

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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| In the Matter of the Petition | : | |
| of | : | |
| VIRGINIA PERKINS | : | DECISION DTA NO. 815918 |
| 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 December 1, 1991 through August 31, 1994. | : | |

Petitioner Virginia Perkins, c/o 384 Central Islip Boulevard, Ronkonkoma, New York 11779, filed an exception to the determination of the Administrative Law Judge issued on October 29, 1998. Petitioner appeared *pro se*. The Division of Taxation appeared by Terrence M. Boyle, Esq. (John E. Matthews, Esq., of counsel).

Petitioner filed a brief in support of her exception. The Division of Taxation did not file a brief on exception but, instead, relied on its post-hearing letter briefs filed below. Oral argument, at petitioner's request, was heard on May 25, 1999 in New York, New York.

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

ISSUES

I. Whether petitioner established that the tax shown as due on a Notice of Determination was paid to the Tax Compliance Division before the issuance of the notice.

II. Whether petitioner established that the tax shown as due on a sales tax return filed for the quarter ending August 31, 1994 was paid at the time the return was filed.

III. Whether petitioner established that sales tax returns filed for the assessment period correctly stated taxable sales and tax due on those sales.

FINDINGS OF FACT

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

The Division of Taxation (“Division”) issued to petitioner, Virginia Perkins, three notices of determination of sales and use taxes due as follows:

| Date Issued | Assessment No. | Period | Tax Due |
|--------------------|-----------------------|--------------------------------------|----------------|
| February 6, 1995 | L-010060988-4 | December 1, 1991 - February 29, 1992 | \$ 635.91 |
| February 6, 1995 | L-010060987-5 | June 1, 1994 - August 31, 1994 | \$ 4,588.98 |
| October 17, 1994 | L-009693752-5 | December 1, 1989 - August 31, 1994 | \$27,095.01 |

Each of the three notices informed petitioner that she was determined to be a corporate officer or a person responsible for the collection and payment of sales and use taxes due from Fair Dinkum Corporation (“Fair Dinkum”). Each notice assessed interest and penalties in addition to the tax due.

Assessment Number L-010060988-4

Assessment number L-010060988-4 was issued on the basis of a sales tax return filed by Fair Dinkum on March 20, 1992 with a partial payment of the tax shown as due on the return. The return showed tax collected and due in the amount of \$5,147.20. A payment of \$2,000.00 was remitted with the return, leaving a balance due of \$3,147.20 plus penalty and interest. The Division issued a notice to Fair Dinkum assessing tax of \$3,147.20, interest of \$183.84 and penalty of \$432.66. Later payments made by Fair Dinkum totaling \$3,127.79 were applied to the

assessment. A Notice of Determination was then issued to petitioner for the balance due of \$635.91.

In April 1992, the Division closed the restaurant operated by Fair Dinkum because of unpaid taxes. Petitioner recalls that Fair Dinkum Corporation owed back taxes of \$12,000.00 at that time. In order to continue operating, she borrowed money which was paid over to the Division. Petitioner remembers conversations with a Tax Compliance Agent, Catherine Fallon, and she was certain that she would not have been able to reopen her business if she had not satisfied all outstanding tax liabilities. For this reason, she believes that the sales taxes assessed for the period December 1, 1991 through February 29, 1992 were paid.

The Division submitted a Tax Compliance Division form headed "District Office Seizure Request and Notification." It indicates that as of April 9, 1992 Fair Dinkum had fixed and final liabilities for corporation franchise, withholding and sales taxes totaling \$6,630.93. The penalty and interest on these liabilities was \$3,532.09, yielding a total amount due of \$10,168.02. The two sales tax liabilities shown are for the quarters ending February 28, 1991 and August 20, 1991. Thus, the assessment under discussion does not appear to have been included in the seizure notice.

The Division has copies of four checks given to it by petitioner on April 23, 1992, showing payments of \$7,900.00, \$1,000.00, \$700.00 and \$1,000.00 for a total payment of \$10,600.00. There is no evidence of any other payments made by Fair Dinkum or petitioner in connection with the April 1992 seizure, although petitioner remembers making additional payments.

The sales and use tax return filed by Fair Dinkum for the period December 1, 1991 through February 29, 1992 bears a date stamp of March 20, 1992 from the Suffolk Office of the Tax

Compliance Division. It indicates that a payment of \$2,000.00 was made at the time the return was filed. A deposit serial number, 79110894, appears on the return. A bank check dated March 20, 1992, number 1093, drawn on the account of Fair Dinkum at the National Westminster Bank, shows a payment to the "Department of Taxes" of \$2,000.00. The memo line states: "Acc Dec 1/ Feb 29 '92."

The Division's Accounts Receivable System shows that payments totaling \$3,127.82 were applied to the balance due for the quarter ending February 29, 1992. The source of those payments and the applications of them are as follows: (1) a payment of \$400.00 made on April 15, 1994 was applied in full; (2) a payment of \$3,775.53 made on December 8, 1992 and \$97.88 from that payment applied to this period; and (3) a payment of \$7,900.00 made on April 23, 1992 and \$2,629.91 from that payment applied to this period.

Assessment Number L-010060987-5

Assessment number L-010060987-5 was issued on the basis of a sales tax return filed by Fair Dinkum on October 4, 1994 without the remittance of any of the tax shown as due on the return. The return showed tax collected and due in the amount of \$4,588.98. The Division assessed tax in this amount plus interest of \$214.54 and penalty of \$642.41, yielding a total due of \$5,445.93.

Because of financial problems encountered by Fair Dinkum, petitioner formed a second corporation, Dinky-Di, Inc., to operate the restaurant business. Petitioner submitted a check drawn on the National Westminster Bank account of Dinky-Di Corp., dated September 19, 1994. It shows a payment of \$2,205.71 to N.Y. State Sales Tax for the quarter ended August 31, 1994. It bears deposit serial number 39103759. Petitioner claims that a check for \$2,383.27 drawn

from the account of Fair Dinkum was submitted to the Division to pay the balance of the tax owed for the period June 1, 1994 through August 31, 1994. A copy of the sales tax return for this quarter, submitted by the Division, bears a deposit serial number of 39760156.

The Division's assessments receivable records do not show any payments applied to Fair Dinkum's sales tax account for the quarterly period ending August 31, 1994.

Assessment Number L-009693752-5

Assessment number L-009693752-5 was issued as the result of a field audit of the books and records of Fair Dinkum Corporation for the period December 1, 1989 through May 31, 1994.

The audit of Fair Dinkum was assigned to John J. McLoughlin, Tax Auditor, in December of 1992. At that time, Fair Dinkum was doing business as Australian Country Inn, a restaurant. On January 14, 1993 and October 6, 1993, Mr. McLoughlin sent letters to Fair Dinkum requesting it to sign and return consents to extend the period of limitation for assessing sales and use taxes. Petitioner executed these consents on behalf of Fair Dinkum. A consent dated February 11, 1993 extended the period of limitation for assessment of sales and use taxes against Fair Dinkum for the period December 1, 1989 through August 31, 1990 to December 20, 1993. The consent dated October 6, 1993 extended the period of limitation for assessment of sales and use taxes against Fair Dinkum for the period December 1, 1989 through August 31, 1991 to December 20, 1994.

The auditor's handwritten log of contacts with the taxpayer shows that petitioner referred the auditor to three different accountants for assistance in conducting the audit. There are entries showing numerous telephone calls from the auditor to petitioner and to the accountants she said

were representing her: Anton Castiglia, David Lasher and Thomas Pirro. Apparently, most of the auditor's communications revolved around his attempt to have consents extending the limitation period executed and to obtain the corporation's sales tax records.

By letter, dated May 4, 1994, Mr. McLoughlin scheduled an audit appointment on May 18, 1994 and asked Fair Dinkum to make available on the appointment date all books and records pertaining to its sales and use tax liability for the audit period. This letter followed numerous verbal requests for records made to petitioner and to the accountants whom she claimed were representing her. Each of the accountants informed Mr. McLoughlin that he did not have the corporation's records and, at some point, that he had ceased representing Fair Dinkum or petitioner.

On September 22, 1994, Mr. McLoughlin received a telephone call from a fourth accountant, Stanley Weisz, who stated that he had been retained to represent Fair Dinkum in the audit. Mr. Weisz stated that he had not yet reviewed the corporation's books and records and that he would telephone Mr. McLoughlin to set up an audit appointment. Ten weeks elapsed without a telephone call from Mr. Weisz.

Finally, the auditor resorted to an estimate of Fair Dinkum's tax liability for the audit period. He compared Fair Dinkum's Federal income tax return for the fiscal year ended October 31, 1990 with its quarterly sales tax returns for that period. This showed that Fair Dinkum reported gross sales of \$378,261.00 on its Federal return but reported gross sales of only \$292,389.00 on its State sales tax returns. Using these figures, the auditor calculated a margin of error of 29.369 percent and applied this error factor to the 18 quarters within the audit period to estimate total, unreported gross sales of \$336,346.00. All of the gross sales were deemed to be

taxable since there was no evidence of nontaxable sales. Total tax due for the audit period was determined to be \$27,095.00.

Petitioner took issue with the auditor's allegation that none of the accountants she referred him to actually represented her. Fair Dinkum's books and records were in the possession of Thomas Pirro, an accountant petitioner hired to prepare tax returns and represent her before the Internal Revenue Service and the Division. Mr. Pirro and petitioner are engaged in a dispute regarding payment for his services. As a result, he has declined to return to petitioner any books and records which may be in his possession.

Since petitioner was in financial difficulties, she entrusted bookkeeping and other accounting duties to a young employee who was studying for licensing as a certified public accountant. At hearing, she contended that the young man had included exempt sales, sales tax and tips in his calculation of gross sales for Federal income tax purposes. Petitioner believed that his error explained the difference between gross sales, as reported on Fair Dinkum's Federal income tax returns and gross sales reported on State sales tax returns. She offered into evidence five folders containing summaries of sales for the periods: December 1, 1992 through February 28, 1993; March 1, 1993 through May 31, 1993; June 1, 1993 through August 31, 1993; September 1, 1993 through November 30, 1993; and March 1, 1994 through May 31, 1994. Petitioner later submitted a set of summaries for the period December 6, 1993 through February 27, 1994.¹

¹The record of hearing was left open for the submission of documents by petitioner and to give the Division an opportunity to review and comment on documents submitted by petitioner at hearing and by mail. Following an exchange of letters and documents by the parties, petitioner was given until June 5, 1998 to submit whatever evidence and argument she had in support of her position, and the Division had until June 19, 1998 to respond. Letters submitted by petitioner, dated June 9, 1998 and June 15, 1998, were not considered as they were
(continued...)

The sales summaries submitted by petitioner consist of computer generated reports, called Cash Reports. The Cash Reports appear to be weekly summaries of all receipts (cash or credit), broken down into various categories for different analyses. For example, service charges (tips paid using a credit card) were analyzed as a percentage of total sales and credit card sales were broken down by credit card company.

Sales tax and tips were not included in the category of net sales as shown in the Cash Reports. The Cash Report for the week of March 1, 1993 is exemplary. A summary of receipts by payment method shows total receipts of \$6,340.88. This total is broken down as follows:
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| | |
|----------------------|---------------|
| Cash | \$2,603.66 |
| MasterCard/Visa | 1,706.36 |
| Diners/Carte Blanche | 160.95 |
| American Express | 1,261.39 |
| Manager Comp. | 224.50 |
| Promotion | 8.14 |
| Check | 255.23 |
| OVERRING | <u>120.65</u> |
| Total: | \$6,340.88 |

Cash receipts were arrived at by subtracting charged tips (\$365.71) from total cash received (\$2,969.37). Thus, tips were not included in total receipts of \$6,340.88. In a "Tax Category Analysis," the Cash Report shows total tax collected of \$496.80. When this amount is subtracted from total receipts of \$ 6,340.88, it yields net sales of \$5,844.08. The tax due on net sales of \$5,844.08 is \$496.80. The only way to reconcile the Cash Reports is to conclude that tips and tax were not included in net sales as shown in those reports.

¹(...continued)
not filed in accordance with this schedule.

The following table compares net sales as shown in the Cash Reports submitted by petitioner (summarized for each period) with gross sales reported on sales tax returns.

| Period | Tax Return | Cash Reports |
|---------------------------------------|-------------------|---------------------------|
| December 1, 1992 - February 28, 1993 | \$ 60,254.00 | \$ 88,670.00 |
| March 1, 1993 - May 31, 1993 | \$ 72,780.00 | \$100,059.97 |
| June 1, 1993 - August 31, 1993 | \$ 57,320.00 | \$ 59,279.57 ² |
| September 1, 1993 - November 30, 1993 | \$ 64,382.00 | Incomplete information |
| March 1, 1994 - May 31, 1994 | \$ 84,124.00 | \$ 88,664.28 |
| December 1, 1993 - February 28, 1994 | \$ 64,487.00 | \$ 60,375.68 ³ |

In addition to the Cash Reports, petitioner submitted handwritten summaries. A summary was attached to a copy of the sales tax return filed for each quarter. The calculations in these summaries vary from quarter to quarter.

(a) The notes for the quarter ending February 28, 1993 summarize the weekly amounts reported in the Cash Reports. As noted, that amount was higher by \$28,426.00 than the amount reported as taxable sales on the sales tax return for that quarter.

(b) The notes for the quarter ending May 31, 1993 vary from the Cash Reports. The notes have four columns. The weekly periods being summarized are listed in the first column. The other columns are not labeled. The second column appears to be net sales, but for some weeks the figures shown differ from the net sales figures in the Cash Reports. For instance, for the

²The cash report was missing for the period June 1, 1998 through June 7, 1998; however, a work paper included with the reports shows that petitioner calculated tax due for this period of \$436.98. I calculated taxable sales for the period of \$5,140.94 by dividing tax due by the tax rate of 8.5%.

³A cash report was missing for the week of December 1, 1993.

week of March 15, 1993, the Cash Report shows net sales of \$5,651.71, while the summary shows sales of \$5,266.71, a difference of \$385.00. This figure can be traced on the Cash Report to an item labeled "SALES * 05;" however, there is no way to determine what is included in that category. In any case, such sales were included in net sales on the Cash Report but not in the summary. This and similar entries account for the difference in total sales shown in the summaries (\$97,116.02) and net sales per the Cash Reports (\$100,059.97), a total difference of \$2,943.95. The third column contains figures which are not identified in the record and cannot be traced to the Cash Reports. The fourth column appears to be tax due, and the total due is shown as \$8,275.77 (\$20.91 less than the tax due on \$97,116.02 at a rate of 8½%). Fair Dinkum reported tax due of \$6,061.86.

(c) The notes for the quarter ending August 31, 1993 do not contain a summary of net sales. There is, however, a listing of sales tax due per week, totaling tax due for the quarter of \$4,807.09. A note indicates that this amount was paid. From a review of the Cash Reports, it appears that the accountant subtracted an item identified as "Theater Charges" from net sales before calculating sales tax due. Assuming that the accountant's calculation of tax due is correct, the sales tax return for this period and the Cash Reports reconcile.

(d) There are no summary reports for the other periods listed in the table above.

At hearing, petitioner referred to having provided original records of sales to the auditors at the time of the audit. Upon questioning, it was established that she was referring to documents provided at a conference conducted by the Division's Bureau of Conciliation and Mediation Services ("BCMS"). As a result of that conference, BCMS issued a Conciliation Order, dated April 4, 1997, sustaining the statutory notices.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge found that petitioner had not met the burden of proof with respect to the purported misapplication of payments by the Division for the period December 1, 1991 through February 29, 1992 and sustained the Notice of Determination.

The Administrative Law Judge found that petitioner established payment of taxes for the period June 1, 1994 through August 31, 1994 in the sum of \$2,205.71, leaving a balance due for the period of \$2,383.27. Petitioner was unable to substantiate payment of any part of this balance despite being afforded the opportunity to do so.

The Administrative Law Judge canceled part of the tax due pursuant to the Notice of Determination for the period December 1, 1989 through August 31, 1994 because petitioner did not execute a consent to extend the period of limitations for assessment of tax against her for the period December 1, 1989 through August 31, 1991 (*citing Matter of Bleistein*, Tax Appeals Tribunal, July 27, 1995).

For the remainder of the periods in issue, the Administrative Law Judge found that the Division made clear and adequate requests for books and records, that petitioner did not produce such records and that the Division properly relied upon an audit methodology which utilized estimates. In this case, the Division relied upon the Federal return of Fair Dinkum for the year ended October 31, 1990 for its statement of gross sales, which revealed a discrepancy with gross sales per the sales tax returns. The resulting error rate was applied to all of petitioner's gross sales to arrive at additional taxable sales. This methodology was found by the Administrative Law Judge to be reasonable given the lack of evidence produced (*Matter of Scott*, Tax Appeals Tribunal, January 16, 1992).

The Administrative Law Judge rejected petitioner's argument that the discrepancy in gross sales was due to the inadvertent inclusion of exempt sales, sales tax and tips in the gross sales figures for the Federal tax returns, stating that a close examination of the records demonstrated that the tax and tips were separately categorized in cash reports and subtracted from gross sales prior to reaching the net sales figure subject to tax. As with other contentions, the assertion that exempt sales were included in the Federal gross sales was unsupported by the evidence.

ARGUMENTS ON EXCEPTION

Petitioner has not raised any new arguments on exception. Petitioner continues to argue that the Division's audit methodology was arbitrary, capricious and unreasonable. Petitioner contends that the final quarter exemplifies the absurdity of the methodology, since the business was not operating yet the Division's audit resulted in an assessment of over \$100,000.00. In fact, petitioner claims the business was only being kept open for the purpose of selling it.

Finally, petitioner continues to argue that tax and tips were included in the Federal gross sales totals and that the Division erred in utilizing said amounts to compute the error rate.

OPINION

We affirm the determination of the Administrative Law Judge for the reasons set forth therein. After a thorough review of the evidence and arguments presented, we can find no basis to modify the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Virginia Perkins is denied;
2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Virginia Perkins is granted as indicated in conclusion of law “G” of the Administrative Law Judge’s determination, but in all other respects is denied; and

4. The notices of determination, dated February 6, 1995 and October 17, 1994, are modified in accordance with paragraph “3” above.

DATED: Troy, New York
July 22, 1999

/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