

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
LENORE GOLDAPPER : DECISION
for Revision of a Determination or for Refund : DTA NO.816756
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period December 1, 1977 :
through August 31, 1983. :

Petitioner Lenore Goldapper, c/o Warren M. Burd, Esq., 535 Broad Hollow Road, Suite B-1, Melville, New York 11747, filed an exception to the determination of the Administrative Law Judge issued on December 14, 2000. Petitioner appeared by Warren M. Burd, Esq. and Stephen P. Sophir. The Division of Taxation appeared by Barbara G. Billet, Esq. (Robert A. Maslyn, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation filed a brief in opposition. Petitioner did not file a reply brief. Petitioner's request for oral argument was withdrawn.

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

ISSUES

I. Whether petitioner has established that the Division of Taxation used an unacceptable audit method in conducting its audit of Jerry-Lee Service Center, Inc., or made errors in the

application of such audit method in arriving at the amount of tax due, so as to require cancellation or reduction of the amount of tax determined due upon audit.

II. Whether the Division of Taxation has established that petitioner was properly subject to the imposition of a fraud penalty.

FINDINGS OF FACT

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

In April 1981 the Division of Taxation (“Division”) commenced a sales tax field audit of the operations of Jerry-Lee Service Center, Inc. (“Jerry-Lee”). Jerry-Lee operated a gasoline and service station located on Northern Boulevard in Great Neck, New York. Jerry-Lee was open from 7:00 A.M. to 9:00 P.M., selling gasoline, oil, automobile repair services and related parts and miscellaneous items such as candy and cigarettes. It is undisputed that receipts from all of such items are subject to sales tax.

The Division’s audit commenced with the auditor’s observation of Jerry-Lee’s physical premises, during which he saw petitioner at the premises attending to the cash register, taking money in payment for repair services and selling candy, cigarettes, and other miscellaneous items. The auditor observed a gas pump attendant at a booth near the gas pumps, but could not discern whether the attendant, as opposed to petitioner, was physically receiving payment for gasoline sold. The audit continued with the issuance of an audit appointment letter and request for books and records dated April 15, 1981, stating “all books and records pertaining to your Sales Tax liability for the period [6/1/78 through 2/28/81] should be available. This would include journals, ledgers, Sales invoices, purchase invoices, cash register tapes, exemption

certificates and all Sales Tax records. Additional information may be required during the course of the audit.”

Jerry-Lee’s appointed representative, Murray Marcus, CPA, sought and obtained delays totaling some eight months prior to meeting with the auditor. At their initial meeting, the only items produced by Mr. Marcus for the auditor to review were Federal corporate income tax returns for 1979 and 1980, one corporation franchise tax report, one wage reporting report and one canceled check for payment of withholding tax. At this initial meeting with Mr. Marcus, the auditor made a second request for records. This request was handwritten and was given to Jerry-Lee’s representative. However, no additional records, including records of sales or purchases, were provided to the auditor pursuant to this request.

In view of the near total lack of records made available, the auditor determined to resort to third-party information for audit review. Accordingly, he requested and received from Amoco Oil Co., Jerry-Lee’s supplier of gasoline and oil, a detailed listing of purchases of gasoline and oil made by Jerry-Lee during the audit period. The auditor’s review of this third-party information indicated that Jerry-Lee purchased over four million gallons of gasoline during the period September 1, 1978 through November 1, 1981 at a cost of \$3,318,276.00. In contrast, Jerry-Lee’s sales tax returns reported total sales of \$285,160.00 for the same period, and its Federal income tax returns for the years 1979 and 1980 reported expenses (purchases) substantially less in amount than the purchases of gasoline indicated on the Amoco reports.

Based on his observation of Jerry-Lee’s premises, his audit experience with similar gasoline service station audits and the information provided by Amoco Oil Co., the auditor calculated Jerry-Lee’s taxable sales for the period in issue as follows:

Gasoline Sales: The auditor used the base cost of the gasoline purchased by Jerry-Lee from Amoco, added to that cost four cents per gallon for Federal excise tax and ten cents per gallon for profit, with such latter amount based upon his office experience in auditing other gasoline and service stations in the surrounding area, to calculate gasoline sales. Audited taxable gasoline sales, thus calculated, totaled \$4,406,496.74.

Oil Sales: The auditor started with the base cost per gallon of oil from the Amoco information, and added thereto a markup of 100 percent, again based on his office experience as above. Audited taxable oil sales, thus calculated, totaled \$33,892.10

Miscellaneous Items: The auditor determined sales of candy, cigarettes and other miscellaneous items to be \$1,000.00 per month, based upon his observation of the inventory at the premises and upon his office audit experience. Audited taxable sales of miscellaneous items, thus calculated, totaled \$36,000.00

Repair Sales: The auditor calculated repair sales, on the basis of office audit experience, at \$2,000.00 per week per service bay multiplied by the two service bays in use at Jerry-Lee's. Audited taxable repair sales, thus calculated, totaled \$624,000.00

Audited taxable sales for the audit period June 1, 1978 through February 28, 1981, calculated as above, totaled \$5,100,388.84. This amount was reduced by reported taxable sales of \$285,160.00, leaving additional unreported taxable sales of \$4,815,228.84. The auditor divided such additional unreported taxable sales by reported taxable sales to arrive at a reporting error rate of 1,688.60 percent. This error rate was then applied to reported taxable sales per quarterly period to result in additional taxable sales, with sales tax due thereon in the amount of \$273,512.34.

The auditor concluded that petitioner Lenore Goldapper was a person responsible to collect and remit sales taxes on behalf of Jerry-Lee. This conclusion was based on the facts that she was listed as an officer on the corporation's sales tax Certificate of Registration, that she signed quarterly sales and use tax returns on behalf of Jerry-Lee, that her name was listed on the purchase information furnished by Amoco, that she signed, under the title of president, a power of attorney appointing Mr. Marcus to represent Jerry-Lee and also signed a consent extending

the period of limitations on assessment of tax on behalf of Jerry-Lee, and that she was observed at Jerry-Lee's business premises making sales and receiving money from customers.

The auditor also determined that a penalty for fraud was appropriate in this case. This determination was premised on the very substantial underreporting of sales and of sales tax by Jerry-Lee, as shown by the comparison of the Amoco purchase information to the information shown on Jerry-Lee's sales tax returns and corporate income tax returns. Specifically, the auditor noted this information revealed that Jerry-Lee's gasoline purchases exceeded four million gallons at a cost of \$3,818,276.00. Such amount alone, which does not include any factor for profit thereon, exceeded Jerry-Lee's reported sales of \$285,160.00 by a factor of over 13. Moreover, sales tax of \$298,704.65 calculated on such gasoline purchases (again with no factor for profit) exceeded, by more than ten times, the amount of sales tax reported by Jerry-Lee. The auditor observed that these differentials were calculated without consideration for any profit on gasoline sales and without including any amount of receipts for sales of oil, repairs or miscellaneous items. He also observed that this underreporting reflected a pattern that occurred consistently in each of the sales tax quarterly periods reviewed upon audit. Furthermore, the auditor concluded that a fraud penalty was warranted since he received essentially no books and records, including specifically source documentation of purchases and sales despite repeated requests therefor during the course of the audit or thereafter. He also noted that there was a pattern of lack of cooperation on audit, including numerous canceled appointments with Jerry-Lee's representatives as well as many unreturned telephone calls, and that he was not advised that Jerry-Lee was actively attempting to sell its business during the audit period. Further, Jerry-Lee filed no sales tax returns after the quarterly period ended February 28, 1982. While the

Division concedes that due to a change in the Tax Law sales tax on gasoline was no longer remitted by retailers but rather was remitted by distributors,¹ Jerry-Lee was nonetheless required to file sales tax returns and remit tax with respect to its other, non-gasoline sales (i.e., oil, repairs and miscellaneous items). In addition, the auditor's review of sales tax filings by the prior owner of Jerry-Lee's business revealed reported sales of approximately \$240,000.00 per quarterly period versus sales of approximately \$27,000.00 per quarterly period as reported by Jerry-Lee.

In addition and with respect to imposing the fraud penalty against petitioner, the auditor reviewed her income tax returns for the years 1979, 1980 and 1981. This review revealed that in 1979 petitioner deducted \$640.00 for sales tax paid on the purchase of a car, thus indicating the purchase of a car costing \$9,100.00, paid real property tax of \$4,122.00 but claimed no deduction for interest expense on a mortgage, and claimed additional personal deductions of \$8,646.00. These total expenditures (\$17,746.00) exceeded petitioner's reported income of \$14,775.00 for the year 1979. In addition, petitioner's 1979 income tax return reflected a claim for weatherproofing credits of \$2,550.00, indicating further spending in excess of her reported income. The auditor's comparison of petitioner's 1979 income tax return to her 1980 and 1981 income tax returns revealed increases in interest income and additional listings of stock holdings. Accordingly, on the basis of all of the foregoing items, the auditor concluded that the assessment of a fraud penalty was warranted.

A total of six separate notices of determination, covering the initial audit period, June 1, 1978 through February 28, 1981, and a subsequent audit period spanning March 1, 1981 through

¹ See Laws of 1982 (ch 454, eff. June 1, 1982).

August 31, 1983, were initially challenged in this matter.² However, the Division has conceded that the notices numbered L-006562387, L-006562388, and L-006572468, pertaining to the subsequent audit period, are no longer in issue. Accordingly, the notices numbered S-820419045, dated December 23, 1983, S-830620181, dated June 20, 1983, and S-831219003, dated December 23, 1983, which cover the period June 1, 1978 through February 28, 1981 and assess sales tax due in the amount of \$375,408.38, plus interest and fraud penalty remain in contest, as follows:

NOTICE NUMBER	PERIOD	TAX	NOTICE DATE
S 820419045N	06/01/78-02/29/80	\$273,512.34	04/20/82
S 830620181C	03/01/80-11/30/80	79,607.87	06/20/83
S 831219003N	12/01/80-02/28/81	<u>22,288.17</u>	12/23/83
Total (excluding penalty and interest)		<u>\$375,408.38</u>	

Following a conciliation conference in the Division's Bureau of Conciliation and Mediation Services ("BCMS"), a Conciliation Order (CMS No. 159679) dated July 24, 1998 was issued canceling the tax assessed for the first three quarterly periods covered by the notice numbered S-820419045 (the quarterly periods spanning 6/1/78 through 2/28/79). As a result, the amount of tax remaining at issue under such notice is \$115,570.83, plus interest and penalty for fraud.

Petitioner did not appear or give testimony at the hearing, and no documents in addition to those initially provided to the auditor have been produced. On August 17, 1999, the Division served a Notice to Admit on petitioner's representative, requesting the admission of some 18

² It appears that the results obtained on audit for the subsequent audit period followed consistently from application of the same methodology as was employed for the initial audit period.

separately numbered facts including, *inter alia*, an admission that petitioner: was an officer of Jerry-Lee who signed sales and use tax returns on its behalf for the sales tax quarterly periods December 1, 1978 through November 30, 1980 and March 1, 1981 through February 28, 1982; signed a consent dated August 12, 1981 to extend the period of limitations on assessment; and signed a corporate power of attorney dated August 12, 1981. The notice also sought admission that petitioner failed to produce Jerry-Lee's books and records as requested for audit, that Amoco Oil Company was Jerry-Lee's supplier of gasoline and oil, that petitioner resided at 23 Florence Street, Great Neck, New York, that such residence as well as an automobile purchased by petitioner in 1979 were purchased without financing and that during the audit period petitioner was a shareholder of Jerry-Lee who received a salary, worked at the business and had access to its books and records.

On December 3, 1999, the Division filed its affirmation that petitioner had not responded to the notice to admit and requested the deemed admission of the truth of the items in the notice to admit. Petitioner made no argument in opposition or other response regarding the notice to admit or the request for deemed admission. Accordingly, the truth of the items contained in the notice to admit, including those specified hereinabove, is accepted.

With regard to petitioner's claim that the notices were not received, the auditor, per office standard policy at the time, would complete a worksheet directing preparation of notices of determination for issuance by certified mail, a clerk would type the notices and a mailroom clerk would issue the notices by certified mail. The auditor would have been the "return person" listed on the certified mailing with regard to petitioner and nothing (presumably none of the notices at issue) was returned to him.

In addition to the foregoing the Division also produced an affidavit made by Daniel LaFar, Principal Mail and Supply Clerk in the Division's Mail and Supply Room ("mailroom"), attesting to the standard mailing procedures for notices of determination sent by certified mail during the period in question (June 1983). Outgoing certified mail is weighed, sealed in its envelope and postage and fee amounts are affixed thereto by a member of the mailroom staff. A mailroom clerk then counts the envelopes and verifies the names and certified mail numbers against the information on the mail record. Thereafter, a member of the mailroom staff delivers the sealed envelopes into the custody of the United States Postal Service ("USPS").

The Division also produced an affidavit made by Charles Brennan, a mail clerk employed in the Division's mailroom during the period in question, whose duties include delivering outgoing mail each morning and afternoon to the USPS. Mr. Brennan gives the items of certified mail to the USPS employee (postal clerk) who counts the envelopes of certified mail and checks the resulting figure against the information contained on the Division's mail record. Attached to Mr. Brennan's affidavit is Form AU-371.1, a one-page document entitled "Mailing Record-Notice of Determination-District Office Audit Bureau-Sales Tax-June 20, 1983." The front of such document reflects a column headed "Notice Number," under which appears a column of numbers, and a column headed "Total Amount," under which appears a column of individual dollar amounts. Notice number S 830620181C is listed in the notice number column. To its immediate right appears the number "11-2437352," the significance of which is not explained, followed by the listing "Lenore Goldapper, officer" and the dollar amount "\$147,879.15," which appears in the total amount column. This dollar amount matches the total

amount shown as assessed on notice number S 830620181C.³ The reverse side of this document contains two attestations providing as follows:

On [June 20, 1983], I delivered all notices identified on the reverse of this sheet to the Mail and Supply Section of the Department of Taxation and Finance, Albany, N.Y., and there witnessed the sealing and stamping of the envelopes in which they were enclosed. Each such notice was enclosed in an envelope addressed to the taxpayer named therein, at the address shown on the notice.

[signature]
Audit Division

DISTRICT OFFICE AUDIT BUREAU-SALES TAX

Witnessed by: [signature]
Mail and Supply Section

Dated: [June 20, 1983]

On [June 20, 1983], I deposited in a branch of the United States Post Office of Albany, New York all notices described above, all enclosed in sealed postpaid envelopes.

[signature]
Mail and Supply Section

Witnessed by: [signature]
Mail and Supply Section

Dated: [June 20, 1983]

The signatures appearing on the first affirmation are not legible. Those appearing on the second attestation are made by C. Brennan and by T.C. Paley, respectively.

The Division also provided an affidavit made by Norman Ayers, Project Manager for the Division's Sales Tax Field Audit Management Section. In June 1983, all notices of determination were sent via certified mail. The notices were prepared by sales tax field audit management clerks and the certified mail record listing taxpayers to whom the notices were to be

³ Names and information on the Form AU-371.1 pertaining to taxpayers other than petitioner have been redacted to preserve the confidentiality of such other taxpayers.

mailed were prepared by keyboard specialists. After delivery of the notices to the USPS, the mailroom returned a copy of the certified mail record to the Sales Tax Field Management Office with the two attestations on the back completed, signifying that the notices listed on the mail record had been accepted by the USPS.

The record contains no mailing evidence or affidavit references regarding the other two notices (S 820419045N and S 831219003N) at issue in this proceeding.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge noted that both the Tax Law and applicable case law allow the Division to estimate a taxpayer's sales tax liability where a taxpayer's records are insufficient to verify the amount of the sales and use taxes due for the period under examination. The Division's audit method must be reasonably calculated to reflect the taxes due, although exactness in the outcome of the audit method is not required. Further, the taxpayer bears the burden to show by clear and convincing evidence that the methodology selected by the Division was unreasonable or that the amount assessed was erroneous. The Administrative Law Judge found that it was appropriate for the Division to estimate sales tax due on the basis of external indices here because the corporation failed to submit the records requested for audit.

The Administrative Law Judge concluded that petitioner failed to show that either the audit methodology or the results of the audit were erroneous. Although petitioner claimed that the audit and its results were flawed, there was no evidence introduced to support these claims. The Administrative Law Judge determined that the Division was entitled to rely on its own audit experience in its estimation process where the taxpayer failed to supply any reliable records or

information concerning its operations. The Administrative Law Judge concluded that the audit method selected had a rational basis and, in the absence of any evidence challenging it, the result obtained is presumed to be correct.

The Administrative Law Judge reviewed the factors established by Tax Law §§ 1131(1) and 1133(a) and relevant case law for determining whether petitioner was a person required to collect tax and thus was personally liable for the sales tax, penalty and interest at issue. The Administrative Law Judge found that petitioner offered only an unsupported assertion that she was not a person responsible to collect and remit taxes on behalf of Jerry-Lee. The Administrative Law Judge found that the Division had

produced documentary evidence establishing that petitioner signed documents on behalf of Jerry-Lee, including the sales tax application for a certificate of authority as well as numerous sales tax returns, under the title of president of the corporation. Further, the auditor observed petitioner at Jerry-Lee's premises collecting money and handling transactions. The fact that another person was listed as an officer of the corporation and was listed on the certificate of authority has no bearing on and offers no mitigation with regard to petitioner's liability for the taxes in question. In sum, the uncontroverted evidence clearly shows petitioner's involvement in Jerry-Lee's operations and establishes her personal responsibility to collect and remit tax on behalf of such entity. Accordingly, the Division's assessment of personal liability for the amounts at issue herein against petitioner is sustained (Determination, conclusion of law "C").

The Administrative Law Judge noted that when the fraud penalty is asserted by the Division pursuant to Tax Law § 1145(a)(2), the Division bears the burden of proving "clear, definite, and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representation, resulting in deliberate nonpayment or underpayment of taxes due and owing" (Determination, conclusion of law "D," quoting Matter of Sener, Tax Appeals Tribunal, May 5, 1988). The Administrative Law Judge found that the Division met its burden of establishing fraud in this case because the

Division's audit established an enormous level of underreporting of sales and sales tax over a substantial and continuous period of time; reported sales per Jerry-Lee's returns were less than the sales tax alone due on Jerry-Lee's purchases of gasoline per Amoco records, without any factor for profit on such purchases; gasoline purchases exceeded reported sales by a factor of over 13; the corporation failed to produce the records requested for audit or to produce any meaningful, relevant or reliable records for use in the conduct of the audit; the corporation filed no sales tax returns from the commencement of the audit through the time of the sale of the business; and petitioner's personal income tax returns indicated spending by petitioner in excess of her reported income, from which an inference could be drawn that petitioner received a stream of income from the unreported and unremitted sales tax owed by Jerry-Lee. The Administrative Law Judge concluded that petitioner knowingly and willingly participated in the failure to remit sales taxes as required and was liable for the penalty for fraud.

The Administrative Law Judge also considered petitioner's claim that she did not receive the notices in question. The Administrative Law Judge found that based on this claim, petitioner could argue either that the time within which to file a petition challenging such notices had not commenced or that the notices were not issued within the applicable period of limitations on assessment, thus requiring cancellation of the notices. The Administrative Law Judge noted that the Division did not challenge the petitions as untimely filed and no period of limitations was applicable where the assessment of fraud is involved. Since the Administrative Law Judge upheld the fraud penalties imposed, he found that the statutory notices were not barred by any otherwise applicable statute of limitations.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that the Division erred in its audit methodology in that it used a ten cent per gallon estimate of profit for the corporation based upon the auditor's experience in auditing similar service stations in the surrounding area. Petitioner asserts that no mention is made of the actual number of such audits that were conducted nor whether any of the audited service stations had a lower profit per gallon. Petitioner also claims that the Division erred in using estimates to compute sales tax due from oil sales, repairs and miscellaneous sales. Instead of using an estimation, petitioner believes that the Division should have conducted an observation test to ascertain whether the auditor's estimates were reasonable.

Petitioner also maintains that the Division failed to meet its burden of proof to demonstrate fraud by clear and convincing evidence. Petitioner argues that the assertion by the Division that there was a substantial level of unreporting was due in part to the use of an excessive estimate in computing gasoline profit and the taxable sales of oil, repairs and miscellaneous items.

In opposition, the Division argues that the use of estimation to arrive at petitioner's tax liability was appropriate because virtually none of the documents requested on audit were produced by the corporation. It was reasonable for the auditor to rely on personal experience, personal observation and office experience in auditing businesses of the type operated by Jerry-Lee. The Division asserts it is not required to select the most accurate audit method but merely a rational one. Even if an observation test could have been performed, the Division maintains that it was not obligated to do so. The Division believes that the Administrative Law Judge was correct in finding that the Division was entitled to rely on its own audit experience in its

estimation process. As petitioner offered no evidence to refute the use of the audit method or its results, the results are presumed to be correct.

Additionally, the Division notes that petitioner never produced any documentation concerning actual sales or purchases for the period at issue. Comparing gasoline purchases, without any markup or allowance for other sales, to reported sales yields an enormous discrepancy in reporting. The purchases of gasoline alone exceed reported sales of all items by a factor of 13.

The Division maintains that the Administrative Law Judge correctly determined that petitioner knowingly and willingly participated in the failure to remit sales tax as required and that penalties for fraud were appropriately imposed. The Division believes that it presented numerous indicia of fraud sufficient to meet its burden to prove the elements of fraud by clear and convincing evidence. Petitioner never offered any explanation for the indicia of fraud introduced by the Division and the Administrative Law Judge correctly found that petitioner's actions were intentional, willful and deliberate and resulted in the non-payment of tax due to the State of New York.

OPINION

Petitioner has offered no evidence below, and no argument on exception, that demonstrates that the Administrative Law Judge's determination is incorrect. We find that the Administrative Law Judge completely and adequately addressed the issues presented to him and we see no reason to modify them in any respect. As a result, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Lenore Goldapper is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Lenore Goldapper is denied; and
4. The notices of determination dated April 20, 1982 as modified pursuant to the conciliation order, June 20, 1983, and December 23, 1983 are sustained.

DATED: Troy, New York
February 7, 2002

/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