

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

JOSEPH ROMA & SONS CONSTRUCTION, INC. :

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, 1996 through :
November 30, 2001.

In the Matter of the Petition :

of :

JOHN ROMA :

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 June 1, 1999 through :
November 30, 2001.

In the Matter of the Petition :

of :

JOSEPH ROMA :

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 June 1, 1999 through :
November 30, 2001.

DECISION
DTA NOS. 819508,
819509, AND 819510

Petitioner Joseph Roma & Sons Construction, Inc. and petitioner Joseph Roma, 330 Stratton Road, New Rochelle, New York 10804, filed an exception to the determination of the Administrative Law Judge issued on January 20, 2005. Petitioner John Roma, c/o Robert Rosenberger, 490 Bleeker Avenue, Mamaroneck, New York 10543 filed an exception to the determination of the Administrative Law Judge issued on January 20, 2005. Petitioners appeared by Robert Rosenberger, PA. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Justine Clarke Caplan, Esq., of counsel).

Petitioners filed a letter brief in support of their exception. The Division of Taxation filed a letter stating that it would not be filing a brief in opposition. Oral argument was not requested.

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

ISSUES

I. Whether the audit method employed by the Division of Taxation was reasonable or whether petitioners have shown error in either the audit method or result.

II. Whether penalties imposed pursuant to Tax Law § 1145(a)(1)(i) and (vi) should be sustained.

FINDINGS OF FACT

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

On March 15, 2002, following an audit, the Division of Taxation ("Division") issued to petitioner Joseph Roma & Sons Construction, Inc. ("the corporation") a Notice of Determination

which assessed \$242,997.19 in additional sales and use taxes due, plus penalty and interest, for the period December 1, 1996 through November 30, 2001.

On August 26, 2002, the Division issued to petitioner John Roma a Notice of Determination which assessed \$116,992.12 in additional sales and use taxes due, plus penalty and interest, for the period June 1, 1999 through November 30, 2001. The notice informed this petitioner that the Division had determined that he was a corporate officer or a person responsible for the collection and payment of sales and use taxes due from Joseph Roma & Sons Construction, Inc. and therefore personally liable for the sales and use taxes due from that corporation.

Also on August 26, 2002, the Division issued to petitioner Joseph Roma an identical Notice of Determination which assessed \$116,992.12 in additional sales and use taxes due, plus penalty and interest, for the period June 1, 1999 through November 30, 2001. This notice also informed this petitioner that the Division had determined that he was a corporate officer or a person responsible for the collection and payment of sales and use taxes due from Joseph Roma & Sons Construction, Inc. and therefore personally liable for the sales and use taxes due from that corporation.

The difference between the corporate assessment and the individual officer assessments results from the expiration of the period of limitations for assessment for the period December 1, 1996 through May 31, 1999 with respect to the individual petitioners. The corporation executed consents extending the period of limitations for assessment with respect to such period. The individual petitioners did not. Accordingly, the Division did not assess tax against the individual petitioners for this period.

Each of the statutory notices herein assessed penalties pursuant to Tax Law § 1145(a)(1)(i) and (vi).

The corporation was in the business of landscaping, lawn maintenance, masonry, and snow plowing and removal. It was located at 330 Stratton Road, New Rochelle, New York. Petitioner John Roma has been involved with the business and has been president of the corporation for over ten years. He was president of the corporation during the audit period and ran the business on a day-to-day basis. Petitioner Joseph Roma is John Roma's father. He founded the business and remained involved in its operation during the period at issue. He was responsible for bookkeeping and billing.

Neither John Roma nor Joseph Roma disputed their status as persons responsible for the collection of sales tax for the corporation during the period at issue.

The audit of the corporation began with a letter from the Division to the corporation's representative dated February 28, 2000. By this letter the Division requested that the corporation make available for review all of its books and records pertaining to the corporation's sales tax liability for the period December 1, 1996 through November 30, 1999. The letter specifically requested that the corporation make available financial statements, journals, ledgers, sales invoices, purchase invoices, sales and use tax returns, Federal income tax returns, and exemption certificates. The February 28, 2000 letter also scheduled a date to begin the Division's review of the corporation's records. The corporation's representative cancelled a meeting scheduled for May 2, 2000 and also cancelled two subsequent meetings scheduled for July 10, 2000 and October 30, 2000.

The Division's auditor and the corporation's representative met on March 2, 2001 and May 8, 2001, and at that time certain records were made available for the Division's review. Specifically, the corporation produced its bank statements and cancelled checks for the 2000 calendar year and its 1999 sales invoices. The balance of the requested records was not made available.

By letter dated December 7, 2001, the Division advised the corporation's representative that the audit period was being extended through November 30, 2001. The Division requested that the corporation make available for review all of its books and records pertaining to the corporation's sales tax liability for the period December 1, 1996 through November 30, 2001. The December 7, 2001 letter also scheduled a date to begin the Division's review of the corporation's records for the extended audit period. Petitioner's representative later cancelled this meeting.

In conducting its audit, the Division first reviewed the records made available by the corporation. The Division compared the corporation's taxable sales of \$115,171.17 as shown by its sales invoices for the period March 1, 1999 through November 30, 1999 to taxable sales of \$38,952.00 as reported on its sales tax returns for the same period.¹ Additionally, the invoices for the March 1, 1999 through November 30, 1999 period indicated \$8,157.63 in sales tax charged and collected. The corporation reported and remitted \$2,704.00 in sales tax for this same period. All of the invoices that the Division reviewed were for taxable sales.

¹ The corporation did not provide the Division with copies of its sales tax returns on audit. The Division reviewed its own records for information contained on such returns.

Given the corporation's failure to provide many of the records requested and the disparity between the records that were provided and petitioner's sales tax returns, the Division concluded that such records were inadequate to perform a detailed audit for the period at issue.

The Division's audit found additional tax due in three areas: additional taxable sales, disallowed nontaxable sales, and expense purchases. In light of the corporation's inadequate records, the Division used a test period audit method to determine additional taxable sales. The Division determined an error rate of 2.957 based on the ratio of taxable sales as shown by the corporation's sales invoices to taxable sales reported on its sales tax returns for the period March 1, 1999 through November 30, 1999 (i.e., $\$115,171.17 \div \$38,952.00$). The Division then multiplied this error rate by taxable sales as reported for the entire audit period and thus calculated audited taxable sales. After subtracting reported taxable sales, the Division determined additional taxable sales of \$966,045.65 and, by applying the Westchester County jurisdictional rate of 8.25 percent, calculated additional tax due thereon of \$79,698.77.

With respect to the disallowed nontaxable sales portion of the audit, prior to the issuance of the statutory notice, the corporation did not offer any evidence of nontaxable sales. In the absence of any such evidence and considering that all sales invoices reviewed were for taxable sales, the Division concluded that all claimed nontaxable sales were properly subject to tax. The Division determined the amount of such disallowed nontaxable sales by calculating the difference between gross sales as reported on the corporation's sales tax returns for the audit period and audited taxable sales. Such difference was \$1,963,830.35 and, applying the Westchester County jurisdictional rate of 8.25 percent, the Division calculated sales tax due thereon of \$162,016.00.

With respect to the expense purchases portion of the audit, the Division contacted a third-party vendor from whom the corporation purchased rock salt for use in its snow plowing and snow removal business. The third-party vendor, which was located in Connecticut, provided the Division with invoices for rock salt purchases by the corporation totaling \$8,166.78 during the audit period. All such purchases were delivered to the corporation in New York, either at its headquarters or at a customer's location, and used in the performance of snow plowing and snow removal services. Sales tax was not charged on such purchases. The third-party vendor also provided the Division with a blanket exemption form which the corporation had provided the vendor. Although otherwise completed with the corporation's name, address, and tax identification number, such form did not indicate an exempt purpose for the purchase as required by the form. The Division also determined in its review of cancelled checks provided by the corporation that six expense purchases totaling \$8,750.00 were taxable. The Division thus determined \$16,916.78 in expense purchases subject to \$1,282.37 in additional tax due.

Following the issuance of the subject notices of determination, petitioners submitted to the Division's auditor records of sales totaling \$1,034,399.50 claimed by petitioners to be capital improvements. Following review of such documentation, the Division concluded that petitioners established capital improvements of \$996,821.50 and therefore revised the disallowed exempt sales amount from \$1,963,830.35 to \$967,008.85. In addition, the Division revised the jurisdictional rate of tax from 8.25 percent to 6.75 percent. The basis for this revision was that, although the corporation's headquarters was located in an 8.25 percent jurisdiction, most of the work performed by the corporation took place in a 6.75 percent jurisdiction. Such changes modified tax assessed on disallowed exempt sales from \$162,016.00 to \$65,273.10. The

Division also applied the 6.75 percent rate to additional taxable sales of \$966,045.65 as determined on audit and thereby modified tax asserted due on such sales from \$79,698.77 to \$65,208.08. The Division did not modify the asserted tax due on expense purchases.

In accordance with the foregoing revisions and following a Bureau of Conciliation and Mediation Services ("BCMS") conference on November 19, 2002, BCMS issued conciliation orders dated March 7, 2003 to petitioners herein. The order issued to the corporation asserted \$131,763.56 in additional tax due, plus penalty and interest, for the period December 1, 1996 through November 30, 2001. The orders issued to the individual petitioners asserted \$95,944.77, plus penalty and interest, for the period June 1, 1999 through November 30, 2001.

Approximately 50 percent of the corporation's business during the audit period was with two large customers: Riverwoods Community Association and Wildwoods Condominium. Petitioners conceded that the services provided by the corporation to these large customers was subject to sales tax and that the corporation had improperly failed to charge and collect sales tax on such services. Petitioner John Roma testified that he erroneously believed that such transactions were exempt from tax. Petitioners' representative estimated that the amount of sales tax due on services provided by the corporation to these large customers was \$46,379.00.

Of the 20 sales tax periods which make up the audit period herein, the corporation filed its sales tax returns late 11 times. The corporation reported \$33,942.00 in tax due on its sales tax returns for the audit period.

Among the records submitted by the corporation following the issuance of the notices of determination were two invoices totaling \$1,250.00 for services provided to a customer named

Larchmont Manor Park. The Division deemed \$850.00 of such services to be capital improvements and thus exempt from tax on the revised assessment.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge found that the Division's use of a test period method with respect to the "additional taxable sales" portion of the audit was proper because in response to the Division's requests for corporate books and records, the corporation supplied records which were clearly inadequate for the purpose of conducting an audit to determine the accuracy of the corporation's sales tax returns as filed. The Administrative Law Judge held that petitioners failed to meet their burden of proof to show, by clear and convincing evidence, that the audit method was unreasonable or that the results were unreasonably inaccurate.

In response to petitioners' argument that the Division should have used particular months for its test period, the Administrative Law Judge noted that the Division did use several of the suggested months in its test period. Further, the Administrative Law Judge observed that in the face of inadequate, unreliable or unavailable records, the Division is required merely to employ a reasonable audit method; exactness is not required.

The Administrative Law Judge upheld as reasonable the Division's disallowance of nontaxable sales. He noted that this portion of the audit was not based on an estimated audit method. Rather, the Division relied on the presumption of taxability pursuant to Tax Law § 1132(c)(1) and effectively denied the claimed nontaxable status of all such sales. The Administrative Law Judge observed that following the issuance of the statutory notices, petitioners submitted documentation which resulted in the Division's allowance of \$996,821.50

in nontaxable sales. He pointed out, however, that petitioners offered no evidence at hearing to show that any of the remaining disallowed nontaxable sales were properly nontaxable.

The Administrative Law Judge affirmed the Division's assertion of tax due on expense purchases based upon the Division's detailed review of invoices for rock salt and checks in payment of certain other expenses, especially in view of the fact petitioners provided no evidence to show that such purchases were not taxable.

The Administrative Law Judge found no support in the record for petitioners' argument that one of its customers, Larchmont Manor Park, was an exempt organization.

The Administrative Law Judge sustained the imposition of penalty as he concluded that petitioners established neither reasonable cause nor an absence of willful neglect to justify abatement of penalties.

ARGUMENTS ON EXCEPTION

On exception, petitioners argue that the corporation supplied books and records to the auditor which were not returned; that Larchmont Manor Park is, in fact, an exempt organization and no tax is due on sales to it; that the corporation did not charge sales tax for sales to the two condominium developments through a misunderstanding and, therefore, these sales should be the only items taxed; and that for the test audit months, snow removal was performed only for the two condominium developments and all salt purchased was for those developments.

In opposition, the Division argues that the Administrative Law Judge correctly determined petitioners' liability for tax, interest and penalty and his determination should be affirmed.

OPINION

We find that the Administrative Law Judge completely and adequately addressed the issues presented to him and correctly applied the relevant law to the facts of this case.

Petitioners have offered no evidence below, and no argument on exception, that would provide a basis for us to modify the determination in any respect. Thus, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Joseph Roma & Sons Construction, Inc., John Roma and Joseph Roma is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of Joseph Roma & Sons Construction, Inc., John Roma and Joseph Roma are denied; and
4. The notices of determination dated March 15, 2002 and August 26, 2002, as modified by the conciliation orders dated March 7, 2003, are sustained.

DATED: Troy, New York
October 27, 2005

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

/s/Robert J. McDermott

Robert J. McDermott
Commissioner