

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>OSSAMA HASSAN</b>	:	DECISION
	:	DTA NO. 819688
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, 1997 through	:	
February 28, 2001.	:	

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Petitioner Ossama Hassan, 42-43 Ithaca Street, Apt. 5K, Elmhurst, New York 11373, filed an exception to the determination of the Administrative Law Judge issued on February 10, 2005. Petitioner appeared *pro se*. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Jennifer A. Murphy, Esq., of counsel).

The Division of Taxation filed a brief in opposition to petitioner's exception 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 the Division of Taxation properly determined additional sales tax due from Ossama Hassan.

II. Whether petitioner has established any facts or circumstances warranting the reduction or abatement of penalties imposed.

***FINDINGS OF FACT***

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

Petitioner, Ossama Hassan d/b/a Empire Deli Pita King, operated a small grocery store and deli in Flushing, Queens County, New York. The store, opened at the end of 1996, was located on Woodhaven Boulevard, a busy thoroughfare, and sold items such as bagels, rolls, juice, candy, sandwiches, cigarettes, coffee, tea and soda. Petitioner operated the store's business on a day-to-day basis, with help from his wife and from his brother. Petitioner kept track of sales based on the amount of money in the cash register. He paid for the store's supplies and inventory with cash and, at times when there was insufficient cash, with his own credit card. At the end of each business day he would count the cash and keep it for purchases for the next business day. Sometimes, but not always, he would write down the amount of cash.

On September 20, 2001, an auditor for the Division of Taxation ("Division") sent a letter to petitioner scheduling an appointment for October 23, 2001 on which to commence a sales and use tax field audit of petitioner's business for the period spanning December 1, 1997 through February 28, 2001. The Division's letter requested that all of petitioner's books and records pertaining to the store for the audit period be available for review. Among the records specifically requested were the general ledger, cash receipts journal, Federal income tax returns, purchase invoices, sales invoices, guest checks, cash register tapes, bank statements, financial statements and exemption documents.

The Division's auditor met with petitioner at the store location on October 23, 2001, at which time petitioner provided some bank statements, income tax returns and cigarette invoices.

Petitioner did not provide any general ledger, daybook of sales, cash receipts journal, cash register tapes, sales invoices, daily summary tapes, exemption documents or sales tax accrual account information. The auditor was advised that the sales tax returns filed for the business were prepared by petitioner's brother based on an estimate of the store's sales. For the audit period, the business reported gross sales of \$42,000.00 and taxable sales of \$5,700.00. After reviewing the very limited records presented, the Division's auditor determined that the same were not sufficient to allow the conduct of a detailed audit and concluded that the use of indirect auditing methods to determine petitioner's sales would be appropriate.

The Division conducted an observation of petitioner's business on December 5, 2001. An initial audit interview report, completed either by petitioner or by his brother, states that the business was open Monday through Saturday from 8:00 A.M. to 6:00 P.M. However, on the December 5, 2001 date of the audit observation, the store was opened at 7:00 A.M. and was closed at 4:00 P.M. The auditor, and her audit team leader, observed and recorded the store's sales during the hours of operation, segregating the same into taxable versus nontaxable categories. They recorded gross sales of \$162.74, of which \$131.74 were taxable sales. Dividing such taxable sales by the nine-hour period of observation resulted in taxable sales of \$14.56 per hour.

The auditor multiplied the above-determined \$14.56 per hour taxable sales figure by 11 hours to arrive at \$160.11 in audited taxable sales per day. The 11 hours per day figure reflects the auditor's choice to treat the 7:00 A.M. actual opening time on the audit observation day as the usual opening time, as opposed to the 8:00 A.M. time petitioner reported on the initial audit interview sheet, and (in contrast) to accept the 6:00 P.M. closing time petitioner reported on such

interview sheet as the usual closing time, as opposed to the 4:00 P.M. actual closing time on the audit observation day.

In turn, the auditor multiplied the \$160.11 audited taxable sales per day by the 91 days in each sales tax quarterly period (13 weeks times 7 days per week equals 91 days) to arrive at \$14,570.00 of audited taxable sales per quarter. The auditor's conclusion that petitioner's store was open 7 days per week, as opposed to the 6 days per week reported on the initial audit interview sheet, was apparently based on her audit experience involving similar stores, many of which are allegedly open for long hours, including some which operate 24 hours per day and 7 days per week.

The auditor multiplied the audited taxable sales per quarter (\$14,570.00) by the 13 quarterly periods covered by the audit to arrive at \$189,411.00 in audited taxable sales for the audit period. The auditor reduced audited taxable sales by taxable sales reported by petitioner (\$5,700.00) to arrive at additional taxable sales of \$183,711.00 and sales tax due thereon in the amount of \$15,156.00. The auditor estimated that petitioner sold three packs of cigarettes per day, and thus further reduced the amount of sales tax due for the audit period by \$532.00, representing credit for the tax prepaid by petitioner (at the amount of 45 cents per pack) on cigarettes.

On May 28, 2002, the Division issued to petitioner a Notice of Determination, based on the foregoing audit results, assessing additional sales tax due for the period December 1, 1997 through February 28, 2001 in the amount of \$14,623.96, plus penalty and interest thereon. The Division thereafter reduced the amount of tax assessed to \$12,374.82, plus penalty and interest

thereon, with such reduction based on the fact that the earliest two quarterly periods (those ended February 29, 1998 and May 31, 1998) were barred by the period of limitations on assessment.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

At the outset, the Administrative Law Judge discussed the statute and case law that outlines the standard for reviewing a sales tax audit where external indices were employed. The Administrative Law Judge found that the Division made a clear and unequivocal written request for books and records of petitioner's sales and that petitioner failed to keep or produce such records for the Division's review. Moreover, the Administrative Law Judge determined that the auditor reasonably concluded that petitioner did not maintain books and records sufficient to verify his gross and taxable sales for the audit period and, as such, the Division properly resorted to external indices in the form of a one-day observation test of petitioner's gross and taxable sales. As noted by the Administrative Law Judge, petitioner did not dispute either the absence of sales records or the Division's authority to resort to indirect audit methodologies in this case. However, petitioner argued that the Division's audit method and result were inaccurate. As a general proposition, the Administrative Law Judge noted, any imprecision in the results of an audit arising by reason of a taxpayer's failure to keep and maintain records of all of his sales as required by Tax Law § 1135(a)(1) must be borne by that taxpayer (*see, Matter of Markowitz v. State Tax Commn.*, 54 AD2d 1023, 388 NYS2d 176, *affd* 44 NY2d 684, 405 NYS2d 454). In this case, the Administrative Law Judge found that the audit extrapolation calculations in this case required an adjustment to reflect that the store was not open seven days per week. The Administrative Law Judge noted that the Division extrapolated its observation results using seven days per week, apparently on the basis that many similar

stores are open seven days per week. The Administrative Law Judge pointed out that such a proposition may be a proper basis for extrapolation if there were no other evidence in the record concerning the store's days of operation. However, in this case, there was other evidence. The initial audit interview sheet indicates that the store was open Monday through Saturday (i.e., six days per week) and was closed on Sundays. Petitioner's testimony at hearing was consistent in this claim that the store was not open Sundays (or holidays). This is in contrast to the store's hours of operation, where, the Administrative Law Judge found, the Division's extrapolation was based on evidence provided and gathered on audit (a combination of the hours of operation actually observed and the hours of operation reported on the interview sheet). The Administrative Law Judge found that the auditor's conclusion on the store's days of operation overrode the evidence and was simply based on the auditor's assumption that the store was open seven days per week. Accordingly, the Administrative Law Judge directed that the Division recalculate the amount of taxable sales and sales tax due based on a six-day week rather than a seven-day week.<sup>1</sup>

Petitioner failed to establish that the penalties imposed in this case were improper. Thus, the Administrative Law Judge sustained the penalties.

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<sup>1</sup>The Administrative Law Judge noted that no such modification is warranted with respect to the store's hours of operation. In this respect, the Division chose to extrapolate its observation results using an 11-hour day (rather than on the nine hours of physical observation), based on the actual observation day opening time of 7:00 A.M. (i.e., one hour earlier than the time listed on the interview sheet) through 6:00 P.M. (the closing time listed on the interview sheet rather than the 4:00 P.M. actual closing time on the observation day). Given the vague, inconsistent and conflicting testimony by petitioner regarding his hours of operation, the Administrative Law Judge concluded that the Division's use of actual opening time and reported closing time (a mixture of observed and reported times) was supported by the evidence and was reasonable.

### ***ARGUMENTS ON EXCEPTION***

Petitioner on exception makes substantially the same arguments as were presented below. Although, petitioner does not argue that he maintained and produced adequate books and records for audit, he claims that the audit was inaccurate based upon the fact that business was very slow on Saturdays and that the store was only open until 4:00 P.M. as opposed to 6:00 P.M. Furthermore, petitioner maintains that the Division's observation of sales should have been for a period longer than one day, so as to account for days on which sales were lower than those on the observed day. Petitioner argues generally that his sales were lower than those determined upon audit, that he was unable to pay his expenses of operation, and that he was forced to close the business in 2002.

The Division argues that the audit method and results, as modified by the Administrative Law Judge, were reasonable and should be sustained.

### ***OPINION***

We affirm the determination of the Administrative Law Judge for the reasons stated therein. We find that the Administrative Law Judge fully and correctly addressed each of the issues and arguments presented. After reviewing the evidence and arguments presented thereon, we can find no basis to modify the determination of the Administrative Law Judge in any respect. Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Ossama Hassan is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Ossama Hassan is granted to the extent that additional sales tax due for quarters ending February 29, 1998 and May 31, 1998 be cancelled, and that the Division of

Taxation is directed to further modify the audit results to reflect that petitioner was open six days a week, but is otherwise denied; and

4. The Notice of Determination, dated May 28, 2002, is modified in accordance with paragraph “3” above, but is otherwise sustained together with penalty and interest.

DATED: Troy, New York  
October 6, 2005

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/s/Donald C. DeWitt

Donald C. DeWitt  
President

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/s/Carroll R. Jenkins

Carroll R. Jenkins  
Commissioner

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/s/Robert J. McDermott

Robert J. McDermott  
Commissioner