

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
NEW YORK TRADING CORPORATION,	:	DECISION
NEW YORK TRADING CORPORATION-	:	DTA Nos. 821962, 821963
AMOCO STATION	:	and 821964
AND MUHAMMAD KAMAL	:	
	:	
for Revision of Determinations or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax	:	
Law for the Period December 1, 2002 through	:	
February 28, 2006.	:	

Petitioners, New York Trading Corporation, New York Trading Corporation-Amoco Station and Muhammad Kamal, filed an exception to the determination of the Administrative Law Judge issued on December 23, 2009. Petitioners appeared by Maqsood H. Siddiqui, Esq. The Division of Taxation appeared by Mark Volk, Esq. (Lori P. Antolick, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a letter brief in lieu of a formal brief in opposition. Petitioners did not file a reply brief. Oral argument, at petitioner's request, was heard on December 8, 2010, in Troy, New York.

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

ISSUES

I. Whether the audit methodologies employed by the Division of Taxation, and the results derived therefrom that petitioners owed additional sales tax, plus interest and penalties, were proper and should be sustained.

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

FINDINGS OF FACT

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

Petitioner New York Trading Corporation is a gasoline service station and convenience store located in North Bellmore, New York (the North Bellmore location). The service station reported sales of regular, mid-grade and premium motor fuels, and its three service bays performed general service, New York State Department of Motor Vehicle inspections and tire changes. The convenience store sold automobile supplies, candy, cigarettes, soda, snack foods, telephone cards and coffee.

On August 5, 2005, the Division of Taxation (Division) sent a letter to the New York Trading Corporation and its representative stating that a sales and use tax field audit of the business operation was to be conducted for the period December 1, 2002 through August 31, 2005. The Division's letter requested that all of the business's books and records for the audit period be available for review. Among the records specifically requested were the sales tax returns, cash receipts journal, cash disbursements journal, general ledger, sales invoices, purchase invoices, exemption documents, federal income tax returns, New York State corporation tax returns, cash register tapes, bank statements, and canceled checks.

On August 29, 2006, the Division sent a letter advising the corporation's representative that the audit period was being expanded to include its sales and use tax records for the subsequent period September 1, 2005 through February 28, 2006, and that the amended audit period was now to cover December 1, 2002 through February 28, 2006.

On December 6, 2005 and May 8, 2006, the corporation, by its representative, executed two consents extending period of limitations for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law that collectively extended the period in which to assess sales and use taxes due for the period September 1, 2002 through August 31, 2005 to September 30, 2006.

The corporation provided the auditor with bank deposits and purchase invoices for fuel and cigarettes for the entire audit period. The corporation did not provide the auditor with a general ledger, sales invoices, cash register tapes or other source documentation detailing the amount of retail sales of the business operation.

The auditor reviewed the fuel purchase invoices and determined audited fuel purchases using the actual amount of fuel delivered to the business location as shown on the purchase invoices. A review of the purchase invoices and tax returns revealed that reported purchases did not include at least one delivery of fuel each month, except for the last two quarters of the audit period, after petitioner had been notified by the Division of the audit. As the corporation did not supply any information as to the price charged for its gasoline sales, the auditor obtained the actual selling price per gallon of regular gasoline from the Oil Pricing Information Service (OPIS), which maintains a database of the actual price of regular gasoline purchased with credit cards at many gasoline stations including the corporation's station. After removing the New York State sales and excise taxes from the OPIS price per gallon, the auditor multiplied the audited gallons purchased by the taxable base price per gallon to compute audited taxable sales. The auditor next applied the applicable sales tax rate to audited taxable sales to arrive at the audited amount of sales tax due. Credit was given by the auditor for sales tax that the corporation had prepaid on its fuel purchases and for sales tax previously remitted, resulting in

additional audited sales tax due on motor fuel sales for the North Bellmore location of \$25,852.00.

The auditor next determined non-fuel sales, which consisted of sales at both the service repair bays and the convenience store. These sales were calculated by subtracting the audited sales for fuel from the bank deposits to arrive at audited non-fuel gross sales. A taxable ratio of 93.27 percent was established by the auditor based upon a one-week sample of cash register tapes. This taxable ratio was applied to audited gross non-fuel sales to determine audited taxable sales and sales tax due. From this figure, prepaid sales tax on the purchase of cigarettes and sales tax previously remitted were subtracted to arrive at additional sales tax due on non-fuel sales of \$77,500.00.

On September 7, 2006, the Division issued to petitioner New York Trading Corporation a Notice of Determination asserting additional sales tax due for the period December 1, 2002 through February 28, 2006 in the amount of \$107,354.00, plus penalty and interest.

On September 7, 2007, the Bureau of Conciliation and Mediation Services (BCMS) issued a Conciliation Order to petitioner New York Trading Corporation reducing the amount of sales tax due to \$96,090.00, plus penalty and interest.

Petitioner New York Trading Corporation-Amoco Station operates a gasoline station and small convenience store kiosk in Holtsville, New York (the Holtsville location). The station reported sales of regular, mid-grade and premium motor fuels. The convenience store kiosk sold automobile supplies, candy, cigarettes, soda, snack foods, telephone cards and coffee.

On August 5, 2005, the Division sent a letter to the New York Trading Corporation-Amoco Station and its representative stating that a sales and use tax field audit of the business operation was to be conducted for the period December 1, 2002 through August 31, 2005. The

Division's letter requested that all of the business's books and records for the audit period be available for review. Among the records specifically requested were the sales tax returns, cash receipts journal, cash disbursements journal, general ledger, sales invoices, purchase invoices, exemption documents, federal income tax returns, New York State corporation tax returns, cash register tapes, bank statements, and canceled checks.

On August 29, 2006, the Division sent a letter advising the corporation's representative that the audit period was being expanded to include its sales and use tax records for the subsequent period September 1, 2005 through February 28, 2006, and that the amended audit period was now to cover the period December 1, 2002 through February 28, 2006.

On November 18, 2005 and April 27, 2006, the corporation, by its representative, executed two consents extending period of limitations for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law that collectively extended the period in which to assess sales and use taxes due for the period September 1, 2002 through August 31, 2005 to September 30, 2006.

The corporation provided the auditor with bank deposits and purchase invoices for fuel and cigarettes for the entire audit period. The corporation did not provide the auditor with a general ledger, sales invoices, cash register tapes or other source documentation detailing the amount of retail sales of the business operation.

The auditor reviewed the fuel purchase invoices and determined audited fuel purchases by using the actual amount of fuel delivered to the business location as shown on the purchase invoices. A review of the purchase invoices and tax returns revealed that reported purchases did not include at least one delivery of fuel each month, except for the last two quarters of the audit period, following notification by the Division of the audit. As the corporation did not supply any

information as to the price charged for its gasoline sales, the auditor obtained the actual selling price per gallon of regular gasoline from OPIS, which maintains a database of the actual price of regular gasoline purchased with credit cards at many gasoline stations including the corporation's station. After removing the New York State sales and excise taxes from the OPIS price per gallon, the auditor multiplied the audited gallons purchased by the taxable base price per gallon to compute audited taxable sales. The auditor next applied the applicable sales tax rate to audited taxable sales to arrive at the audited amount of sales tax due. Credit was given by the auditor for sales tax that the corporation had prepaid on its fuel purchases and for sales tax previously remitted, resulting in additional audited sales tax due on motor fuel sales for the Holtsville location of \$22,608.00.

To determine the amount of non-fuel sales, the auditor examined cash register tapes provided by the corporation for one week in the month of November 2005. These were the only sales documents provided. The auditor initially computed audited packs of cigarettes according to the corporation's invoices and developed an index based upon the cash register tapes that revealed that the business had \$7.91 of taxable sales for every pack of cigarettes sold. The \$7.91 included both the sale of cigarettes and any other non-fuel items sold in the convenience store kiosk as indicated by the cash register tapes for the one week of November 2005. The auditor multiplied the \$7.91 figure by the number of packs of cigarettes purchased by the corporation during the audit period, resulting in audited taxable sales for non-fuel items. The auditor subtracted from audited taxable sales the credit for prepaid sales tax paid to suppliers on the purchase of cigarettes and the amount of sales tax paid with the sales tax returns when filed, resulting in additional sales tax due on non-fuel sales for the audit period of \$35,442.00.

On September 5, 2006, the Division of Taxation issued to petitioner New York Trading Corporation-Amoco Station a Notice of Determination asserting additional sales tax due for the period December 1, 2002 through February 28, 2006 in the amount of \$75,366.00, plus penalty and interest.

On September 14, 2007, the BCMS issued a Conciliation Order to petitioner New York Trading Corporation-Amoco Station reducing the amount of sales tax due to \$58,051.00, plus penalty and interest.

On September 11, 2006, the Division of Taxation issued to petitioner Muhammad Kamal as an officer or responsible person of New York Trading Corporation, a Notice of Determination asserting additional sales tax due for the period December 1, 2002 through February 28, 2006 in the amount of \$107,354.00, plus penalty and interest. On the same date, the Division issued to Muhammad Kamal, as an officer or responsible person of New York Trading Corporation-Amoco Station, a Notice of Determination asserting additional sales tax due for the period December 1, 2002 through February 28, 2006 in the amount of \$75,366.00, plus penalty and interest. On September 14, 2007, BCMS issued a Conciliation Order to Mr. Kamal reducing the sales tax due for both notices to \$154,141.00, plus penalty and interest.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge found that the Division was entitled to estimate petitioners' sales tax liability because it made proper records requests and petitioners provided no source documentation to substantiate the sales. The Administrative Law Judge determined that the audit, which was based upon petitioners' own purchases and selling prices, was reasonable. The Administrative Law Judge rejected petitioners' complaints about imprecision with the audit because petitioners failed to maintain sufficient sales records as required by Tax Law

§ 1135(a)(1), and must bear the burden of inaccuracies resulting from the lack of records. The Administrative Law Judge further determined that petitioners failed to show an error in the audit methodology because the auditor used petitioners' data to calculate the taxes due and petitioners provided no source documentation indicating any error. The Administrative Law Judge also concluded that petitioners failed to present evidence supporting reasonable cause for the reduction or abatement of penalties. Accordingly, the Administrative Law Judge sustained the Notices of Determination issued to petitioners.

ARGUMENTS ON EXCEPTION

Petitioners raise the same arguments on exception as they did below. Petitioners take issue with the audit methodology and allege that the Division miscalculated sales of certain items sold by petitioners, including candies and cakes, coffee, and other miscellaneous items. Petitioners contend that the record below is sufficient to overcome the presumption of correctness and argue that we must reverse the determination of the Administrative Law Judge and cancel the Notices of Determination.

The Division argues that petitioners must support their argument by providing clear and convincing proof. The Division states that petitioners failed to provide any evidence, much less the requisite source documentation, to support any of their claims regarding their sales. The Division also argues that penalties should be sustained because petitioners presented no reasonable cause for the abatement of penalties.

OPINION

We affirm the determination of the Administrative Law Judge.

We have often restated the standard for reviewing a sales tax audit where external indices

were employed. In *Matter of AGDN, Inc.* (Tax Appeals Tribunal, February 6, 1997), we stated as follows:

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). Specifically, such records required to be maintained “shall include a true copy of each sales slip, invoice, receipt, statement or memorandum” (Tax Law § 1135). It is equally well established that where 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 estimating sales tax due, the Division need only adopt an audit method reasonably calculated to determine the amount of tax due (*Matter of Grant Co. v. Joseph*, 2 NY2d 196, 159 NYS2d 150, *cert denied* 355 US 869); exactness is not required (*Matter of Meyer v. State Tax Commn.*, 61 AD2d 223, 402 NYS2d 74, *lv denied* 44 NY2d 645, 406 NYS2d 1025; *Matter of Markowitz v. State Tax Commn.*, 54 AD2d 1023, 388 NYS2d 176, *affd* 44 NY2d 684, 405 NYS2d 454). 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 (*Matter of Meskouris Bros. v. Chu*, 139 AD2d 813, 526 NYS2d 679; *Matter of Surface Line Operators Fraternal Org. v. Tully*, 85 AD2d 858, 446 NYS2d 451).

Our review of the record reveals that the Division made a clear and unequivocal written request for books and records of New York Trading Corporation and New York Trading Corporation-Amoco Station sales. We find that the corporations failed to provide the Division with books and records sufficient to verify their gross and taxable receipts because petitioners’ submission included no source documents, such as sales invoices, complete purchase invoices or cash register tapes (*see Matter of Vebol Edibles v. Tax Appeals Trib.*, 162 AD2d 765 [1990], *lv denied* 77 NY2d 803 [1991]; *Matter of Club Marakesh v. Tax Commn. of State of New York*, 151 AD2d 908 [1989], *lv denied* 74 NY2d 616 [1989]). Accordingly, we hold that the Division

was entitled to resort to external indices to estimate the amount of taxes due (*see Matter of Urban Liqs. v. State Tax Commn.*, 90 AD2d 576 [1982]).

The central question presented in this case is whether petitioners have established that the amount of tax assessed as the result of the application of the audit methods used in this case was erroneous (*Matter of Scarpulla v. State Tax Commn.*, 120 AD2d 842 [1986]; *Matter of Surface Line Operators Fraternal Org. v. Tully* 85 AD2d 858 [1981]).

We note that “[c]onsiderable latitude is given an auditor’s method of estimating sales under such circumstances as exist in [each] case” (*Matter of Grecian Sq. v. New York State Tax Commn.*, 119 AD2d 948, 950 [1986]). Whether the audit method used was “reasonably calculated to reflect the taxes due” (*Matter of W.T. Grant Co. v. Joseph, supra* at 206) can only be determined based on information made available to the auditor before the assessment is issued (*see e.g. Matter of Queens Discount Appliances*, Tax Appeals Tribunal, December 30, 1993; *Matter of House of Audio of Lynbrook*, Tax Appeals Tribunal, January 2, 1992).

Herein, in order to determine the corporations’ sales of motor fuel, the Division resorted to the purchase records supplied by the corporations, together with the actual price of their sales as reported by OPIS. Petitioners do not dispute either the absence of complete sales records or the Division’s authority to resort to indirect audit methodologies in this case. In fact, the Division’s authority to do so has been consistently sustained, including specifically its authority to resort to the use of statewide average selling prices for gasoline (*see Matter of Mobley v. Tax Appeals Trib.*, 177 AD2d 797 [1991], *appeal dismissed* 79 NY2d 978 [1992]; *Matter of Flanagan*, Tax Appeals Tribunal, June 14, 1990). Here, the Division used the corporations’ own purchases and selling prices to determine the amount of petitioners’ sales of motor fuel.

In determining non-fuel sales at the North Bellmore location, the auditor relied on audited sales for fuel and New York Trading Corporation's own bank deposits to determine additional sales tax due. In determining the amount of non-fuel sales at the Holtsville location, the auditor used cash register tapes for one week, which were provided by New York Trading Corporation-Amoco Station, to calculate the amount of taxable sales for each pack of cigarettes sold. Again, having established the unavailability of required books and records, the Division was clearly entitled to resort to the use of indirect audit methods to determine sales and sales tax liability.

Petitioners take issue with the assessment based upon what they allege are imprecisions with the audit. As a general proposition, 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 that taxpayer (*see Matter of Markowitz v. State Tax Commn., supra; Matter of Meyer v. State Tax Commn., supra*). Petitioners specifically complain that their profit margin was less than that determined on audit, and that most of their non-fuel sales were not subject to the imposition of sales tax. The record shows that the auditor used petitioners' own purchases and selling prices to determine the amount of fuel sales, and that petitioners presented no documentation to establish the amount of reported fuel sales.

Petitioners' claims that their profit margin was less than determined on audit and that their non-fuel sales were nontaxable fall far short of the evidence necessary to override the results of the audits.

We find petitioners' claims to be without merit because they provided no source documentation, such as sales invoices, complete purchase invoices or cash register tape records, either on audit or at the hearing, that would establish the actual amount of fuel and non-fuel sales. Absent any records, petitioners' arguments do not provide any grounds for changing the

Division's audit results. As such, petitioners have not carried their burden of showing any error and provide no basis to either modify or cancel the Notices of Determination.

We also find that the Administrative Law Judge properly sustained the penalties assessed against petitioners. In establishing reasonable cause for the abatement of penalties, the taxpayer faces an onerous task (*see* Tax Law § 1145[a][1][iii]; *Matter of Philip Morris*, Tax Appeals Tribunal, April 29, 1993). Petitioners bear the burden of showing reasonable cause such that the nonpayment of taxes was beyond the control of petitioners and due to no fault of their own (*Matter of F & W Oldsmobile v. State Tax Commn.*, 106 AD2d 792 [1984]). Here, the corporations neither maintained nor produced records, as required. Further, purchases were underreported and there was a discrepancy between reported and audited sales. Accordingly, the penalties assessed against petitioners are sustained.

We have reviewed and considered petitioners' remaining argument, and we find it without either support or merit. Therefore, we affirm the determination of the Administrative Law Judge. We find nothing in this record, nor in the arguments presented by petitioners on exception, that would justify our modifying the determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of New York Trading Corporation, New York Trading Corporation-Amoco Station and Muhammad Kamal is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of New York Trading Corporation, New York Trading Corporation-Amoco Station and Muhammad Kamal are denied; and

4. The Notices of Determination issued to New York Trading Corporation, New York Trading Corporation-Amoco Station, and Muhammad Kamal, dated September 7, 2006, September 5, 2006, and September 11, 2006, respectively, as modified by BCMS, are sustained.

DATED: Troy, New York
May 5, 2011

/s/ James H. Tully, Jr.
James H. Tully, Jr.
President

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

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner