STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JOHN KYPREOS, OFFICER OF TRI-STATE ALUMINUM PRODUCTS, INC.	:	DECISION DTA NO. 814731
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 June 1, 1988 through February 29, 1992.	:	

Petitioner John Kypreos, Officer of Tri-State Aluminum Products, Inc., c/o Stewart Buxbaum, CPA, 500 Airport Executive Park, Suite 501, Nanuet, New York 10954, filed an exception to the determination of the Administrative Law Judge issued on July 11, 1997. Petitioner appeared by Stewart Buxbaum, CPA. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (John E. Matthews, Esq., of counsel).

Petitioner filed a letter in lieu of a brief in support. The Division of Taxation did not file a brief in opposition. Oral argument, at petitioner's request, was heard on February 11, 1998 in New York, New York.

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

ISSUES

I. Whether the Division of Taxation's use of a test period audit to determine Tri-State Aluminum Products, Inc.'s sales and use tax liability for the period in issue was proper.

II. Whether the Division erred in failing to examine Tri-State Aluminum Products, Inc.'s sales in detail.

III. Whether the results of the test period audit were applied properly to the quarters for which petitioner was assessed.

FINDINGS OF FACT

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

Petitioner, John Kypreos, was the president of Tri-State Aluminum Products, Inc. ("Tri-State"), which did business under the name Tri-State Window Factory. The business, located at 355 Marcus Boulevard, Deer Park, New York 11729, was involved in the manufacture and installation of custom windows.

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

> On August 29, 1994, following an audit of Tri-State's books and records, the Division of Taxation ("Division") issued a Notice of Determination of sales and use taxes due against petitioner, as officer of Tri-State, covering the period June 1, 1988 through February 29, 1992, for taxes due of $293,228.82, plus interest.
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> Previously, on July 28 1994, petitioner, as president, signed a consent to have the tax, penalty and interest assessed against Tri-State irrevocably fixed by the Division.[1]

[1]We modified this finding by adding the second paragraph to more accurately reflect the record.

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

> The Division began the audit by mailing to Tri-State a standard form audit appointment letter dated October 17, 1991. In addition to setting a date and time for the first meeting between Tri-State and the Division's auditor, this letter specifically requested that Tri-State make available at the time of the first meeting all books and records pertaining to Tri-State's sales tax liability for the period under review. The letter indicated that the period under review was September 1, 1988 through August 31, 1991. In the letter, the Division requested that the corporation make available for the auditor all journals, ledgers, sales invoices, purchase invoices, cash register tapes, Federal income tax returns, exemption certificates, guest checks and bank statements maintained for the audit period. The appointment letter specifically provided that "[e]xemption certificates not made available may be disallowed in which case you will be held liable for the tax on the transaction."
>
> On May 4, 1992, the Division sent a second appointment letter to Tri-State requesting the same documentation. This second letter also contained the same admonishment about a failure to produce exemption certificates. In this letter, however, the period under review was extended to June 1, 1988 through February 29, 1992.[2]

All of the requested records were made available to the auditor by Tri-State. The auditor concluded that the records provided an opportunity to trace any transaction back to the original source or forward to a final total. The accounting records were considered by the auditor to be in an auditable condition. The gross sales per the records of Tri-State were in substantial agreement with the sales as reported on its Federal income tax returns, and the purchases per Tri-State's records were in substantial agreement with purchases as reported on its Federal income tax

[2]We modified this finding to more accurately reflect the record.

returns. Finally, according to the auditor, the business operation had adequate internal control procedures.

The auditor conducted an analysis of Tri-State's sales for a two-week period in November 1991 which revealed that all of the corporation's sales were capital improvements. Properly completed capital improvement certificates had been obtained by Tri-State for all jobs performed. As a result of this review, the auditor concluded that all of Tri-State's sales consisted of capital improvements and were thus exempt from the imposition of sales tax. The auditor then turned his attention to the corporation's purchases. In that Tri-State had complete and adequate books and records, the auditor had Tri-State, by petitioner, as president, execute on May 20, 1993 a Test Period Audit Method Election Form which stated that the audit of recurring expense purchases would be conducted using the test period audit method.

The auditor first analyzed the material expense account for the period March 1, 1991 through May 31, 1991. This review revealed that Tri-State was not properly paying tax on its purchases used in the capital improvement jobs. An error rate of 74.85% was initially calculated, but after discussions with Tri-State's representative about suppliers to whom tax was paid but not indicated in the test, the error rate was adjusted to 70%. The additional tax due on the material expense account was determined to be $229,863.31.

An analysis of the manufacturing expense account for the same period revealed the same result; that Tri-State was not properly paying tax on purchases it was using in capital improvements. The auditor computed an error rate of 99.80% which resulted in additional tax due of $57,065.19.

The auditor analyzed Tri-State's office expense account for the months of May, July and October 1991. An error rate of 17.9% was computed resulting in additional tax due of $547.37.

A review of Tri-State's purchases of electricity and gas revealed that Tri-State was improperly claiming an exemption from sales and use tax. As Tri-State's consumption of electricity and gas was not predominantly used in the manufacturing process, it was subject to the imposition of sales and use tax. The additional sales and use tax due on its purchases of electricity and gas was $4,827.52.

In sum, the total amount of expense purchases determined by the auditor to be subject to sales and use tax was $3,744,933.00, resulting in additional sales and use tax due of $292,303.39.

An analysis by the auditor of Tri-State's asset account revealed $12,339.00 in assets purchased with respect to which Tri-State was unable to verify payment of sales tax upon purchase. The failure of Tri-State to substantiate that tax was paid resulted in additional tax determined to be due of $925.43.

During the audit, Tri-State, by petitioner, as president, executed five consents extending the period of limitation for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law which collectively extended to September 20, 1994 the period within which the Division could assess tax due for the period June 1, 1988 through May 31, 1991.

We find the following additional finding of fact.

> By letter, dated June 15, 1994, petitioner's representative at the time, David G. McMahon, CPA, petitioned the Division for abatement of penalty and additional interest on the "pending tax assessment resulting from the sales and use tax audit." In the letter, Mr. McMahon stated that the failure to pay use tax on some of its material purchases was "honest oversight" stemming from the growth of the business, where Tri-State began purchasing in

> bulk, first by truckload and then directly from manufacturers, from out-of-state suppliers which failed to collect or "mention" sales tax. In addition, Mr. McMahon noted that Thermo Air Industries, Inc., another company started by Mr. Kypreos to manufacture vinyl windows, began to purchase materials with Tri-State, commanding an even greater bulk discount. However, as a manufacturer which sold its windows to contractors for resale, Thermo's purchases were not taxable. Mr. McMahon stated that this added to Mr. Kypreos' confusion over the payment of sales and use tax for materials purchased by Tri-State.

On December 29, 1995, the Bureau of Conciliation and Mediation Services ("BCMS") issued a Conciliation Order reducing the tax due to $52,282.07 by eliminating all but the last three quarters of the notice of determination as the consents extending the period of limitation for assessment of sales and use taxes related only to the corporation and not to petitioner.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

After reviewing the procedures the Division must follow when it determines that a taxpayer maintains books and records adequate to determine the amount of tax it owes, the Administrative Law Judge found that petitioner in this case had records sufficient to verify his sales and purchases under review and that the Division could not estimate the amount of taxes due. The Administrative Law Judge found that the test period audit, conducted pursuant to a written agreement with the taxpayer was properly used and that no such agreement was necessary for the sales of petitioner because sales records were not used to determine additional tax liability.

Further, the Administrative Law Judge found that the fact that the test period was outside the quarters for which petitioner was assessed was inconsequential since case law establishes that

the Division may determine tax due for one period based upon data projected from a different period.

The Administrative Law Judge also determined that petitioner had not offered any proof of his claims for exemptions and, therefore, did not meet his burden of proof to show by clear and convincing evidence that he was so entitled.

ARGUMENTS ON EXCEPTION

Petitioner argues that the Division obtained a test period audit method election for recurring expense purchases, not material purchases used in capital improvements for March, April and May of 1991. Sales were not analyzed to see if any were to other jurisdictions or to exempt organizations and without an examination of all sales for the audit period, the auditor could not have determined the correct amount of tax due.

Petitioner also contends that the test period used by the Division was not within the period for which petitioner is being assessed and, therefore, he cannot be held responsible for taxes found due from the corporation based upon said test.

Finally, petitioner argues that where, as here, a taxpayer's records are deemed adequate, use of a test period to determine taxes due was improper and inappropriate.

The Division argues that it requested all documents and records related to the sales and capital improvements and that petitioner did not produce any exemption certificates for any of the jobs analyzed in the test periods. Further, petitioner did not produce any evidence of exempt sales at conference or in this proceeding.

The Division argues that petitioner never raised the issue of exempt sales in response to his two appointment letters and in meetings between his representative and the auditor. Further, the

Division argues that the issue raised by petitioner at oral argument concerning the proper attribution of tax to the proper jurisdiction was done for the first time in this proceeding.

OPINION

We affirm the determination of the Administrative Law Judge.

Petitioner argues that some of the capital improvements were exempt pursuant to Tax Law § 1116 as sales to exempt organizations and that it was the obligation of the Division to determine which of those projects were exempt through a detailed analysis of Tri-State's sales, not a two week preview. However, once the Division determined that the books and records of Tri-State were adequate, it was not improper for the Division to have determined from only two weeks of records that all of the sales were nontaxable capital improvements. The sales information analyzed by the Division was not used to determine Tri-States's ultimate tax liability, but to determine its business operation and direct the auditor to inspect purchases. In this way, Tri-State, as a taxpayer which maintained comprehensive records, was assured that its records would be used to determine its tax liability (***see, Matter of Chartair, Inc. v. State Tax Commn.,*** 65 AD2d 44, 411 NYS2d 41).

If Tri-State had wanted to avail itself of an exemption on its purchase of materials used in capital improvement projects, it should have offered proof of same, since it bore the burden of establishing such an entitlement ***(Matter of Grace v. New York State Tax Commn.,*** 37 NY2d 193, 371 NYS2d 715, ***lv denied*** 37 NY2d 708, 375 NYS2d 1027; ***Matter of Richards,*** Tax Appeals Tribunal, December 3, 1991). The Division made two clear requests for all books and records relating to Tri-State's sales, including any documentation of exempt sales. In response, it provided complete books and records, but no evidence of sales to exempt organizations. Since

proof of exempt sales was not offered on audit, at BCMS or on submission of this case to the Administrative Law Judge, we find Tri-State's and petitioner's failure fatal to their claims for the exemption.

Further undermining petitioner's argument herein is the fact that when, upon audit, Tri-State applied for abatement of penalties, it never claimed the purchases were exempt from tax. In fact, in Mr. McMahon's letter of June 15, 1994 on behalf of Tri-State, he did not argue that Tri-State had made sales to exempt organizations, rather, he conceded that it had purchased materials for use in its capital improvement projects on which it failed to pay sales or use tax. Although he argued this was only an oversight, it remains that the tax was owing and that Tri-State, and particularly Mr. Kypreos, were aware of this liability.

The Administrative Law Judge correctly determined that the Division properly performed an audit of three months of purchases pursuant to a Test Period Method Election Form and that the preliminary examination of two weeks of sales for November 1991 was simply to determine the business operation of the corporation so that the auditor would know whether to review purchases or sales and that no tax liability resulted from this two week review. Further, the Division's test of material and manufacturing expense accounts as well as office expenses was proper pursuant to the test period agreement, which indicated that the test period audit would be conducted on "recurring expense purchases."

In this case, petitioner consented to a test period audit even though he acknowledged that he had adequate records to support an audit utilizing records for the entire audit period. "Having consented to the use of a test period audit method with full knowledge of its right to insist upon a complete audit based upon all of its records for the audit period, the corporation cannot now

claim that a complete audit was required" (***Matter of Wallach v. Tax Appeals Tribunal,*** 206 AD2d 696 , 614 NYS2d 647, 648***, lv denied*** 85 NY2d 805, 626 NYS2d 756)***.*** Petitioner consented to the audit of Tri-State's purchases for a three-month period, but believes the audit was inadequate because it did not consider sales to exempt organizations. However, since its purchases were directly related to said sales or otherwise consumed by Tri-State, petitioner had the burden of proving that the purchases of materials used in specific jobs were eligible for an exemption based upon the classification of the ultimate consumer as an exempt organization (***Matter of Grace v. New York State Tax Commn***., ***supra***; Tax Law § 689[e]). As stated above, petitioner offered no proof on this issue. Therefore, petitioner's criticism that the test period audit was flawed because it did not encompass sales is without merit.

Petitioner raised for the first time at oral argument the contention that the Division's failure to examine its sales in detail resulted in the application of incorrect tax rates to purchases and the failure to determine if jobs were commercial or residential. We have consistently held that new legal issues can be raised on exception (***see***, ***Matter of Chuckrow***, Tax Appeals Tribunal, July 1, 1993). However, the raising of factual issues after the closing of the record has been distinguished from the raising of legal issues (***Matter of Sandrich***, Tax Appeals Tribunal, April 15, 1993). The introduction of factual issues after the record has closed is not allowed as it deprives the party with the burden to prove the disputed fact of the opportunity to submit evidence, thereby prejudicing the party (***see***, ***Matter of Consolidated Edison Co. of New York***, Tax Appeals Tribunal, May 28, 1992).

Finally, petitioner argues that the use of a test period outside of the quarters for which petitioner was assessed was in error. However, as the Administrative Law Judge stated in his

determination, conclusion of law "C," "the Division may determine tax due for one period based on data projected from a different period" (***Matter of Markowitz v. State Tax Commn.***, 54 AD2d 1023, 388 NYS2d 176, ***affd*** 44 NY2d 684, 405 NYS2d 454.)

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of John Kypreos, Officer of Tri-State Aluminum Products, Inc., is denied;

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

3. The petition of John Kypreos, Officer of Tri-State Aluminum Products, Inc., is denied; and

4. The Notice of Determination, dated August 29, 1994, is sustained.

DATED: Troy, New York
August 6, 1998

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner