

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
RAINBOW WATERPROOFING CORPORATION	:	DECISION
AND ANTHONY BALLATO, AS OFFICER	:	DTA Nos. 812269
for Revision of Determinations or for Refund	:	and 812270
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period June 1, 1985	:	
through May 31, 1991.	:	

Petitioners Rainbow Waterproofing Corp. and Anthony Ballato, as Officer, 59-18 Parsons Boulevard, Flushing, New York 11365, filed an exception to the determination of the Administrative Law Judge issued on August 24, 1995. Petitioners appeared by Louis F. Brush, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Kathleen D. Church, Esq., of counsel).

Petitioners did not file a brief on exception. The Division of Taxation filed a brief in opposition. Any reply brief by petitioners was due on December 11, 1995, which date began the six-month period for the issuance of this decision. Oral argument was not requested.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether the Division of Taxation properly determined additional sales and use taxes due from Rainbow Waterproofing Corporation for the period at issue.

II. Whether Rainbow Waterproofing Corporation has shown that its failure to file sales tax returns and failure to pay sales tax due was due to reasonable cause and not due to willful neglect.

III. Whether Anthony Ballato is liable for the sales and use taxes due on behalf of Rainbow Waterproofing Corporation as a person responsible for the collection and payment of sales tax pursuant to Tax Law §§ 1131 and 1133.

IV. Whether the notices of determination issued by the Division of Taxation were barred by the statute of limitations.

FINDINGS OF FACT

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

On August 31, 1992, the Division of Taxation ("Division") issued to petitioner Rainbow Waterproofing Corporation ("Rainbow") a Notice of Determination for the period June 1, 1985 through May 31, 1991 and assessing a sales tax liability in the amount of \$566,527.81, plus penalty and interest. On September 10, 1992, the Division issued a Notice of Determination spanning the same periods and assessing the same tax amount as above to petitioner Anthony Ballato, as an officer of Rainbow. The notice indicated that he was personally liable as an officer of Rainbow for taxes determined to be due from the corporation. The notices were based upon the results of a field audit of the business operation of Rainbow as described hereinafter.

Rainbow 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 preventing water from seeping into houses, much the same as roofing contractors or the work of roof repairers. Rainbow was located at 43-14 54th Road, Maspeth, New York 11378.

The audit of this business was selected after it was discovered that Rainbow was performing taxable services but not collecting the sales tax due. For the audit period, sales tax returns were not filed and sales tax was not remitted.

The initial auditor commenced the audit by mailing an appointment letter to Rainbow on January 17, 1991 which requested that all books and records pertaining to its sales tax liability for the audit period (the audit period was listed as 4/75 through 11/30/90) be made available for audit. The letter specifically requested journals, ledgers, sales and purchase invoices, register tapes, exemption certificates and Federal returns.

Attached to the appointment letter was a document entitled "Required Records for Sales Tax Audit". It requested the following records for the same audit period:

- General Ledger
- Federal Income Tax Returns for Years in Audit Period
- Purchase, Sale and Expense Invoices for a Period to be Selected
- All Fixed Asset Invoices for Fixed Assets acquired during Audit Period
- Resale, Exempt and Capital Improvement Certificates supporting non-taxable sales for a Period to be Selected
- 1989 W-2's for all Employees and Officers
- Withholding Tax Compliance
- Bank Statements

On July 22, 1991, a new auditor, who eventually performed the audit on Rainbow, forwarded a second appointment letter to Rainbow which again requested that all books and records pertaining to its sales tax liability for the audit period (the audit period was now listed as 4/75 through 5/31/91) be made available for audit. The letter specifically requested journals, ledgers, sales and purchase invoices, register tapes, exemption certificates and Federal income tax returns.

Attached to the appointment letter was a document entitled "Records Required for Sales Tax Audit". It contained the name and address of Rainbow and listed the following documents as necessary for the audit:

- General Ledger
- Federal Income Tax & NYS Corp. Returns for the Last Three Years
- Invoices for Sales, Purchases & Expenses for a Test Period to be Selected
- Invoices for all Fixed Assets Acquisitions
- Resale, Exempt Org. and Capital Improvement Certificates for a Test Period to be Selected
- Home Addresses and Social Security Numbers for all Officers

Following an appointment with petitioners' representative, the auditor left with him a document listing the "required items for our next appointment". The document provided, in part, as follows:

- Last cancelled check for Corporation Tax, Withholding Tax and Income Tax
- Cash Receipts Journal for 1990 and 1991
- Cash Disbursements Journal for 1990 and 1991
- Federal Income Tax Returns and Associated Worksheets for entire audit period 1985 - 1991.
- Sales Invoices for Periods 9/1/88 - 11/30/88 and 6/1/89 - 8/31/89
- Any substantiation (capital improvement certificates and exempt certificates) for sales invoices where tax was not paid
- Purchase Invoices for Periods 9/1/88 - 11/30/88 and 6/1/89 - 8/31/89
- Fixed Asset Acquisition Invoices

In addition to the above detailed requests for books and records, the auditor made telephone calls and wrote letters to Mr. Ballato and his representative on 25 to 30 occasions in an effort to obtain additional books and records.

During the course of the audit, records which were requested and provided included a cash receipts journal, cash disbursements journal and information concerning bank deposits, all for the period January 1987 through December 1989, except the cash receipts journal was missing March 1989. Records requested but not provided included the cash receipts journal, cash disbursements journal and information relating to bank deposits, all for the periods June 1985 through December 1986 and January 1990 through May 1991, Federal income tax returns, sales invoices, purchase invoices, exemption documents and the sales journal, all for the entire audit period.

The auditor concluded that the records were inadequate, in that no records were provided for the periods June 1985 through December 1986 and January 1990 through May 1991, there were no source documents for the entire period of the audit and there was no information as to Federal income tax returns filed. The auditor was of the opinion that there were insufficient records provided to trace any transaction back to the original source or forward to a final total. In addition, the auditor concluded that the existence of internal control procedures could not be

determined because of the paucity of records provided and that the accounting records were generally not auditable because all records were not available.

To determine Rainbow's sales for the audit period, the auditor employed the sales listed in the cash receipts journal. For the period January 1987 through December 1989, actual sales of \$3,562,936.00 were used. For the period June 1985 through December 1986, the auditor prorated the 1987 year sales for 19 months to arrive at audited sales of \$1,382,801.00. For the period January 1990 through May 1991, the auditor prorated the 1989 sales as contained in the cash receipts journal for 17 months and arrived at audited sales of \$1,921,267.00. The auditor added these three figures together to arrive at gross sales for the audit period of \$6,867,004.00, then multiplied this total by the applicable sales tax rate to arrive at sales tax due of \$566,527.81. The auditor imposed penalties because the corporation had not registered as a sales tax vendor, was conducting business and not filing sales tax returns and failed to maintain adequate books and records during the audit period.

Petitioner Anthony Ballato signed the following documents on behalf of Rainbow:

Application for Three-Month Extension for Filing Tax Report, Form CT-5 -
FYE 3/31/85, 3/31/89, 3/31/91
Metropolitan Transportation Business Tax Surcharge Return, Form CT-
3M/4M - FYE 3/31/85, 3/31/86, 3/31/87, 3/31/88, 3/31/89, 3/31/91
Corporation Franchise Tax Report, Form CT-4 - FYE 3/31/85, 3/31/86,
3/31/87
General Business Corporation Franchise Tax Report, Form CT-4 FYE
3/31/88
General Business Corporation Franchise Tax Return, Form CT-3 FYE
3/31/89, 3/31/91

All documents were signed by Mr. Ballato as vice-president, except the Corporation Franchise Tax Report for the fiscal year ended March 31, 1985, which he signed as president, and the Metropolitan Transportation Business Tax Surcharge Return and the General Business Corporation Franchise Tax Return, both for the fiscal year ended March 31, 1991, neither of which contain a title.

Petitioners introduced into the record of this matter an affidavit of Mr. Ballato which stated that:

- (a) Rainbow was in business during the years at issue.
- (b) Sales during the audit period were exempt or were capital improvements.
- (c) Sales tax returns were not required to be filed or paid by Rainbow.
- (d) Rainbow's books and records were sufficient for the Division to determine that there were no sales or use taxes due.
- (e) All tax returns believed to be due and required to be filed were filed. The sales tax returns were not filed based upon the advice of the accountant for Rainbow.

OPINION

The Administrative Law Judge found that the Division adequately requested and reviewed petitioners' books and records. The Administrative Law Judge further found that since no nontaxable documentation was provided, the Division properly deemed all gross sales taxable and was entitled to rely on the "presumption of taxability contained in Tax Law § 1132(c) with respect to the unsubstantiated claimed exempt sales (Matter of Academy Beer Distributors, Tax Appeals Tribunal, January 21, 1993, affd Matter of Academy Beer Distributors v. Commissioner of New York State Dept. of Taxation & Fin., 202 AD2d 815, 609 NYS2d 108, lv denied 83 NY2d 759, 616 NYS2d 14)" (Determination, conclusion of law "B").

Next, the Administrative Law Judge, relying on Matter of Sunny Vending Co. v. State Tax Commn. (101 AD2d 666, 475 NYS2d 896), determined that the burden was on petitioners to establish that the receipts were not taxable by submitting documentation in the form of sales invoices and payment records. The Administrative Law Judge found that the only evidence produced by petitioners was a general affidavit of Mr. Ballato which stated that the sales were exempt. No examples of exempt sales or sales involving a capital improvement were submitted.

The Administrative Law Judge sustained the penalties imposed because petitioners did not establish reasonable cause for failing to file returns and pay tax. The Administrative Law Judge found that petitioners' reliance on professional advice was insufficient to warrant abating the penalties.

The Administrative Law Judge next found that petitioner Anthony Ballato was liable for the sales and use taxes due on behalf of Rainbow as no evidence was offered to the contrary.

Finally, the Administrative Law Judge stated that "[t]he notices of determination were not barred by the statute of limitations as Rainbow failed to file sales and use tax returns during the period at issue (see, Tax Law § 1147[b])" (Determination, conclusion of law "I").

On exception, petitioners continue to argue that: (1) Rainbow's books and records were adequate; (2) petitioner Anthony Ballato is not personally liable for the tax; (3) it was inappropriate for the Division to rely on a presumption of taxability; (4) there is evidence to substantiate that the sales are exempt or capital improvements; (5) the affidavit of petitioner Anthony Ballato should be accepted as competent evidence; and (6) penalties should be abated.

The Administrative Law Judge correctly and adequately addressed all of the issues raised before him and we find no basis in the record before us for modifying the Administrative Law Judge's determination on these issues 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 Rainbow Waterproofing Corporation and Anthony Ballato, as Officer is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of Rainbow Waterproofing Corporation and Anthony Ballato, as Officer are denied; and

4. The notices of determination, dated August 31, 1992 and September 10, 1992, are sustained.

DATED: Troy, New York
April 11, 1996

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

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

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