, 1995. Petitioner appeared by Konstlaw, P.C. (Nicholas Konst, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Kathleen D. Church, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation filed a letter in lieu of a brief in opposition stating it would rely on its brief below. This letter was received on May 5, 1995 and began the six-month period for the issuance of this decision. Petitioner's request for oral argument was denied.

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

***ISSUES***

I. Whether the Division of Taxation properly determined additional sales and use taxes due from Lancaster Auto Collision for the period at issue.

II. Whether Lancaster Auto Collision has shown that its 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.

On November 23, 1992, the Division of Taxation ("Division") issued to petitioner, Lancaster Auto Collision ("Lancaster"), a Notice of Determination for the period December 1, 1980 through February 29, 1992 and assessing a sales tax liability in the amount of \$55,370.06, plus penalty and interest. The amount determined to be due and the period of assessment were identical to those indicated on a Statement of Proposed Audit Adjustment issued to Lancaster on September 3, 1992. The basis of the Notice of Determination and the Statement of Proposed Audit Adjustment was an audit of the business operation of Lancaster. The audit commenced in March 1992 and is described hereinafter.

Lancaster was an active business operation during the audit period but was not registered as a person required to collect sales tax. The business consisted of automotive body repair, collision damage, windshield replacement and automobile body painting. Lancaster was located at 70 St. Mary's Street, Lancaster, New York 14086.

The audit of this business was selected after it was discovered that petitioner was issuing resale certificates with its sales tax identification number even though the records of the Department of Taxation and Finance indicated that the business had been inactive since November 1980. For the quarter ended November 30, 1980, and prior thereto, Lancaster had filed sales tax returns and remitted the tax due. For the audit period, sales tax returns were not filed and sales tax was not remitted.

The auditor made an unannounced visit to the premises and discovered that Lancaster was in operation. On the premises was the owner of Lancaster, John Loukatos. Mr. Loukatos was advised by the auditor that Lancaster should have been filing sales tax returns since November 1980, and Mr. Loukatos responded that in the past he did not have the funds available to pay the sales tax due. The auditor told Mr. Loukatos that the Division wanted to examine the business's

books and records to determine its taxable and exempt sales as well as to determine any tax liability for the audit period.

On the appointment date, the auditor was provided with ledger sheets listing monthly sales from December 1985 to February 1992 and a check register for the period March 1981 through November 1991. The bookkeeper who provided the ledger sheets stated that ledger sheets were not provided for the earlier period beginning December 1980 because the sales invoices for the earlier period were not available to establish that the amount reported was the total gross sales including sales tax. The sales invoices for the period December 1985 through February 1992 were reviewed by the auditor and exempt sales were removed from the computation of taxable sales. No provision was made for exempt sales in the earlier portion of the audit.

The auditor presented Lancaster with blank sales and use tax returns for the audit period. These returns were completed by the bookkeeper and returned to the auditor. The sales and use tax returns indicated total sales of \$788,843.00, while an analysis of check disbursements revealed checks issued in the total amount of \$808,459.00. A comparison revealed expenses exceeding income by \$19,606.00. In addition, an examination of the ledger sheets for the period December 1, 1985 through February 29, 1992 indicated that they totalled \$28,799.00 more than the sales and use tax returns for the same period. Finally, during the examination of the sales invoices, it was discovered that Lancaster had been collecting sales tax but not remitting it.

During the course of the audit, records which were requested and provided included ledger sheets, sales invoices, resale certificates and exempt organization certificates for the period December 1, 1985 through February 29, 1992 and the check register for the entire audit period. Records requested but not provided included Federal and New York State income tax returns and related worksheets, asset depreciation schedules, source documents for journal sheets, banking information, such as, bank deposit slips and monthly bank statements, for the

entire audit period and ledger sheets, sales invoices, resale certificates and exempt organization certificates for the period December 1, 1980 through November 30, 1985.

The auditor concluded that the records were inadequate, in that no records were provided for the period December 1, 1980 through November 30, 1985, there were no source documents for the earlier period of the audit, there was no information as to bank deposits, there was no record of cash payouts and there was no sales tax account. The auditor was of the opinion that the totals on the ledger sheets could not be traced to source documents, especially in the first half of the audit period when no documents were provided. In addition, the auditor concluded that internal control procedures did not exist and the accounting records were generally not auditable.

The auditor performed a detailed audit, looking at all the books and records provided by petitioner. The additional tax due was based upon the taxable sales as shown by Lancaster on the ledger sheets, less any substantiated nontaxable sales.

Lancaster's bookkeeper and representative during the audit testified that by reviewing the sales invoices for the period December 1, 1985 through February 29, 1992, she was able to create the monthly ledger sheets and complete the sales and use tax returns. According to the bookkeeper, yearly ledger sheets were used for the earlier period of the audit to complete the sales and use tax returns because sales invoices were not available. The sales and use tax returns as completed by the bookkeeper were initially used by the auditor to compute a Statement of Proposed Audit Adjustment, dated June 1, 1992, for the period December 1, 1980 through February 29, 1992 which assessed tax due of \$50,987.06, plus penalty and interest.

Subsequently, the auditor returned to the business premises to review the available sales invoices. The bookkeeper testified that he added into taxable sales each customer's insurance deductible which had been eliminated by the bookkeeper. The auditor left the deductible out of taxable sales only where documents were produced to establish that the customer was not charged such amount. The bookkeeper testified that Lancaster did not charge the customer the same amount as the automobile insurance company indicated the repairs were worth. As an

example, if the insurance company assessed the damages at \$2,500.00, and the customer had a deductible of \$200.00, Lancaster would charge and collect tax on \$2,300.00. However, unless otherwise established, the auditor computed the sales price at \$2,500.00. Finally, the bookkeeper testified that cash sales were included in the ledger sheets and the sales and use tax returns.

### ***OPINION***

Tax Law § 1138(a)(1) provides, in part, that if a return required to be filed is incorrect or insufficient, the amount of tax due shall be determined by the Division on the basis of such information as may be available. If necessary, the tax may be estimated on the basis of external indices. The resort to external indices is predicated upon a finding of insufficiency in the taxpayer's recordkeeping such that verification of sales is a virtual impossibility (Matter of Chartair, Inc. v. State Tax Commn., 65 AD2d 44, 411 NYS2d 41). To determine the adequacy of a taxpayer's records, the Division must first request and thoroughly examine the taxpayer's books and records for the entire period of the proposed assessment (Matter of Adamides v. Chu, 134 AD2d 776, 521 NYS2d 826, lv denied 71 NY2d 806, 530 NYS2d 109; Matter of King Crab Rest. v. State Tax Commn., 134 AD2d 51, 522 NYS2d 978). The purpose of this examination is to determine whether the records are so insufficient as to make it virtually impossible for the Division to verify taxable sales receipts and conduct a complete audit (Matter of Chartair, Inc. v. State Tax Commn., supra; Matter of Ronnie's Suburban Inn, Tax Appeals Tribunal, May 11, 1989). In such circumstances, the Division must select a method of audit reasonably calculated to reflect tax due (Matter of Grecian Sq. v. New York State Tax Commn., 119 AD2d 948, 501 NYS2d 219), and the burden is on petitioner to establish by clear and convincing evidence that both the method used to arrive at the tax assessment and the assessment itself are erroneous (Matter of Sol Wahba, Inc. v. New York State Tax Commn., 127 AD2d 943, 512 NYS2d 542).

The Administrative Law Judge determined that:

"[i]n this case, there is no challenge to the adequacy of the Division's request for and review of [petitioner's] books and records for the audit

period. Rather, the Division made such request and reviewed the materials presented by [petitioner]. In fact, the Division's calculation of tax due is based on [petitioner's] gross sales per the books and records less substantiated nontaxable sales. The Division assessed as taxable unsubstantiated nontaxable sales based on [petitioner'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 also found proper the Division's inclusion of insurance deductibles in the amount of taxable sales made by petitioner. The Administrative Law Judge also determined that:

"[p]etitioner offered no testimony at hearing to establish reasonable cause for the failure to report or pay any tax. During the audit period, petitioner collected sales tax from its customers, but did not file sales tax returns or remit the tax collected. Petitioner was clearly aware of its responsibilities as it had filed sales tax returns and remitted the tax due prior to the audit period. Under all these circumstances, penalties are sustained" (Determination, conclusion of law "G").

On exception, petitioner asserts that the Division erred in its treatment of the amount of insurance deductibles and that documentation was available from which the Division could have determined that the sales were exempt from tax. Specifically, petitioner asserts that:

"[a]t the hearing:

"1) There were no witnesses who had personal knowledge of the tax or audit or the problems arising therefrom that testified on behalf of the State of New York. The only evidence supplied was from records.

"2) Petitioner's attempt to cross-examine was severely restricted and petitioner was unable to cross-examine the witnesses.

"3) The person responsible for and making the tax returns on behalf of the taxpayer (petitioner) testified that the sales tax examiner disallowed all exempt sales as the sales slips to verify were not available at the time of examination.

"4) These sales slips were made available and were submitted to the Court at the hearing. Said evidence was contrary to what the audit reports stated.

"5) In addition thereto, other slips were disallowed by the State based on the accuracy of the sales journal.

"6) Again, petitioner's witness testified that the records submitted on behalf of the petitioner were accurate based on all of the evidence and documents in fact made at the time of the sale. There was no evidence submitted by the State in contradiction thereof.

"The New York State Dept. of Taxation & Finance had no basis for making the determination, either originally or by the conciliation order, and that the correct records are those presented to the court by the petitioner, Lancaster Auto Collision" (Petitioner's brief on exception, pp. 1-2).

Finally, petitioner asserts that "the penalty was not justified under the facts herein" (Petitioner's brief on exception, p. 2).

First, we address petitioner's assertion, in effect, that it was denied a fair hearing because it was deprived of its right to cross-examine the auditor who performed the audit. We find no basis in petitioner's assertion.

The presence and testimony at hearing of the auditor who did the audit is, no doubt, the preferable situation for the conduct of the hearing since it provides the Division with a witness with first-hand knowledge of what was done on the audit and petitioner the opportunity to cross-examine the person who did the audit. However, the presence of such person is not always possible such as here where the auditor has retired from State service. While the testimony of the audit supervisor is hearsay, it is, nonetheless, admissible into the record and can provide substantial evidence for the determination of the Administrative Law Judge (see, Matter of Mira Oil Co. v. Chu, 114 AD2d 619, 494 NYS2d 458, lv denied 68 NY2d 602, 505 NYS2d 1026). Petitioner has not pointed to any inaccuracies in the testimony of the Division's witness nor does our examination of the record indicate any such flaw. In short, the failure of the auditor to testify did not deny petitioner a fair hearing (Matter of Volt Information Sciences, Tax Appeals Tribunal, October 15, 1992; Matter of Robritt Liquor Store, Tax Appeals Tribunal, December 27, 1991).

Next, we address petitioner's assertions that the Division's audit method was improper and that penalty was not justified.

The stark facts in this case are that petitioner conducted business for the entirety of the audit period, i.e., December 1, 1980 through February 29, 1992; that during this period petitioner did not file any sales tax returns; that on audit, the Division was provided only with ledger sheets listing monthly sales from December 1985 through February 1992 and a check

register for the period March 1981 through November 1991; and that no other documents were provided during the audit or introduced into the record by petitioner at hearing to substantiate its assertion that the sales at issue were exempt. The core of petitioner's proof that the assessment was erroneous is the testimony of its bookkeeper. The Administrative Law Judge, who had the opportunity to view the testimony of the bookkeeper first hand, found this testimony insufficient for petitioner to prove that the audit method was erroneous. We find no reason to disagree.

The Administrative Law Judge dealt fully and properly with the issues in this case and we affirm his determination for the reasons stated therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Lancaster Auto Collision is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Lancaster Auto Collision is denied; and
4. The Notice of Determination, dated November 23, 1992, is 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