

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>AMBOY QUICK SERVICE, INC.</b>	:	DECISION
<b>AND HARMINDER SINGH</b>	:	DTA NOS. 820063
	:	AND 820064
for Revision of Determinations or for Refund of	:	
Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Periods September 1, 1998	:	
through November 30, 2001.	:	

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Petitioners Amboy Quick Service, Inc. and Harminder Singh, 1870 Hyland Boulevard, Staten Island, New York 10305, filed an exception to the determination of the Administrative Law Judge issued on December 1, 2005. Petitioners appeared by Bailey & Sherman, P.C. (Edward G. Bailey, Esq., of counsel). 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 brief 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.

***ISSUES***

I. Whether the Division of Taxation's determination, upon audit, that petitioner Amboy Quick Service, Inc. owed additional sales tax, plus interest and penalties, was proper and should be sustained.

II. Whether petitioner Harminder Singh was a person under an obligation to collect and remit sales and use taxes on behalf of petitioner Amboy Quick Service, Inc. such that he was properly subjected to liability for the amounts determined to be due upon audit of Amboy Quick Service, Inc.

III. Whether petitioners have established any basis warranting reduction or elimination of penalties imposed.

### ***FINDINGS OF FACT***

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

Petitioner Amboy Quick Service, Inc. (“Amboy”) operated a gasoline station and convenience store located on Hyland Boulevard, Staten Island, New York, during the period at issue, to wit, September 1, 1998 through November 30, 2001. Amboy sold gasoline, cigarettes, soda, beer and other miscellaneous items.

By a letter dated September 28, 2000, the Division of Taxation (“Division”) advised Amboy that a sales tax field audit of its business operations for the period spanning October 1, 1998, when Amboy began operations, through May 31, 2000, would commence on November 7, 2000. This audit appointment letter advised Amboy that all of its books and records pertaining to the audit period, including financial statements, cash receipts and disbursement journals, general ledgers, sales invoices, purchase invoices, cash register tapes, Federal income tax returns, forms FT-943, daily pump readings, bank statements and canceled checks, should be available for review. The letter also advised Amboy that additional records and information

might be required during the course of the audit, and that the audit period specified in the letter might be adjusted depending on the information gathered during the audit.

The initially scheduled audit appointment date of November 7, 2000 was changed, at petitioners' request, to November 3, 2000. On November 3, 2000, petitioner Harminder Singh, who identified himself as Amboy's owner, and petitioners' then-representative met with the Division's auditor. No books and records were presented by petitioners at this meeting. The Division's auditor, in turn, made additional written requests for books and records on November 3, 2000 and thereafter on December 14, 2001. This latter request for records advised that the period under audit had been extended to November 30, 2001.

The Division's auditor met with petitioners' representative on March 6, 2001, but was provided only with copies of some, but not all, of Amboy's fuel (gasoline) purchase invoices. None of the other records requested by the Division were provided by petitioners. Thereafter, the Division's auditor met with petitioners' representative in January 2002, at which time petitioners provided additional fuel purchase invoices and purchase histories obtained from Amboy's supplier. It appears that these records were sent by the supplier to petitioners in response to a Division request to the supplier for fuel purchase histories. No other books and records were provided by petitioners upon audit.<sup>1</sup>

After reviewing the documents provided, the auditor determined the same to be insufficient and inadequate for the performance of a detailed audit, most specifically due to the

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<sup>1</sup>Amboy's sales tax returns for the four earliest sales tax quarterly periods in issue (September 1, 1998 through August 31, 1999) and the five latest sales tax quarterly periods (September 1, 2000 through November 30, 2001) were delinquent at the time the audit was commenced, and were submitted to the auditor at the January 2002 meeting.

lack of any records pertaining to sales. Accordingly, the auditor determined to resort to an indirect audit method to calculate the amount of Amboy's sales and its sales tax liability.

#### Fuel Sales

To determine Amboy's fuel sales, the auditor performed a quarter-by-quarter analysis based on fuel purchases. Amboy's fuel purchases were all made from Certified Heating Oils, Inc., and consistently ranged from 125,000 to 145,000 gallons for those quarterly periods for which complete fuel purchase records were available. As to the quarterly periods for which there was no complete purchase history, the Division utilized the same number of gallons as had been determined for the closest prior quarterly period for which there were complete purchase records. In the case of the earliest quarterly period under audit, spanning September 1, 1998 through November 30, 1998, the Division accepted the documented purchase total of 40,000 gallons, given that Amboy had been in business for only a portion of such period.

Since Amboy presented no documentation of the prices at which it sold gasoline, the Division made two separate observations of actual pump selling prices, at a 200-day interval (August 22, 2000 and March 9, 2001). The Division compared the observed selling prices with the documented cost of gasoline for the same dates, and determined average markups for regular and premium grades of gasoline and for full-serve and self-serve. These average markups were applied to the purchase cost of each grade of gasoline for each quarterly period as determined earlier. As part of the observation, the auditor determined that 52.7 percent of Amboy's gasoline sales were made as higher priced full-serve sales, with 47.3 percent made as self-serve sales. The auditor actually used a 50 - 50 ratio between full-serve and self-serve to calculate Amboy's fuel

sales.<sup>2</sup> Credits taken by Amboy for prepaid taxes on gasoline were allowed since the purchase records, though incomplete, did show the prepayment of sales tax.

#### Cigarette Sales

No records or other information were provided on audit concerning cigarette purchases or sales. The auditor determined the number of packs of cigarettes sold during the period in issue by dividing the tax credit for prepaid sales tax on cigarettes, as set forth on Amboy's sales tax returns, by the then 15 cents per pack amount of prepaid tax on cigarettes. In determining cigarette sales for quarterly periods for which no sales tax returns had been filed by Amboy, the auditor used the average number of packs of cigarettes sold in the quarterly periods for which returns had been filed. The auditor utilized an estimated average retail selling price of \$4.00 per pack of cigarettes, based on his audit experience of cigarette vendors in Amboy's geographical location. Notwithstanding Amboy's claim of credit for prepaid tax on cigarettes set forth on its sales tax returns, no credit for prepaid tax was allowed on audit because such purchases (unlike fuel purchases) were not documented by invoices showing that such tax had, in fact, been prepaid.

#### Miscellaneous Sales

No documentation of Amboy's purchases or sales of miscellaneous items such as soda, beer, candy, paper goods and various grocery items was provided on audit. The Division determined sales of miscellaneous items to be \$20,000.00 per sales tax quarterly period, based upon the auditor's supervisor's audit experience.

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<sup>2</sup>This ratio is, in fact, slightly beneficial to petitioners.

Total audited sales tax due on fuel sales, cigarette sales and miscellaneous sales, as calculated pursuant to the foregoing audit methodology, was reduced by sales tax paid by Amboy to arrive at additional sales tax due for the audit period in the aggregate amount of \$88,894.14.

As a result of its audit, the Division issued to petitioner Amboy a Notice of Determination, dated December 13, 2002, assessing additional tax due in the amount of \$88,894.14, plus interest and penalties, including omnibus penalty based on underreporting of more than 25 percent of the amount that should have been reported as due, for the period September 1, 1998 through November 30, 2001. A consent had been executed by Amboy, dated November 16, 2001, pursuant to which the statute of limitations on assessment for the period September 1, 1998 through November 30, 1999 was extended to December 20, 2002.

The Division also issued to petitioner Harminder Singh a Notice of Determination, dated January 6, 2003, assessing additional tax, interest and penalties (including omnibus penalty) in the same amounts and for the same period as set forth on the assessment issued against Amboy. Petitioner Harminder Singh is listed as the owner of Amboy, held himself out as its owner and operator during the course of the audit, and provided no argument or evidence contrary to the Division's position that he was the owner and operator of Amboy.<sup>3</sup>

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<sup>3</sup>As noted by the Administrative Law Judge, a consent was executed by Amboy, dated November 16, 2001, pursuant to which the statute of limitations on assessment for the period September 1, 1998 through November 30, 1999 had been extended to December 20, 2002. In contrast, Mr. Singh did not execute a consent to extend the period of limitations on assessment and the Division concedes that the portion of the assessment issued against Mr. Singh pertaining to the sales tax quarterly period ended November 30, 1999 should be cancelled as not timely issued. Further, since Amboy did not file returns for the quarterly periods ended November 30, 1998, February 28, 1999, May 31, 1999 and August 31, 1999 until January 2002, the period of limitations on assessment for such periods was not triggered and does not require cancellation for any of such quarterly periods.

Petitioners challenged the assessment and, pursuant to conciliation orders dated March 26, 2004, the amount of tax due on each assessment was reduced to \$57,828.85, plus interest and penalties. The reduction was based on changes in each of the three areas for which additional sales tax had been found due, as follows:

- a) Fuel Sales– sales of fuel were reduced based upon petitioners’ submission of additional purchase invoices and purchase histories from Amboy’s supplier which eliminated the need to estimate fuel purchase amounts for any of the quarterly periods covered by the audit, and allowed quantities of fuel sold to be based upon Amboy’s documented purchases.
- b) Cigarette Sales– credit was allowed for prepaid tax on cigarettes based upon petitioners’ production of a printout of purchases from Amboy’s cigarette supplier plus invoices showing actual prepaid tax and payments made.
- c) Miscellaneous Sales– miscellaneous sales were redetermined based upon an observation of such sales, conducted on January 31, 2002, as opposed to the initial determination based upon audit experience. The amount of daily taxable sales determined upon such observation (\$31.19) was projected throughout the period in issue.

At hearing, petitioners provided an envelope dated February 20, 2001, which allegedly had been received by petitioners from Amboy’s fuel supplier and contained Amboy’s purchase history and purchase invoices.<sup>4</sup> It undisputed that such fuel purchase information was provided to the Division during the course of the audit, and was utilized in arriving at the reduction in tax due on fuel sales as incorporated in the conciliation orders. Although not entirely clear, it appears that such envelope was provided at hearing to establish that when the supplier information was received by petitioners it was, in turn, given over to the Division and should,

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<sup>4</sup>It appears that the purchase information may have been initially furnished to the Division by Amboy’s supplier, but was returned to the supplier by the Division as not being “original purchase records.” In turn, the information was mailed by the supplier to petitioners’ representative who, thereafter, provided copies of such information to the Division’s auditor.

according to petitioners, serve as an indication of good faith in mitigation of the penalties imposed.

Petitioners' representative also submitted into evidence copies of eleven credit card receipts for gasoline sales. According to petitioners these receipts, dated May 26 through May 28, 2001, May 9, 2000, and November 7 and 8, 2000, were chosen out of some 50 such receipts provided by Mr. Singh to petitioners' representative, and reflect mark-up amounts of twelve cents, ten cents and seven cents per gallon. Petitioners' witness did not know whether the receipts represented sales of regular or premium gasoline or were made at full-serve or self-serve pumps, but claimed that such receipts support an average markup of ten cents per gallon which, in turn, would reduce the amount of tax determined to be due on audit by approximately \$10,000.00. In contrast, the Division's calculations determined a markup ranging from 16.9 to 21.9 cents per gallon, and differentiated between regular and premium grades of gasoline and between full-serve and self-serve sales.

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

The Administrative Law Judge noted first the standard for reviewing a sales tax audit where external indices were employed. This standard, as set forth in *Matter of AGDN, Inc.* (Tax Appeals Tribunal, February 6, 1997), points out that:

a vendor . . . is required to maintain complete, adequate and accurate books and records regarding its sales tax liability and, upon request, to make the same available for audit by the Division (*see*, Tax Law §§ 1138[a], 1135, 1142[5]; *see, e.g., Matter of Mera Delicatessen*, Tax Appeals Tribunal, November 2, 1989). . . . [W]here insufficient records are kept and it is not possible to conduct a complete audit, "the amount of tax due shall be determined by the commissioner of taxation and finance from such information as may be available. If necessary, the tax may be estimated on the basis of external indices . . ." (Tax Law § 1138[a]; *see, Matter of Chartair, Inc. v. State Tax Commn.*, 65 AD2d 44, 411 NYS2d 41, 43).



When the Division resorts to estimating sales tax due, it need only adopt an audit method reasonably calculated to determine the amount of tax due and exactness is not required (*see, Matter of Meyer v. State Tax Commn.*, 61 AD2d 223, 402 NYS2d 74, *lv denied* 44 NY2d 645, 406 NYS2d 1025). The burden is then on the taxpayer to demonstrate, by clear and convincing evidence, that the audit method employed or the tax assessed was unreasonable (*see, Matter of Meskouris Bros. v. Chu*, 139 AD2d 813, 526 NYS2d 679).

The Administrative Law Judge found that the record in this case establishes that the Division made clear, unequivocal written requests for the books and records of petitioners' sales, and that petitioners failed to produce such books and records for the Division's review. As a result, the Administrative Law Judge found that the auditor reasonably concluded that Amboy did not maintain books and records that were sufficient to verify its gross and taxable sales for the audit period. Having established the insufficiency of petitioners' books and records, the Division used the purchase records supplied by Amboy's fuel supplier, together with observed pump prices and quantities, to determine Amboy's fuel sales and, further, resorted to estimates based initially on audit experience to determine Amboy's sales of cigarettes and miscellaneous items. The Administrative Law Judge noted that petitioners did not dispute the absence of complete sales records, or dispute the Division's authority to resort to indirect audit methodologies in this case. Accordingly, the only issue for the Administrative Law Judge was whether petitioners established that the amount of tax assessed upon audit was erroneous.

Petitioners object to the Division's audit result because it is imprecise. The Administrative Law Judge pointed out that 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. In this instance, petitioners specifically complained that the mark-up amounts on gasoline, as used by the auditor, were too high, and that the estimated selling price per pack of cigarettes was too high and should be reduced by five cents per pack to account for the excise tax on cigarettes. Nonetheless, the Administrative Law Judge found that petitioners' submission of a few credit card receipts out of a 27-month audit period together with the accompanying claim that ten cents per gallon is a more accurate mark-up amount, falls far short of the evidence necessary to support petitioners' claim and override the results of the audit. Similarly, the Administrative Law Judge rejected petitioners' assertion that the Division's estimated selling price of \$4.00 per pack of cigarettes was too high and should, at a minimum, be reduced to \$3.95 per pack because of a five cents per pack excise tax amount included therein. Again, petitioners provided no records establishing the actual selling price per pack of cigarettes, nor any other basis for refuting the Division's estimated price.<sup>5</sup> The Administrative Law Judge found that petitioners' failure to maintain or provide any records of sales left no basis for changing the Division's audit results.

The Administrative Law Judge also found that petitioners failed to provide evidence that would support reduction or abatement of the penalties imposed and, therefore, penalties were sustained. The Administrative Law Judge noted that in establishing reasonable cause for penalty abatement, the taxpayer faces an onerous task. Here, the Administrative Law Judge observed, Amboy neither maintained nor produced records as required, and was delinquent in the filing of its sales tax returns for a number of quarterly periods. Further, there was a substantial

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<sup>5</sup>In any event, the cigarette excise tax is a component part of the receipt (selling price per pack) subject to sales tax (*see*, 20 NYCRR 526.5[b]).

discrepancy between reported taxable sales (\$1,307,709.00) and audited taxable sales (\$12,295,473.00).

The Administrative Law Judge pointed out that Harminder Singh held himself out as the owner and operator of petitioner Amboy at all times, and neither challenged nor provided any evidence or argument to refute the Division's position that he was a person under a duty to collect and remit sales and use taxes on behalf of Amboy. Accordingly, the Administrative Law Judge found Harminder Singh was properly liable as a responsible officer for the tax due, including penalties and interest, assessed against Amboy.

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

Petitioners, on exception, argue as they did below that the audited markup on gasoline and cigarettes was too high. They also urge that penalties should be abated.

#### ***OPINION***

We affirm the determination of the Administrative Law Judge for the reasons stated therein. The Administrative Law Judge fully and properly addressed each of the issues raised by petitioners. Petitioners have produced no evidence below, nor arguments 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 the Amboy Quick Service, Inc. and Harminder Singh is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of Amboy Quick Service, Inc. and Harminder Singh are granted to the extent of the reduction set forth in the conciliation orders dated March 26, 2004 and, with regard to Harminder Singh, to the extent that the tax, interest and penalties assessed for the sales tax

quarterly period ended November 30, 1999 are cancelled (*see*, Footnote “3”), but are otherwise denied; and

4. The notices of determination dated December 13, 2002 and January 6, 2003, respectively, are modified in accordance with paragraph “3” above.

DATED: Troy, New York  
October 19, 2006

/s/Charles H. Nesbitt

Charles H. Nesbitt  
President

/s/Carroll R. Jenkins

Carroll R. Jenkins  
Commissioner

/s/Robert J. McDermott

Robert J. McDermott  
Commissioner