

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

RUBEN MARTE :
D/B/A MARTE GROCERY :

DECISION
DTA NO. 818999

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, 1998 through May 31, 2000.

Petitioner Ruben Marte d/b/a Marte Grocery, 34 Kendall Avenue, Sleepy Hollow, New York 10591, filed an exception to the determination of the Administrative Law Judge issued on November 13, 2003. Petitioner appeared by Gopaljee Jaiswal, Esq. 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 brief in opposition and petitioner filed a reply brief. Oral argument was not requested.

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

ISSUES

I. Whether petitioner has proven error in the Division of Taxation's audit method or result where such method consisted of an observation of the sales of Marte Grocery.

II. Whether penalties should be canceled.

FINDINGS OF FACT

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

Petitioner, Ruben Marte, purchased Marte Grocery, which was known as Coleman's Grocery, in 1998. During the period in issue, Marte Grocery was a bodega style convenience store which was located at 107 Bethune Boulevard, Spring Valley, New York. Among other things, the store sold rice, beans, canned goods, milk, pet food, vegetables, fruit, paper products, cigars and cigarettes, beer, soda and cold cuts. The business lost money, and in 2000 the store was closed. Mr. Marte sold Marte Grocery on July 29, 2001.

On or about July 26, 2000, the Division of Taxation ("Division") commenced a field audit of the Marte Grocery. On this date, the auditor, Mr. Richard Wessels, sent a letter to petitioner at 107 Bethune Blvd., Spring Valley, New York stating, in part, that his tax records have been scheduled for a field audit on August 16, 2000 at 9:30 A.M. The letter requested that petitioner make available all of his books and records pertaining to his sales tax liability for the period under audit including "financial statements, journals, ledgers, sales invoices, purchase invoices, cash register tapes, sales and use tax returns, federal income tax returns, and exemption certificates." There was no response to this letter.

On August 16, 2000, the auditor sent a second audit appointment letter to petitioner which scheduled an audit on September 5, 2000 at 9:30 A.M. This letter was addressed to petitioner at 43 Bethune Blvd., Spring Valley, New York, because this was the address listed in a telephone book. John Barr, who was an investigator with the Division, personally delivered the letter.

On August 23, 2000, Mr. Wessels received a telephone call from Mr. Marte acknowledging that he had received the appointment letter. Mr. Marte confirmed the audit appointment, which was scheduled to be held on September 5, 2000 at the store, and indicated that he would return the questionnaires which had been sent to him. Nevertheless, when Mr. Wessels went to the store, Mr. Marte did not appear for the meeting.

On September 14, 2000, the auditor mailed a third letter which scheduled an audit appointment on October 12, 2000. However, Mr. Marte did not appear for the meeting.

At this juncture, Mr. Wessels concluded that Mr. Marte was not going to be cooperative on the audit. Therefore, he asked investigators for the Division to perform an observation test at the store in order to obtain an estimate of the amount of taxable and nontaxable sales.

On September 26, 2000, an observation test was conducted on Marte Grocery by Investigators John Barr and Ricardo Cruz. Initially, Investigator Barr made a point of arriving before the store opened so that he could see when the store opened. At 9:45 A.M., an employee opened Marte Grocery. The employee apologized for being late that morning and said that he had been detained by public transportation. The employee also stated that the normal hours of operation were 9:30 A.M. to 12:00 A.M. Investigator Barr did not confirm the store hours with Mr. Marte.

Investigator Barr noted that the cash register was located behind the counter and that the employee was usually located near the cash register. However, he would occasionally step away. From the time the store opened, Investigator Barr noted the sale of each taxable item with a tick mark on a tally sheet.

Investigator Barr remained near the cash register until 5:00 P.M. without a break for lunch or the use of the bathroom. Thereafter, the observation test was continued by Investigator Richard Cruz. When Investigator Barr was finished with his portion of the observation test, Mr. Marte was not present and the tally sheet was not shown to him because he did not ask to see it.

Investigator Barr did not observe sales tax being collected during the observation test. Nor did he see the person behind the cash register maintain a record of what was being sold or run a cash register tape.

Investigator Barr did not count the number of customers. Nor did he take an inventory or ask to examine purchase invoices. Investigator Barr did not regard any of these matters as pertinent to his observation. In addition, Investigator Barr did not ask to examine cash register tapes because he was not interested in the level of sales on prior occasions.

At 5:00 P.M., Investigator Cruz took over the observation test from Investigator Barr. Investigator Cruz continued keeping track of the taxable sales on the same tally sheet which was started by Investigator Barr. Investigator Cruz stood behind the counter a little to the right of the cash register while sales were taking place. As Investigator Barr had done, Investigator Cruz would note the taxable items being sold. The nontaxable sales were grouped together because they were not in issue on this audit.

Investigator Cruz had to depend on the clerk to tell him the price of the items which were sold. While the observation was in progress, Investigator Cruz also confirmed with the employee the hours of the store's operation.

If a customer bought multiple items, Investigator Cruz would note the items sold on a scrap of paper. When the clerk was finished with the customer, Investigator Cruz would ask the

clerk for the price of each item. The maximum number of items bought at a particular time was three.

It was Investigator Cruz's impression that cigars were the best-selling item. A customer would purchase from one to three cigars.

The Division authorizes investigators to conclude an observation test whenever it would be unsafe to proceed. Investigator Cruz concluded the observation test at 8:00 P.M. because someone was tampering with his vehicle. At the time he left, the store was still open and operating.

Investigator Cruz did not see any sales being rung up on the cash register. However, he observed the clerk making change from the cash register. Investigator Cruz did not see any vendors being paid from the cash register, nor did he count the amount of cash in the cash register.

Petitioner was cooperative during the observation, and Mr. Marte did not cause any difficulty for Investigator Cruz in performing the audit.

The tally sheet did not identify that it pertained to Mr. Marte's business or who prepared it. However, at the hearing Investigator Barr was certain that he could identify the tally sheet that was used during the audit of Mr. Marte's business. Further, there was no chance that the tally sheet for the audit of Marte Grocery could be mixed up with another tally sheet because the investigators only perform one observation at a time. In this case, Investigator Cruz handed the tally sheet back to Investigator Barr and he, in turn, turned it over to the auditor, Richard Wessels.

After the observation test, Mr. Wessels requested that Investigator Barr prepare a memo stating whether he noticed anything unusual during the audit. Investigator Barr responded in a memo that the cash register was left open a lot of the time. After the observation test was completed, the auditor reviewed the results with Investigator Barr to make sure he understood what was recorded.

In order to take into account the fact that Investigator Cruz left the store at 8:00 P.M., the results of the observation test were extended by mathematical extrapolation until midnight. Taxable sales for the one day were determined to be \$757.82 and nontaxable sales were determined to be \$100.73, for total sales of \$858.55. The taxable and nontaxable sales were each multiplied by seven to get weekly sales. The weekly total was then multiplied by 13 to get a quarterly total. The auditor next prepared a schedule comparing the amount found on audit with the amount that the taxpayer had reported. The difference in the taxable amount was multiplied by the appropriate tax rate to determine the additional tax due. A penalty for failure to pay tax was assessed. An omnibus penalty was assessed also assessed because the amount found due on the audit exceeded the amount reported by 25 percent. When he prepared the assessments, the auditor did not deduct sales tax from the amount of sales because the investigators did not see any sales tax being charged and there was no record kept of sales tax being collected.

When the computations were complete, the auditor prepared a Statement of Proposed Audit Change for Sales and Use Tax which was sent to Mr. Marte along with the work papers. According to the statement, tax was due in the amount of \$33,202.54 plus interest in the amount of \$5,550.37 and penalty in the amount of \$11,403.18 for a balance due of \$50,156.09. In

response, petitioner indicated his disagreement with the amount of tax asserted to be due and requested a conference.

On April 23, 2001, a courtesy conference was conducted with the Division. Mr. Marte was accompanied by Victor Cannistra, CPA. At the conference, Mr. Marte offered a notebook containing entries, but no other supporting data. Mr. Marte stated that the book was a record of sales. The notebook was written in ink and appeared to be brand new. The pages had hardly been used and the book was not broken in. No corroborating documentation was offered in connection with the amount of sales. The Division did not regard the notebook as a basis for an adjustment to the proposed assessment.

At the courtesy conference, Mr. Cannistra expressed his opinion that the actual sales were lower than was found during the observation test. He also disagreed with extrapolating the results of the observation test for the period of 8:00 P.M. until midnight. Mr. Cannistra did not object that the observation was done on a particular day of the week. However, he did raise an objection that he was not advised in advance when the observation would take place. Mr. Cannistra felt that the fairest way of resolving the difference of opinion between the parties was to conduct a second observation test. Therefore, he requested that a second observation test be conducted when he could be present. In furtherance of this request, Mr. Cannistra explained that he would only need a couple of days notice to clear his calendar for the new observation test. Despite the fact that each of the investigators observed the store selling beer and also observed Mr. Marte rearranging the beer inventory, Mr. Marte maintained at the conference that he did not sell beer or cigarettes.

The Division decided not to conduct a second observation test because it feared that it would not include beer sales, and consequently, not lend itself to an accurate result. The Division also declined a related request to conduct a second observation test but use the beer sales from the first test to determine total sales. The Division did not regard Mr. Cannistra's conditions that he be notified in advance of when the observation test would occur or that he be present to observe the observation test as acceptable. Further, the Division did not feel that there was a need to conduct a new test. As a result, the courtesy conference did not resolve the differences between the parties.

The Division issued a Notice of Determination, dated March 13, 2001, which assessed a deficiency of sales and use tax, for the period September 1, 1998 through May 31, 2000, in the amount of \$33,202.54 plus interest in the amount of \$6,257.36 and penalty in the amount of \$11,639.03 for a balance due of \$51,098.93. The notice explained that since petitioner did not submit adequate records to prove his liability, the tax due was based on available records and information.

Mr. Marte or an employee used a calculator when the cost of items in his store had to be added together. Petitioner kept the calculator tapes in order to obtain the amount of receipts from sales. The tapes do not show the date of the transaction or what item or items were sold. According to Mr. Marte, if one item was sold it was recorded in a notebook but if multiple items were sold, the sale was kept on tape. The notebook was not offered into evidence at the hearing.

Mail addressed to the grocery store was received by the individual who handled the morning shift. Mr. Marte never bothered checking the mail.

Deliveries to the store were paid for in cash from receipts from the previous day.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge pointed out that every person required to collect tax must maintain and make available for audit records sufficient to verify all transactions in a manner suitable to determine the correct amount of tax due and failure to maintain and make available adequate records will result in the Division's estimating tax due (*see, Matter of Ristorante Puglia, Ltd. v. Chu*, 102 AD2d 348, 478 NYS2d 91; *Matter of Surface Line Operators Fraternal Org. v. Tully*, 85 AD2d 858, 446 NYS2d 451). To determine the adequacy of a taxpayer's records, the Division must first request and thoroughly examine the taxpayer's books and records for the audit period. The purpose of such an examination is to determine whether the records are so insufficient as to make it virtually impossible for the Division to verify taxable sales receipts and conduct a complete audit (*see, Matter of King Crab Rest. v. Chu*, 134 AD2d 51, 522 NYS2d 978).

If a taxpayer's records are inadequate, the Division may select an audit method reasonably calculated to reflect the sales and use taxes due. The Administrative Law Judge noted that it is only necessary that sufficient evidence be produced to demonstrate that a rational basis existed for the auditor's calculations (*Matter of Grecian Square v. New York State Tax Commn.*, 119 AD2d 948, 501 NYS2d 219). The burden is then placed upon petitioner to prove, by clear and convincing evidence, that the audit method employed or the tax assessed was unreasonable (*Matter of Meskouris Bros. v. Chu*, 139 AD2d 813, 526 NYS2d 679).

There was a sharp discrepancy between the testimony of the auditor and the two investigators, on the one hand, and the testimony of Mr. Marte, on the other hand. Many of the arguments raised by petitioner's representative, the Administrative Law Judge pointed out, were

premised upon the assertion that the testimony given by the auditor and the two investigators was false while the testimony of Mr. Marte was entirely truthful.

The Administrative Law Judge opined that in order to accept petitioner's testimony on many key aspects of this audit, one would have to conclude that the auditor and the two investigators had engaged in an elaborate scheme, without any apparent gain, to find Mr. Marte liable for a substantial deficiency of taxes. One would have to further conclude that Mr. Marte, who has an obvious financial interest in this matter, was completely forthright. When viewed from this perspective, the Administrative Law Judge found petitioner's position implausible. The Administrative Law Judge rejected petitioner's position regarding the credibility of his testimony vis-a-vis that of the auditor and the investigators.

Petitioner argued that the observation test was unreasonable because it was not conducted over a longer period of time and he objected to the fact that the results of the observation test were extrapolated for the period 8:00 P.M. until the time that the store closed at midnight. Moreover, petitioner urged that an adjustment for inclusion of sales tax in the audited taxable receipts should have been made and that the tally sheet used by the auditor to calculate tax due was unreliable. The Administrative Law Judge rejected these claims and concluded that the audit method employed in this matter was reasonable. The Administrative Law Judge pointed out that it was petitioner's failure to maintain proper books and records which made it necessary to estimate the amount of tax due (*see, Matter of Meyer v. State Tax Commn.*, 61 AD2d 223, 402 NYS2d 74, *lv denied* 44 NY2d 645, 406 NYS2d 1025).

At the hearing, petitioner offered a package of loose undated calculator tapes in order to show that his sales were less than \$700.00 a day. The tapes were not in any ascertainable sequence and did not list the items sold. The Administrative Law Judge found that the tapes did

not have any probative value with regard to the level of the store's taxable sales. It is noted that in those instances where a customer purchased only one item, a calculator was not used and, therefore, those sales would not be reflected on a calculator tape.

Petitioner also offered a letter from the clerk who worked at the store which stated, among other things, that sales on the day of the observation were \$250.00. The Administrative Law Judge found that this unsworn letter from petitioner's employee was entitled to no weight.

Petitioner next asserted that the Division unreasonably denied Mr. Cannistra's request to conduct a second observation test. The Administrative Law Judge rejected this argument pointing out that the Division was under no obligation to conduct a second observation test where there was no reason to believe that the result of the first observation test was not representative of the store's sales. The Administrative Law Judge did not find credible Mr. Marte's claim that investigator Cruz said that the sales were only a couple of hundred dollars and that petitioner had nothing to worry about.

Petitioner also contended that the audit computations are based upon the erroneous premise that the store hours were 9:45 A.M. to 12:00 A.M. each day. The Administrative Law Judge found that the record in this matter shows that each of the investigators asked the store clerk what the hours of operation were and his response was utilized to calculate the assessment. The Administrative Law Judge concluded that the audit methodology used by the Division was reasonable and petitioner's testimony on this point is not sufficiently reliable to warrant an adjustment.

Penalties were assessed pursuant to Tax Law § 1145(a)(1)(i) which authorizes the imposition of penalties for failure to pay any tax imposed under Articles 28 and 29 of the Tax

Law. Tax Law § 1145(a)(1)(iii) provides that if the failure or delay was due to reasonable cause and not due to willful neglect, penalty and additional interest shall be abated. The Administrative Law Judge noted that the failure to maintain and provide records is another reason to sustain the imposition of penalties (*see, Matter of Rosemellia*, Tax Appeals Tribunal, March 12, 1992).

Petitioner has also been assessed penalty pursuant to Tax Law § 1145(a)(1)(vi) for omission of greater than 25% of the tax due. The Administrative Law Judge found the initial issue of penalty pursuant to Tax Law § 1145(a)(1)(i) against petitioner, and the additional penalty was also sustained in light of petitioner's failure to show reasonable cause.

The Administrative Law Judge noted that petitioner's reference to the Amnesty Program was misplaced. Petitioner had the option of pursuing the Amnesty Program or proceeding with the hearing. Having chosen the latter course, the Administrative Law Judge found the Amnesty Program has no bearing on this matter.

ARGUMENTS ON EXCEPTION

On exception, petitioner raises the same arguments as were presented below.

In opposition, the Division states that petitioner has failed to set forth any basis for modifying any aspect of the determination. The Division alleges that petitioner wholly failed to sustain his burden of proof in this case. Thus, the Division requests that its assessment be sustained in its entirety.

OPINION

We affirm the determination of the Administrative Law Judge for the reasons stated therein. Petitioners have offered no evidence below or argument on exception that would justify our modifying the determination of the Administrative Law Judge in any respect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Ruben Marte d/b/a Marte Grocery is denied;
2. The determination of the Administrative Law Judge is sustained;
3. The petition of Ruben Marte d/b/a Marte Grocery is denied; and
4. The Notice of Determination issued March 13, 2001 is sustained.

DATED: Troy, New York
August 5, 2004

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner