

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
GEDERA SERVICE CORPORATION : DECISION
DTA NO. 820780
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, 2001 through May 31, 2004. :

Petitioner, Gedera Service Corporation, filed an exception to the determination of the Administrative Law Judge issued on March 29, 2007. Petitioner appeared by Yona Carmazi. The Division of Taxation appeared by Daniel Smirlock, Esq. (John E. Matthews, Esq., of counsel).

Petitioner filed a brief in support of its exception and the Division of Taxation filed a letter brief in lieu of a formal brief in opposition. Petitioner's request for oral argument was denied.

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

ISSUE

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

FINDINGS OF FACT

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

Petitioner, Gedera Service Corporation ("Gedera"), operated a gasoline station and convenience store located at 1149 Utica Avenue, Brooklyn, New York, during the period at issue, June 1, 2001 through May 31, 2004. Gedera was open 24 hours a day, 7 days a week, and sold gasoline, cigarettes, beer, soda and other miscellaneous items. Yona Carmazi was the president of petitioner during the audit period.

By a letter dated June 1, 2004, the Division of Taxation ("Division") advised Gedera that a sales tax field audit of its business operations for the period spanning June 1, 2001 through May 31, 2004 would commence on August 31, 2004. The letter advised that all books and records pertaining to the audit period, including those on an attached list, should be made available. The letter also advised Gedera that additional records and information might be required during the course of the audit. The list requested that sales tax returns, FR schedules, forms FT-943, daily pump readings, pump prices, gasoline purchase invoices, other purchase invoices, bank statements, canceled checks, cash register tapes, cash receipts and disbursement journals, charge card slips and Federal income tax returns be made available.

During the course of the audit, petitioner provided the auditor with sales and use tax returns, Federal forms 1120 and gasoline purchase invoices. Petitioner did not provide any records which related to the sales tax returns filed, or how the amount of sales tax due on the returns was computed. There appeared to be no internal controls with respect to the sales portion of the business operation. After reviewing the records provided, the auditor determined that they were insufficient and inadequate for the performance of a detailed audit, most specifically due to the lack of any records pertaining to sales. Accordingly, the auditor resorted to an indirect audit method to calculate the amount of Gedera's sales and its sales tax liability.

To determine Gedera's fuel sales, the auditor accepted petitioner's fuel purchases as indicated on the gasoline purchase invoices. Since Gedera presented no documentation of the prices at which it sold gasoline, the Division resorted to price information for the average monthly motor gasoline prices for the downstate New York area, including Brooklyn, as compiled by the United States Department of Energy, for the period under audit. Applying the resulting audited average price per gallon to petitioner's purchases of gasoline for the audit period resulted in additional sales tax due of \$49,473.69 on petitioner's sales of gasoline.

No records or other information were provided on audit concerning cigarette purchases or sales, or how the claimed credit for prepaid sales tax on cigarette purchases was computed. The auditor disallowed petitioner's claimed prepaid sales tax, resulting in additional sales tax due of \$3,301.40 for the audit period.

On September 27, 2004, Yona Carmazi, as president, executed a Consent Extending Period of Limitation for Assessment of Sales and Use Taxes Under Articles 28 and 29 of the Tax Law for Gedera, which extended the period of limitation for assessing the period June 1, 2001 through November 30, 2001 to December 31, 2004. On December 15, 2004, petitioner's representative, Seth Wapnick, pursuant to a power of attorney, executed a second consent which extended the period of limitation for assessing the period June 1, 2001 through November 30, 2002 to December 31, 2005.

On February 18, 2005, the Division issued to petitioner a Statement of Proposed Audit Change for Sales and Use Tax for the period June 1, 2001 through May 31, 2004 indicating total tax due of \$52,775.09. For the period ending February 28, 2002, the statement indicates a credit to petitioner of \$1,583.18.

The Division issued to petitioner, on April 4, 2005, a Notice of Determination assessing sales tax due of \$54,358.27, plus penalty and interest, for the period June 1, 2001 through May 31, 2004. The difference in the tax assessed between the Statement of Proposed Audit Change and the Notice of Determination is the omission on the notice of the credit for the period ending February 28, 2002. At the hearing, the Division conceded that this credit should be applied to the amount assessed on the notice, reducing the tax assessed on the Notice of Determination to \$52,775.09.

Following the hearing held in this matter, petitioner provided documentation to the Division establishing the amount of the prepaid cigarette sales tax claimed on petitioner's sales tax returns. The Division agrees that the Notice of Determination should be reduced by the amount of the prepaid sales tax claimed by petitioner, and originally disallowed by the Division, in the amount of \$3,301.40. This concession by the Division reduces the amount assessed in the Notice of Determination to sales tax due of \$49,473.69, plus penalty and interest.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge discussed the standard for reviewing a sales tax audit where external indices are employed. He noted that a vendor is required to maintain complete, adequate and accurate books and records and, upon request, to make same available for audit by the Division. The Administrative Law Judge stated that where insufficient records are kept and it is not possible to conduct a complete audit, the tax may be estimated on the basis of external indices where the Division need only adopt an audit method reasonably calculated to determine the amount of tax.

The Administrative Law Judge pointed out that 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 [1978], *lv denied* 44 NY2d 645 [1978]). 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 [1988]).

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 petitioner's sales, and that petitioner 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 Gedera 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 petitioner's books and records, the Division resorted to the use of purchase invoices supplied by Gedera, together with the price information for the average monthly motor gasoline prices for the downstate New York area, which includes Brooklyn, as compiled by the United States Department of Energy to determine petitioner's fuel sales. The Administrative Law Judge noted that petitioner 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 to determine was whether petitioner established that the amount of tax assessed upon was erroneous.

Petitioner objected 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 own failure to keep and maintain records of all of its sales as required by Tax Law § 1135(a)(1) must be borne by the taxpayer (*Matter of Markowitz v. State Tax Commission, supra.; Matter of Meyer, supra.*). In the instant matter, petitioner specifically complained that the estimated selling price per gallon of gasoline was too high and should be

reduced. Nonetheless, the Administrative Law Judge determined that petitioner's claims that prices changed on an hourly and daily basis and that prices for gasoline sales to bulk purchasers were discounted fall far short of the evidence necessary to support petitioner's claims and override the results of the audit based on petitioner's purchases and the United States Department of Energy average sales prices per gallon of gasoline. Again, petitioner provided no records establishing the actual selling price per gallon of gasoline. The Administrative Law Judge determined that petitioner's failure to maintain or provide any records of sales, leaves no basis for changing the Division's audit results.

The Administrative Law Judge determined that petitioner failed to provide evidence which 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 (*Matter of Philip Morris, Inc.*, Tax Appeals Tribunal, April 29, 1993). Here, the Administrative Law Judge observed, Gedera neither maintained nor produced records as required, and there was a substantial discrepancy between reported taxable sales and audited taxable sales. Accordingly, the Administrative Law Judge granted the petition to the extent indicated above, but was otherwise denied, and the Notice of Determination dated April 4, 2005, was reduced accordingly and sustained.

ARGUMENTS ON EXCEPTION

Petitioner, on exception, argues that it produced bank statements and daily sales records showing gallons sold and money received for the audit period. Petitioner also argues that the auditor used different prices in the same audit period, changed his findings, and in one instance showed that the taxpayer overpaid his taxes.

OPINION

We affirm the determination of the Administrative Law Judge for the reasons stated therein. The Administrative Law Judge fully and properly addressed the issue raised by petitioner. Petitioner has 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 Gedera Service Corporation is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Gedera Service Corporation is granted to the extent of the reduction set forth at the hearing held on September 13, 2006, and following the hearing by a reduction in the amount of prepaid sales tax claimed by petitioner; and
4. The notice of determination dated April 4, 2005 as modified in accordance with paragraph "3" above is sustained.

DATED: Troy, New York
November 21, 2007

/s/ Charles H. Nesbitt
Charles H. Nesbitt
President

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

/s/ Robert J. McDermott
Robert J. McDermott
Commissioner