

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
HODNETT & BRITT :
LIQUOR STORE CORPORATION :
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, 1994 through August 31, 1997. :

DECISION
DTA NOS. 818646
AND 818647

In the Matter of the Petition :
of :
JOHN BRITT :
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, 1994 through August 31, 1997. :

Petitioners Hodnett & Britt Liquor Store Corporation and John Britt, c/o Leonard Fein, CPA, 911 East 18th Street, Brooklyn, New York 11230, filed an exception to the determination of the Administrative Law Judge issued on July 3, 2003. Petitioners appeared by Leonard Fein, CPA. The Division of Taxation appeared by Mark F. Volk, Esq. (Robert A. Maslyn, Esq., of counsel).

Petitioners filed a brief in support of their exception and the Division of Taxation filed a letter in lieu of a formal brief in opposition. Petitioners filed a letter in lieu of a formal reply brief. Oral argument, at petitioners' request, was held on December 11, 2003 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 assessment of sales and use tax which was issued to the business entity was barred by the statute of limitations.

II. Whether the assessment of sales and use tax was void because it was issued as if the business was organized as a corporation while petitioners maintain that, in fact, the business was a sole proprietorship.

III. Whether petitioners have shown that the audit method was unreasonable or that the audit results were incorrect.

FINDINGS OF FACT

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

Petitioner Hodnett & Britt Liquor Store Corporation (“Hodnett & Britt”) was a retail liquor establishment which was located in Brooklyn, New York. On or about November 18, 1997, the Division of Taxation (“Division”) mailed a letter to Hodnett & Britt which scheduled an audit for the period December 1, 1994 through August 31, 1997 at the Division’s offices on December 10, 1997. The letter requested that Hodnett & Britt have all of the books and records pertaining to its sales and use tax liability available on the appointment date including “journals, ledgers, sales invoices, purchase invoices, cash register tapes, federal income tax returns, and exemption certificates. . . .”

On January 8, 1998, a meeting was held at petitioners’ accountant’s office. At this time, the Division was presented with certain cash register tapes. Upon examination, the Division

found that there were several problems with the cash register tapes. A complete set of cash register tapes for each day of the audit period was not made available. In addition, the cash register tapes which were produced did not show totals. The auditor also noted that the tapes ended at different times of the day. That is, some tapes ended at 3:00 P.M. and other tapes ended at 8:00 P.M. The Division was also offered Federal returns for the years 1994 and 1995 and bank statements, although statements for some months were missing. In the course of the meeting, the accountant for the liquor store told the Division that the business was a sole proprietorship.

During the meeting, the auditor made an additional written request for books and records. Specifically, he requested that petitioners provide the missing bank statements, a daybook, any other purchase invoices, and a general ledger. The auditor never received any additional records.

The Division concluded that Hodnett & Britt's books and records were not sufficient to perform a detailed audit because the cash register tapes were incomplete and did not have totals which corresponded to the amounts reported on the sales tax returns, Federal income tax returns or any other documents. On the basis of purchase invoices, the Division determined which firms supplied Hodnett & Britt with its inventory. Thereafter, the Division contacted the firms, Charmer Industries, Inc., Peerless Importers, Inc., Premier Wines and Spirits (formerly Gallo), Star Industries Inc. and Banfry Products Corp., and obtained the wholesale cost incurred by Hodnett & Britt in purchasing its inventory. The Division found that the amount of the liquor store's purchases, according to the liquor suppliers, was \$1,582,086.00, which was more than twice the amount of the liquor store's reported sales during the audit period, i.e., \$746,899.00.¹

¹ The Division does not know how the return of merchandise is reflected in the amounts reported by the liquor suppliers.

Similarly, the liquor store's purchases for the years 1994 and 1995 according to the suppliers were greater than the purchases reported on the Federal schedule C for the same years.

In order to calculate retail sales, the Division utilized a markup of 32.63 percent which it derived from information contained in the 1995 Robert Morris Association Annual Statement Studies. The Robert Morris Association Annual Statement Studies is an industrial index which is commonly used in the auditor's office. The Division did not perform a markup test because it did not have any information regarding the sales price of the bottles of liquor during the audit period. Although the cash register tapes showed the amount of a particular sale, they did not identify the item which was sold. The Division multiplied Hodnett & Britt's purchases, according to the suppliers, by the markup to determine that the liquor store had adjusted gross sales of \$2,098,321.00. The reported taxable sales of \$746,899.00 were subtracted from the adjusted gross sales to calculate additional taxable sales of \$1,351,422.00. An error rate of 1.809377 was determined by dividing the additional taxable sales by the reported taxable sales. The error rate was then multiplied by the reported taxable sales to find the additional taxable sales per quarter. A sales tax rate of 8.25 percent was then applied to the additional taxable sales to calculate the amount of additional sales and use tax that was due.

The Division issued a Notice of Determination to Hodnett & Britt Liquor Store Corp., dated May 24, 1999, which assessed sales and use tax for the period December 1, 1994 through August 31, 1997 in the amount of \$111,492.28 plus interest in the amount of \$51,095.45 and penalty in the amount of \$92,443.10 for a balance due of \$255,030.83. The Division also issued a Notice of Determination to John Britt, dated September 7, 1999, as a responsible officer or person of Hodnett & Britt Liquor Store Corp. The notice assessed the same amount of sales and

use tax as was assessed against Hodnett & Britt. However, interest was assessed in the amount of \$56,860.43 and penalty was assessed in the amount of \$95,325.59.

Prior to issuing the Notice of Determination to the liquor store, the auditor took note of the fact that the business filed its sales and use tax returns as Hodnett & Britt Liquor Store Corp. On the basis of the returns, the auditor decided to issue the assessment to the business as a corporation. The auditor concluded that the status of the business, as reflected on the sales and use tax returns, was more reliable than the information gleaned from the representative of petitioners on January 8, 1998. Petitioner John Britt was considered a responsible officer of the business because he signed a power of attorney form, he signed a waiver of the statute of limitations and he signed the tax returns. Some of the sales tax returns were signed by Mr. Britt as president.

Following a conference held by the Bureau of Mediation and Conciliation Services, the amount of tax assessed against Mr. Britt was reduced to \$43,396.07, plus penalties and interest, because the Division had never obtained a consent from Mr. Britt, as an individual, to extend the statute of limitations. The assessment against Mr. Britt was sustained for the period June 1, 1996 through August 31, 1997.

Three consents to extend the statute of limitations were executed on behalf of Hodnett & Britt Liquor Store Corp. The first consent extended the time for assessing tax for the period in issue to any time on or before December 20, 1998. The consent was signed by John H. Britt as owner and dated January 16, 1998. The second and third consents were signed by an accountant named Mr. Shore who acted under the authority of a power of attorney. The second consent was dated October 2, 1998 and the third consent was dated January 25, 1999.

The Division's file contains a power of attorney authorizing petitioners' current representative, Leonard Fein, CPA, to appear on petitioners' behalf. The corporate taxpayer is listed as "Hodnett & Britt Liquor Store Corp." Mr. Britt's signature on the form is dated May 27, 1999. A stamp on the front of the form shows that it was received by the Tax Compliance Section of the Department of Taxation and Finance on June 3, 1999. No other power of attorney form appointing Mr. Fein as a representative appears in the Division's papers.

Mr. Fein met Mr. Britt in the early 1980s. At the time, Mr. Britt was in a partnership with Morris Hodnett and the business was known as John Britt and Morris Hodnett Discount Liquor. Mr. Fein provided accounting services to the business. According to Mr. Fein, the entity filed partnership returns. In or about 1987, Mr. Britt purchased his partner's interest and the business entity became a sole proprietorship.

Mr. Fein remained the firm's accountant until the end of 1993 when he sold his accounting practice and moved out of the country for four or five years. While he was away, Shore & Samter, CPAs, provided accounting services to Mr. Britt. At the end of 1998, Mr. Fein resumed his position with Mr. Britt.

Mr. Fein did not prepare any of Mr. Britt's sales and use tax returns for the period December 1, 1994 through August 31, 1997. He did not have the opportunity to review any of the information that Mr. Britt would have concerning gross sales, taxable sales or sales tax due because Mr. Britt's former accountants have the records and they would not release the documents to him.

Mr. Britt's personal Federal income tax returns for the years 1995 and 1996 included a Federal schedule C which reported that the name of the business was "DISCOUNT LIQUORS."

Until the middle of 1997, Mr. Britt was employed as an X-ray technician by Maimonides Medical Center and was not at the business during the daytime. During the period in issue, Mr. Britt drafted checks with insufficient funds and was required to use funds from his pension plan to finance the business.

On March 1, 2001, Gallo Wine Distributor, LLC d/b/a Premier Wine & Spirits entered a judgment against petitioners in the amount of \$48,976.10.

DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge concluded that the notices of determination were valid as issued to Hodnett & Britt Liquor Store Corporation and John Britt as owner despite petitioners' argument that the liquor store was never a corporation but rather a sole proprietorship. The Administrative Law Judge did not find petitioners' allegations persuasive and noted that even if petitioners proved that the liquor store was originally a partnership (which turned into a sole proprietorship) rather than a corporation, petitioners failed to demonstrate any harm or prejudice that would require the notices to be vacated.

Next, the Administrative Law Judge rejected petitioners' argument that the notices should be dismissed based upon petitioners' assertion that the notices were issued outside the period of statutory limitations because the representative who executed the second consent to extend the period of limitations had no authority to do so since the power of attorney had been previously revoked and the Division was on notice of such alleged revocation. The Administrative Law Judge found that petitioners failed to prove this fact.

The Administrative Law Judge then considered the issue involving the audit methodology employed by the Division in arriving at the assessments. The Administrative Law Judge determined that a request for books and records was made on two separate occasions and since

the records produced were inadequate for determining actual sales tax due, the Division was entitled to estimate tax due based upon external indices. Therefore, the Administrative Law Judge sustained the notices of determination issued to petitioners.

ARGUMENTS ON EXCEPTION

Petitioners continue to argue that there never was an entity known as Hodnett and Britt Liquor Store Corporation, but rather, it was known as John Britt Discount Liquor and no proof was submitted that purchases were made by John Britt Discount Liquor. Petitioners claim that, although the auditor presented some confirmations from third party vendors, it was never demonstrated that the sales were made to John Britt Discount Liquor.

Petitioners also maintain their previous argument that the power of attorney form authorizing Shore & Samter, CPAs, to represent petitioners was revoked and, thus, there was not a valid consent extending the period of limitations within which to assess petitioners.

Petitioners assert that the Division has not shown the number of purchases made by Mr. Britt or how he paid for such purchases. Petitioners argue that there is no evidence to corroborate the purchases as estimated by the Division. Therefore, petitioners state that the Division has not established any underreporting of purchases by Mr. Britt. Petitioners urge that we reverse the determination of the Administrative Law Judge and find that the notices are invalid.

In opposition, the Division points out that each of the arguments made in the exception were presented to the Administrative Law Judge and were rejected entirely. The Division states that petitioners' assertions have no factual or legal basis. Thus, the Division requests that the determination be sustained.

OPINION

In their exception, petitioners argue that the Administrative Law Judge made several errors and the Division should not be entitled to benefit from such errors. As can be gleaned from the issues of this case, the heart of this proceeding is fact-driven. Petitioners make several assertions, none of which they established sufficiently in order to support their arguments.

Primarily, petitioners urge consistently that there is no business entity known as Hodnett & Britt Liquor Store Corporation. However, in the record is a power of attorney form signed by John Britt as president of the corporation and, as president, he authorized his current representative to act on his behalf. When asked directly at oral argument about this issue, petitioners' representative merely stated that he could not remember how the power of attorney form was completed by petitioners. This is an example of the underlying ambiguity that is replete throughout the record of this case. Petitioners assert that the auditor's report contains conclusions that are not possible. However, as indicated by the Administrative Law Judge in his determination below, it is not enough for petitioners to show where the estimate may be inaccurate. Rather, it is incumbent that petitioners establish the correct markup or the adjustments that should be made for items such as breakage, theft or competition (*see, Licata v. Chu*, 64 NY2d 873, 487 NYS2d 552).

Thus, since the Administrative Law Judge adequately and completely dealt with the issues presented to him, we sustain his determination for the reasons set forth therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Hodnett & Britt Liquor Store Corporation and John Britt is denied;
2. The determination of the Administrative Law Judge is sustained;

3. The petitions of Hodnett & Britt Liquor Store Corporation and John Britt are denied;
and

4. The notices of determination, dated May 24, 1999 and September 7, 1999 respectively,
are sustained.

DATED: Troy, New York
June 10, 2004

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

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