

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

LUIS RINCON D/B/A :
NEW WAY SUPERMARKET :

DECISION
DTA NO. 818597

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 September 1, 1997 through August 31, 2000.

Petitioner Luis Rincon d/b/a New Way Supermarket, 2095 Gruger Avenue, 6-C, Bronx, New York 10462, filed an exception to the determination of the Administrative Law Judge issued on January 30, 2003. Petitioner appeared *pro se*. The Division of Taxation appeared by Mark F. Volk, Esq. (Robert A. Maslyn, Esq., of counsel).

Petitioner did not file a brief in support of his exception. The Division of Taxation filed a letter in lieu of a formal brief in opposition. Oral argument was not requested.

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

ISSUE

Whether the Division of Taxation properly estimated the taxable sales of petitioner's grocery store.

FINDINGS OF FACT

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

Petitioner, Luis Rincon, operated a small grocery store or bodega at 3963 Bronxwood Avenue in the New York City borough of the Bronx from the fall of 1997 until July 20, 2000 when he sold the business to Rafael Taveras. Petitioner's store sold cigarettes, soda, beer, paper products, cold cuts, and sandwiches. The premises, described by an investigator of the Division of Taxation ("Division") as "a small supermarket," also included four aisles of dry grocery items.

On his sales tax returns for the period at issue,¹ petitioner reported gross sales, taxable sales, and tax due as follows:

Quarter Ended	Gross sales	Taxable sales	Tax due at 8¼%	Vendor collection credit for timely-filed, fully-paid returns	Credit for prepaid sales tax on cigarettes	Tax due
11/30/97	\$23,441.00	\$ 9,875.00	\$814.69	(\$5.93)	(\$526.50)	\$282.26
02/28/98	25,220.00	10,117.00	834.65	(6.07)	(565.50)	263.08
05/31/98	22,915.00	9,899.00	816.66	(5.93)	(507.00)	303.73
11/30/98	23,825.00	10,112.00	834.24	(6.06)	(487.50)	340.68
02/28/99	22,150.00	9,325.00	769.31	-0- ²	(507.00)	262.31
05/31/99	21,925.00	8,515.00	702.48	-0-	(526.50)	175.98

¹ Petitioner introduced into evidence copies of his sales tax returns for nine of the twelve quarters at issue. No returns were produced for the periods June 1, 1998 through August 31, 1998, March 1, 2000 through May 31, 2000, and June 1, 2000 through August 31, 2000.

² The returns for the periods ended February 28, 1999, May 31, 1999, August 31, 1999 and November 30, 1999 were each dated December 20, 1999, and no vendor collection credit for a timely-filed, fully-paid return was claimed.

08/31/99	21,995.00	8,265.00	681.86	-0-	(546.00)	135.86
11/30/99	22,425.00	8,541.00	704.63	-0-	(546.00)	158.00
02/29/00	23,715.00	8,933.00	736.97	(12.50)	(448.50)	275.97

The taxable sales reported by petitioner on his tax returns, expressed as a percentage of his reported gross sales, ranged between 38% and 42%. Further, petitioner's prepaid sales tax on cigarettes represented a substantial percentage of his store's total sales tax reported for each of the quarters for which sales tax returns were produced as follows:

Quarter ended	Prepaid sales tax on cigarettes as a percentage of total sales tax reported due
11/30/97	65%
02/28/98	68%
05/31/98	62%
11/30/98	58%
02/28/99	66%
05/31/99	75%
08/31/99	80%
11/30/99	77%
02/29/00	61%

The Division received a Notification of Sale, Transfer or Assignment in Bulk dated July 20, 2000 from Rafael Taveras providing information concerning the sale by petitioner to him of the Bronx grocery store for a total sales price of \$80,000.00. This sales price of \$80,000.00 was allocated to the assets sold as follows: tangible personal property (furniture, fixtures, etc.),³ \$2,000.00; merchandise inventory for resale, \$15,000.00; and intangible property (goodwill,

³ A coffee machine and an ice cream freezer were specifically excluded from the sale.

etc.), \$63,000.00. In response, the Division issued a letter dated September 6, 2000 to petitioner informing Mr. Rincon of its receipt of the notification of bulk sale and “[b]ased on a review of your sales tax history you have been selected for a Sales Tax Desk Audit.” In addition to informing petitioner that the purchaser of the grocery, Mr. Tavares, had been advised to release no funds until the audit had been resolved, petitioner was asked to provide copies of his “business related books and records” including the following specific items: (i) Federal returns, including all related schedules, for the audit period denoted as 12/01/97 to 8/31/00; (ii) sales invoices and/or cash register tapes for each sale; (iii) purchase ledgers and invoices, cash disbursements journal; (iv) bank deposit slips; and (v) lease agreement for the business location.

Petitioner provided no records of any type to the Division in response to its request dated September 6, 2000. Petitioner admitted that he did not have any records that showed the grocery store’s actual sales.

As part of its audit, an investigator for the Division visited the Bronx location of petitioner’s store. The investigator observed that the premises consisted of approximately 1,320 square feet (30 feet by 44 feet), and that the store sold the items as detailed above. The investigator spoke to Rafael Tavares, the current owner of the store, who “advised me that he was operating the business in the same way as had Mr. Rincon, and that his daily gross sales were approximately \$700.”

The Division’s auditor, based upon his audit experience as well as information obtained from a Robert Morris Associates Annual Statement Studies 1999-2000 which was commonly used by him in the performance of desk audits, estimated that petitioner’s Bronx grocery store had taxable sales which were 40% of its gross sales. Consequently, he multiplied the amount of

daily gross sales of \$700.00 approximated by Mr. Tavares by 90, the number of days in a sales tax quarter. That sum of \$63,000.00 was then multiplied by the taxable ratio factor of .40 to determine taxable sales for the quarter of \$25,200.00. The auditor then applied a sales tax rate of 8.25%⁴ to compute sales tax due per quarter of \$2,079.00.

The Division issued a Notice of Determination dated November 20, 2000 against petitioner asserting tax due of \$20,710.00, plus interest and penalty, for the period September 1, 1997 through August 31, 2000.⁵ Tax asserted due of \$20,710.00 was allocated over this period as follows:

Tax Period Ended	Tax Amount Asserted Due
11/30/97	\$ 1,265.00
2/28/98	1,244.00
5/31/98	1,262.00
8/31/98	1,803.00
11/30/98	1,803.00
2/28/99	1,803.00
5/31/99	1,803.00
8/31/99	1,912.00
11/30/99	1,912.00
2/29/00	1,912.00
5/31/00	1,912.00

⁴ In his affidavit dated June 4, 2002, the Division's auditor misstated that in determining sales tax due per quarter, he applied a sales tax rate of 8.5%. In point of fact, he applied the correct sales tax rate for New York City of 8.25% in calculating sales tax due per quarter of \$2,079.00.

⁵ Multiple copies of an undated Statement of Proposed Audit Change for Sales and Use Tax with a payment due date of November 9, 2000 are included in the audit file. This undated statement shows tax due for the period at issue of \$27,838.00. There is no explanation in the record for this higher amount of \$27,838.00, which is \$7,128.00 greater than the \$20,710.00 asserted due in the Notice of Determination dated November 20, 2002.

8/31/00	2,079.00
Total	\$20,710.00

At the time of his sale of the grocery store to Mr. Tavares, petitioner was behind in the payment of many of his bills. In particular, he was in debt to his meat and milk suppliers, accountant, Federal and State tax authorities, and owed rent to the store's landlord. He viewed his sale of the grocery store as a way to catch up on his debts and financial obligations.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began his analysis by stating that, since petitioner failed to maintain any records to verify his store's daily sales, the Division was authorized to resort to an estimate of petitioner's sales provided that the audit method chosen reasonably reflected the amount of tax due.

The methods utilized in this case by the Division were its investigator's report along with the Robert Morris Associates Annual Statement Studies. The Administrative Law Judge concluded that these methods provided a reasonable basis for calculating petitioner's sales. Thus, the Administrative Law Judge held that the burden was upon petitioner to show that the result reached was either unreasonably inaccurate or erroneous and that petitioner failed to sustain his burden of proof.

The Administrative Law Judge, however, did make certain allowances to the assessment. First, the Administrative Law Judge noted that since petitioner sold his business on July 20, 2000, petitioner could not be liable for any sales tax assessed after such date. Secondly, the Administrative Law Judge noted that petitioner introduced into evidence sales tax returns for nine of the sales tax quarters at issue which reflected an amount of prepaid sales tax on

cigarettes. Therefore, the Administrative Law Judge directed the Division to modify the notice to credit petitioner for such prepaid sales tax.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues basically two points. Primarily, petitioner contends that the audit methodology is inherently inaccurate by calculating petitioner's daily sales at \$700.00. Petitioner claims that the reason he sold his business was due to financial hardship and if he was making sales near that amount, petitioner states that he would not have any financial difficulties.

Secondly, petitioner states that he does not have the financial means to pay the assessment at issue and states that the Division should claim the \$10,000.00 held in escrow as a result of the sale of his business.

In opposition, the Division argues that the Administrative Law Judge properly addressed the facts and issues and correctly determined that petitioner was liable for the sales tax assessed to him. Moreover, the Division states that certain pages attached to petitioner's exception should be excluded as such documents were not a part of the record herein. The Division urges us to reject this attempt at introducing evidence at this stage of the proceedings.

OPINION

We begin by addressing petitioner's attempt to introduce three documents into the record as attachments to his exception.⁶ We have held that a fair and efficient hearing process must be defined and final, and the acceptance of evidence after the record is closed is not helpful towards that end and does not provide an opportunity for the adversary to question the evidence on the

⁶There are four pages of attachments to his exception and they are separated under the titles of exhibit one and exhibit two. Although the first page of exhibit one is a copy of correspondence sent to the Division of Tax Appeals during these proceedings, the second page of exhibit one as well as both pages of exhibit two are the objectionable documents.

record (*Matter of Purvin*, Tax Appeals Tribunal, October 9, 1997; *see also*, *Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991). Thus, we reject petitioner's attempt to introduce these documents at this stage of the proceedings.

In turning our attention to the assessment at issue herein, petitioner has not made any argument nor pointed to any evidence that would establish that the Division's audit methodology was flawed in any respect. Therefore, we find that the Administrative Law Judge properly and adequately addressed the issue presented and we affirm his determination based upon the reasoning set forth therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Luis Rincon d/b/a New Way Supermarket is denied;
2. The determination of the Administrative Law Judge is sustained;
3. The petition of Luis Rincon d/b/a New Way Supermarket is granted to the extent that a reduction be made to the assessment for the final sales tax period based upon the sale date of the business and a credit be allowed for prepaid sales tax on cigarettes for each of the nine sales tax quarters for which the sales tax returns in evidence prove the specific amounts for prepaid sales tax, but is otherwise denied; and

4. The Notice of Determination dated November 20, 2000 is modified in accordance with paragraph "3" above.

DATED: Troy, New York
October 9, 2003

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner