STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
BIANCULLI & SONS PRIVATE SANITATION, INC.	:	DECISION DTA NO. 821312
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 March 1, 1999 through February 28, 2002.	:	

Petitioner, Bianculli & Sons Private Sanitation, Inc., filed an exception to the determination of the Administrative Law Judge issued on July 3, 2008. Petitioner appeared by Kestenbaum & Mark (Bernard S. Mark, Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (Marvis A. Warren, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a brief in opposition. Oral argument, at petitioner's request, was held on January 28, 2009 in New York, New York.

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 tax due on sales, asset acquisitions and expense purchases for the audit period.

II. Whether the Division of Taxation properly asserted a penalty against petitioner for failing to pay the tax due and an additional penalty for omitting in excess of 25% of the tax which should have been reported on the return.

FINDINGS OF FACT

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

Petitioner, Bianculli & Sons Private Sanitation, Inc., was a sanitation business located at 4 O'Neil Avenue, Bayshore, New York, from March 1, 1999 through February 28, 2002 (the audit period), which provided garbage removal services and also removal services of materials brought to its three-acre transfer station facility located at the same address.

Petitioner operated the transfer station without required permits from the appropriate municipal government or the State of New York and, therefore, did so illegally. On October 17, 2001, petitioner's president, Paul Bianculli, pled guilty to misdemeanor charges for maintaining the illegal transfer station.

The Division of Taxation ("Division") performed a field audit of petitioner for the audit period, which was begun by Ms. Jennifer Buscemi on March 18, 2002 and completed by Mr. David Fitzgerald in September 2005. The initial appointment letter and request for books and records was issued on March 29, 2002, with subsequent written requests made by letters of July 25, 2002, September 10, 2002, November 20, 2002, September 19, 2003, July 2, 2004, August 6, 2004 and January 24, 2006. Records requested included tax returns, the general ledger for the audit period, sales invoices for the audit period, exemption documentation, fixed asset purchase and sale invoices, expense purchase invoices, all bank statements, cancelled checks, deposit slips, cash receipts and disbursement journals and other relevant documentation.

The Division's review of petitioner's sales records indicated that they were inadequate because petitioner did not produce sales invoices or other original source documentation. Although it was found that gross sales were in agreement with the sales reported for federal

income tax purposes, reconciliation with sales tax returns was impossible since petitioner did not report gross sales on its sales tax returns, only taxable sales.

The Division received information on two bank accounts maintained by petitioner during the audit period at European American Bank and the State Bank of Long Island. An analysis revealed that total deposits to the banks was $5,718,699.82,[1] which the Division determined was not in agreement with petitioner's books and records. From this figure, the Division subtracted those deposits attributable to town, county, exempt and U. S. Postal Service jobs. The remainder were identified as taxable sales or unexplained exempt sales. The Division totaled these sales for each month in the audit period, resulting in a difference between the taxable sales found by the Division and those reported by petitioner of $3,722,845.66.

The Division reduced the difference by the $6,376.00 of tax paid and subtracted sales to the State University at Stony Brook to arrive at audited taxable sales of $3,397,983.06. After subtracting reported sales of $77,280.00 the Division arrived at additional sales of $3,320,703.06 and additional tax of $275,607.21. This figure represented sales from the garbage route business and did not include sales made by petitioner at the illegal transfer station.

Sales at the transfer station were not documented by identifiable checks. The Division examined all checks deposited into the bank accounts for the month of June 2001 and determined, in the absence of proof to the contrary, that they were received from regular garbage route customers only. In addition, no invoices or sales receipts were produced that would have demonstrated that the checks were issued by customers other than regular garbage pickup customers.

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[1]This figure did not include a loan related to the State Bank of Long Island for April 2000 in the sum of $147,598.40, which was noted by Ms. Buscemi, but not included in the total deposits/sales column of her worksheet.

Petitioner provided entries of yards of material collected from customers as recorded in a ledger. Petitioner informed the Division that it charged between $10.00 and $22.00 per yard for this service, but provided no breakdown of how much was charged at any discreet price. During the audit period, the transfer station received 116,891 yards of material, resulting in sales of $2,571,602.00 when multiplied by $22.00, and $213,352.01 in sales tax due.

The total additional tax on route and transfer station sales was determined to be $488,959.22.

After reviewing the asset acquisition records, the Division determined that the records were adequate and auditable, and revealed $128,123.50 in additional taxable asset purchases with resulting additional tax due of $10,570.19. Petitioner paid $9,893.94 of the additional tax on assets under the Division's amnesty program, leaving a remainder due of $676.25.

The Division also reviewed expense purchase records for truck expense, machinery repairs and maintenance and equipment rentals and found the records to be inadequate because approximately 80% of them were not found or produced. Those that were located and reviewed were filed in order by date. Petitioner never provided any invoices for machinery repair and maintenance and equipment rentals. Further, suppliers associated with these accounts could not be identified.

An analysis of truck expense invoices, the only expense invoices provided, revealed a tax error rate of .007763, which, when applied to total truck expense purchases of $230,867.77, resulted in an additional tax due of $1,792.22. Machinery repairs and maintenance purchases of $35,123.66 and equipment rental purchases of $250,014.22 were all deemed taxable in the absence of any invoices and additional tax on these items was determined to be $2,925.12 and $20,626.17, respectively. Total additional tax due on all expense purchases was $25,343.51.

The total amount of additional sales and use tax due on sales, purchases and assets, less tax paid under amnesty on fixed assets, was determined on audit to be $514,978.98.

The Division issued a Notice of Determination to petitioner, dated August 25, 2005, which set forth additional tax due of $514,978.98, interest of $459,987.66 and penalty of $205,990.74, for a total due of $1,180,957.38.

Although the auditor, Mr. Fitzgerald, performed a test check of bank deposits for the month of June 2001, which included analyzing the names of customers, he was unable to discern if any were customers who paid petitioner for dumping at its transfer station since no invoices were presented to him to substantiate the claim that many were transfer station customers. Although petitioner submitted unsworn statements from seven individuals who stated they dumped at petitioner's transfer station, the Division did not attempt to contact the customers listed on checks deposited during June 2001, and petitioner did not have any other substantiating documentation relating any customers to transfer station sales during the audit period.

In operating its transfer station, petitioner collected the refuse and then transferred it, untreated, to other dumping stations for a fee. The fees petitioner paid to have the trash removed were acknowledged by the Division in its analysis of transfer station sales. Petitioner was able to profit in this business by charging customers one price for dumping small quantities at its transfer station and then paying at a volume discount for removal of the materials in larger quantities to other dumping stations. Most of the material received at the transfer station was construction debris.

After petitioner's transfer station was closed, a cleanup operation was commenced to return the property to an environmentally sound condition. During this operation, the building housing petitioner's business was subjected to severe water damage as a result of water used to

contain dust. Petitioner had its books and records in boxes and admittedly did not take precautions to safeguard them during the cleanup. Even though a cleanup of the property where the books and records were stored was imminent, there was no plan to safeguard or transfer them to another location.

Petitioner relied on its accountants to prepare its tax returns and never made an independent decision, investigation or inquiry concerning the taxability of the transfer station sales.

In its brief, the Division conceded additional nontaxable sales, which were discovered in the review of Mr. Fitzgerald's check deposit analysis for the month of June 2001. The 15 sales totaled $46,984.41 and resulted in a reduction of sales tax due of $3,894.32.

Ms. Toni Jean Bianculli worked for petitioner during the audit period. She was in charge of "managerial secretarial stuff" and did very little bookkeeping. Bookkeeping was done by another employee, Bob Rogers. Ms. Bianculli provided an undetermined number of invoices to the Division for expense purchases, which were later destroyed.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge found that the record established that the Division made a clear and unequivocal written request for books and records of petitioner's sales, and that petitioner failed to fully produce such books and records. The Administrative Law Judge concluded that the Division's auditor reasonably concluded that petitioner did not maintain or have available books and records that were sufficient to verify gross and taxable sales for the audit period.

The Administrative Law Judge observed that the audit method utilized by the Division to determine sales was a bank deposit analysis, which assumed that all the deposits to petitioner's bank accounts were receipts from taxable sales, reducing said figure by taxes paid and demonstrated tax exempt sales to towns, counties, the United States Postal Service, the State University at Stony Brook and other tax exempt organizations. Since petitioner offered no evidence of sales at the transfer station and an analysis of the checks for the month of June 2001 failed to identify any customers other than route customers, it was assumed that all deposits represented receipts from petitioner's route business.

The Division conceded at the hearing that there were additional tax exempt sales that were identified among the checks tested by the auditor for the month of June 2001. As a result, the Administrative Law Judge directed the Division to reduce the amount of additional sales tax due by $3,894.32.

The Administrative Law Judge noted that petitioner did not dispute that the rubbish removal service performed by petitioner is a taxable service (Tax Law §1105[c][5]; 20 NYCRR 527.7[a][1]). Petitioner argued, however, that because additional tax exempt sales were found in the June 2001 checks tested by the auditor, the Division should have credited petitioner for other tax exempt sales for the other months. The Administrative Law Judge rejected this argument, finding that petitioner did not carry its burden of establishing that additional tax exempt sales existed.

Petitioner argued for concessions in the tax on additional sales based upon various alleged errors committed by the Division. For instance, petitioner contended that tax exempt certificates were provided to the auditor at some point during the audit but were ignored. However, the Administrative Law Judge noted that no copies to support exempt sales not already

credited by the Division were introduced at the hearing, and no credible testimony was offered to demonstrate that exemption certificates were produced or reviewed by the Division on audit.

Petitioner also argued that loan proceeds from a loan with the State Bank of Long Island for the month of April 2000 in the sum of $147,598.40 was erroneously included in the deposits/sales column of the auditor's worksheet, resulting in additional audited sales. The Administrative Law Judge rejected this claim, since an examination of the worksheet (Schedule B-1) showed that this sum was noted, but was not included in audited gross sales.

Petitioner next challenged the results of the unexplained deposits, claiming that the Division was informed that one of the bank accounts was dedicated to receipts from the transfer station only. However, the Administrative Law Judge pointed out that except for *unsworn* statements from seven individuals who stated they dumped at petitioner's transfer station, petitioner submitted no other substantiating documentation that identified any customers as transfer station customers during the audit period. This made it impossible to tell if any account represented transfer station customers alone.

Without adequate books and records to support its contentions, the Administrative Law Judge concluded that petitioner failed to establish through credible documentary evidence or testimony that the Division's audit methodology was unreasonable and that the assessment erroneous.

During a portion of the audit period, petitioner operated a transfer station where customers came with rubbish and debris (mostly construction debris), which was collected by petitioner and then disposed of without further treatment. Customers were charged for the service of dumping at the transfer station. The Administrative Law Judge found, based upon the credible testimony of Ms. Bianculli, that petitioner merely accepted the debris and rubbish from

customers and then hauled the trash to other sites without treating or processing the material. Since petitioner established that these sales should have been treated as nontaxable by the Division, the Administrative Law Judge canceled that portion of the assessment based upon the transfer station sales.

With respect to the additional tax determined to be due in the areas of asset purchases and expense purchases consisting of truck expense, machinery repair and maintenance, and equipment rentals, petitioner has only argued that Ms. Bianculli's testimony, which was not rebutted, was sufficient proof that all taxes were paid on all rental items. The Administrative Law Judge rejected this argument. In fact, the Administrative Law Judge doubted that she had the personal knowledge to draw such a conclusion. Therefore, the Administrative Law Judge found that Ms. Bianculli's own testimony cast significant doubt on her claim that petitioner always paid tax on the rental expenses. Accordingly, the Administrative Law Judge sustained the Division's determination of additional tax due on asset and expense purchases.

The Administrative Law Judge, in addressing the issue of penalties, found that petitioner failed to establish that it maintained adequate records and did not produce records as required. The Administrative Law Judge viewed petitioner's attempt to lay blame for its failure on the environmental cleanup as a red herring, and observed that petitioner was well aware of the location of its records stored in boxes, yet it chose not to move them to a safe location. This permitted a very destructive and sloppy cleanup operation to take place with the real possibility of losing the records. The Administrative Law Judge found that petitioner's negligence in caring for its records did not constitute reasonable cause to abate penalty. The Administrative Law Judge sustained the penalties. However, given the cancellation of the tax determined to be due

on the transfer station sales, the Administrative Law Judge directed the Division to determine if petitioner remains liable for the omnibus penalty imposed under Tax Law § 1145(a)(1)(vi).

ARGUMENTS ON EXCEPTION

Petitioner, on exception, argues, as it did below, that petitioner's evidence established that the Division failed to consider non-taxable or tax exempt sales in its analysis. Petitioner also asserts that the evidence establishes that the auditor included the amount of non-taxable transfer station sales as part of its additional taxable sales found in the analysis of bank deposits, thus, "doubling up" on taxable sales. Petitioner also argues that its records were destroyed through no fault of its own and that it relied on its tax professionals and cannot be held liable for any underpayment of tax due or any penalty resulting therefrom. Petitioner did not take exception to the tax asserted on asset purchases.

The Division urges that we affirm the Administrative Law Judge. The Division argues that petitioner's taxable sales and sales tax due were substantially underreported for the entire audit period.

The Division also points out that the review of June 2001 bank deposits was not performed for the purpose of determining petitioner's audited taxable sales and did not result in a "doubling up" of audited transfer station sales. The Division argues that taxable sales were determined by a detailed examination of all of the deposits for the entire audit period.

The Division asserts that it properly determined petitioner's non-taxable sales, stating that the only adjustments the Division did not make were for alleged non-taxable sales for which petitioner offered no credible documentation or verification.

The Division argues that petitioner failed to show reasonable cause for abatement of penalties.

OPINION

A sales tax is imposed on the receipts from every "retail sale" of tangible personal property except as otherwise provided in Article 28 of the Tax Law (Tax Law § 1105[a]). A "retail sale" is "[a] sale of tangible personal property to any person for any purpose, other than . . . for resale as such . . ." (Tax Law § 1101[b][4][i]). The Tax Law provides, in relevant part, that if a sales tax return was not filed, "or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined [by the Division of Taxation] from such information as may be available. If necessary, the tax may be estimated on the basis of external indices . . . ." (Tax Law § 1138[a][1]).

When estimating tax pursuant to section 1138(a)(1), the Division is required to select a method of audit reasonably calculated to reflect the tax due, and the burden then rests upon the taxpayer to demonstrate that the method of audit or the amount of the assessment was erroneous.

With regard to the standard to be used in reviewing a sales tax audit using external indices, we stated in ***Matter of Your Own Choice***, ***Inc.*** (Tax Appeals Tribunal, February 20, 2003) that:

> To determine the adequacy of a taxpayer's records, the Division must first request (***Matter of Christ Cella, Inc. v. State Tax Commn.***, [102 AD2d 352, 477 NYS2d 858]) and thoroughly examine (***Matter of King Crab Rest. v. Chu***, 134 AD2d 51, 522 NYS2d 978) the taxpayer's books and records for the entire period of the proposed assessment (***Matter of Adamides v. Chu***, 134 AD2d 776, 521 NYS2d 826, ***lv denied*** 71 NY2d 806, 530 NYS2d 109). The purpose of the examination is to determine, through verification drawn independently from within these records (***Matter of Giordano v. State Tax Commn.***, 145 AD2d 726, 535 NYS2d 255; ***Matter of Urban Liqs. v. State Tax Commn.***, 90 AD2d 576, 456 NYS2d 138; ***Matter of Meyer v. State Tax Commn.***, 61 AD2d 223, 402 NYS2d 74, ***lv denied*** 44 NY2d 645, 406 NYS2d 1025; ***see also***, ***Matter of Hennekens v. State Tax Commn.***, 114 AD2d 599, 494 NYS2d 208), that they are, in fact, so insufficient that it is "virtually impossible [for the Division of Taxation] to verify taxable sales receipts and conduct a complete audit" (***Matter of Chartair, Inc. v. State Tax Commn.***, 65 AD2d 44, 411 NYS2d 41, 43; ***Matter of Christ Cella, Inc.***

> ***v. State Tax Commn.***, ***supra***), "from which the exact amount of tax due can be determined" (***Matter of Mohawk Airlines v. Tully***, 75 AD2d 249, 429 NYS2d 759, 760).

Where the Division follows the above procedure, thereby demonstrating that the records are incomplete, inaccurate or unverifiable, it may resort to external indices to estimate the tax due (***Matter of Urban Liqs. v. State Tax Commn.***, ***supra***), but must use an estimate methodology, which is reasonably calculated to reflect taxes due (***Matter of W.T. Grant Co. v. Joseph***, 2 NY2d 196 [1957], ***cert denied*** 355 US 869 [1957]). Exactness in the outcome of the audit method is not required (***Matter of Markowitz v. State Tax Commn.***, 54 AD2d 1023 [1976], ***affd*** 44 NY2d 684 [1978]).

The taxpayer bears the burden of proving by clear and convincing evidence that the assessment is erroneous (***Matter of Scarpulla v. State Tax Commn.***, 120 AD2d 842 [1986]) or that the audit methodology is unreasonable (***Matter of Cousins Serv. Station***, Tax Appeals Tribunal, August 11, 1988).

We affirm the determination of the Administrative Law Judge.

The record establishes that the Division properly requested taxpayer's books and records, reviewed such records as were made available. The Division found them to be inadequate, since petitioner did not provide verifiable books and records sufficient to verify gross and taxable sales for the audit period.

The Division's audit methodology to determine taxable sales used a bank deposit analysis, which assumed, in the absence of proof to the contrary, that all the deposits to petitioner's bank accounts were receipts from taxable sales. The auditor reduced said figure by taxes paid and by amounts that petitioner demonstrated to be tax exempt sales. Since no evidence of sales at the transfer station was offered and an analysis of the checks for the month of

June 2001 failed to identify any customers other than route customers, it was assumed that all deposits represented receipts from petitioner's route business.[2] Petitioner argues that because additional tax exempt sales were found in the June 2001 checks tested by the auditor, the Division should have credited petitioner for other tax exempt sales for the other months. However, we agree with the Administrative Law Judge that petitioner did not carry its burden of establishing with credible evidence that any additional tax exempt sales existed.

In every instance in which petitioner's arguments have failed in this case, it has been due to its lack of documentation or other convincing evidence to support its arguments. Without adequate books and records to support its contentions, we conclude that petitioner has failed to establish through credible evidence that the Division's audit methodology was unreasonable and the assessment erroneous.

As we noted earlier, during a portion of the audit period, petitioner operated a transfer station where customers came with rubbish and debris, which was collected by petitioner and then disposed of without further treatment. Tax Law § 1105 (former [c][2]), in effect during the period in issue, provided that the receipts from every sale for the processing of tangible personal property were subject to tax.

The Administrative Law Judge determined that these sales should have been found nontaxable by the Division and canceled that portion of the assessment based upon the transfer station sales. Petitioner claims that these nontaxable transfer station sales were included as part of additional taxable sales arrived at by the auditor's analysis of petitioner's unexplained bank

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[2] The finding of fact above reflects that the Division conceded at the hearing that there were additional tax exempt sales that were identified among the checks tested by the auditor for the month of June 2001. As a result, the Administrative Law Judge directed the Division to reduce the amount of additional sales tax due by $3,894.32.

deposits, thereby "doubling up" the determination of gross amount of transfer station sales. We must again reject petitioner's argument as not supported by the record.

We also affirm the Administrative Law Judge on the issue of penalty for reasons stated in his determination. As the Administrative Law Judge observed, since the tax determined to be due on the transfer station sales was canceled, it remains for the Division to determine if petitioner remains liable for the penalty assessed pursuant to Tax Law § 1145(a)(1)(vi).

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of Bianculli & Sons Private Sanitation, Inc. is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Bianculli & Sons Private Sanitation, Inc. is granted to the extent set forth above in conclusions of law "C," "E," and "G" of the Administrative Law Judge's determination, but is otherwise denied; and

4. The Notice of Determination dated August 25, 2005, as modified in accordance with paragraph "3 " above, is sustained.

DATED: Troy, New York
July 9, 2009

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

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