

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
2101 DINER CORP. D/B/A SUFFOLK DINER	:	
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 September 1, 2005 through May 31, 2007.	:	

In the Matter of the Petition	:	DECISION
of	:	DTA NOS. 822271
GEORGE REKKAS	:	AND 822329
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 September 1, 2005 through May 31, 2007.	:	

Petitioners, 2101 Diner Corp. d/b/a Suffolk Diner and George Rekkas, filed exceptions to the determination of the Administrative Law Judge issued on March 11, 2010. Petitioners appeared by Paul Kalker, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Lori P. Antolick, Esq., of counsel).

Petitioners did not file a brief in support of their exception. The Division of Taxation did not file a 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 2101 Diner Corp. d/b/a Suffolk Diner (petitioner¹) produced, upon request by the Division of Taxation (Division), adequate books and records for the performance of a detailed audit.

II. Whether the audit method employed by the Division was reasonably calculated to reflect tax due or whether petitioner has shown error in either the audit method or the amount of the assessment resulting therefrom.

III. Whether petitioner has offered evidence sufficient to establish reasonable cause for the abatement of penalties.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact “8,” which has been modified. We have also made an additional finding of fact. The Administrative Law Judge’s findings of fact, the modified finding of fact and the additional finding of fact are set forth below.

During the period at issue herein, petitioner operated a diner known as the Suffolk Diner in Centereach, New York. It ceased operation in or about March 2007, at which time the business was sold.

The auditor mailed an appointment letter with an attached Records Requested List to petitioner on February 13, 2007. The letter indicated that the audit period was September 1, 2005 through November 30, 2006. Petitioners’ representative requested a postponement of the appointment.

¹ George Rekkas was assessed as an officer or responsible person of 2101 Diner Corp. At the hearing held in these matters, it was conceded by petitioners’ representative that Mr. Rekkas was an officer or responsible person of the corporation. Therefore, the term “petitioner” refers to 2101 Diner Corp.

On March 28, 2007, the auditor mailed another appointment letter (with attached Records Requested List) to petitioner, which expanded the audit period to include the period December 1, 2006 through February 28, 2007. When petitioners' representative called to cancel the appointment, another letter was sent on April 25, 2007 that scheduled an audit for May 8, 2007. On May 3, 2007, after receiving a telephone call from petitioners' representative, the auditor picked up petitioners' records, which consisted of sales tax returns, 2005 and 2006 federal income tax returns, cash disbursements journal and one bank statement. Guest checks, cash register tapes and expense purchase invoices for the audit period were not provided to the auditor.

Subsequently, on May 8, 2007, the representative informed the auditor that petitioner was no longer in business. The auditor then visited the business premises and spoke with a person who identified himself as the new owner and manager who took over from petitioner on March 26, 2007. As a result of this conversation, the auditor decided to again update the audit period to include the final sales tax quarter in which petitioner was in business, i.e., March 1, 2007 through May 31, 2007. Additional appointment letters and records requests were sent on May 10, 2007, May 29, 2007 and June 11, 2007. No additional books and records were provided to the auditor.

Because the auditor determined that the records provided by petitioner were inadequate for the performance of a detailed audit, he selected an audit method that related credit card receipts to total receipts.

Since complete bank statements were not made available, the auditor subpoenaed petitioner's bank records from HSBC Bank. From the bank statements received, the auditor was able to determine whether the deposits were cash or, if a credit card deposit, the type of credit

card used, i.e., Visa, MasterCard, American Express or Discover Card, and the amounts deposited.

To the credit card receipts, the auditor added a settlement fee, which is the fee charged by the credit card company to the taxpayer. These fees were determined by using percentages derived from other audits performed by the Division. The fees varied for each credit card company and ranged from 1.5% for Discover Card to 2.9% for American Express. For the audit period, total credit card receipts, including settlement fees, were \$1,660,770.06.

At the time of this audit, the auditor was also auditing a similar diner located in Bohemia, New York. During his 24 years with the Division, the auditor had conducted between 350 and 480 sales tax audits. He indicated that in the last few years, he had audited four or five diners including a diner that had operated at the same location as petitioner. For each of the diners that he audited, the auditor utilized the credit card percentage audit method.

Because petitioner was out of business at the time of the commencement of this audit, the auditor obtained a menu from the new operator of the diner that succeeded petitioner at the Centereach location and compared the menu to that of the diner in Bohemia, New York, which, the auditor testified, had nearly identical pricing as well as a similar location with comparable business traffic. The auditor indicated that in his experience, similar pricing was the primary factor in determining the method of payment, i.e., whether the patrons paid in cash or by credit card. In addition, since petitioner and the Bohemia, New York, diner were in similar locations, the auditor indicated that “we assume the same type of people live [there].”

The Division introduced into evidence, as part of the audit workpapers, a Nassau/Suffolk Diner Database, which set forth a listing of 25 diners with audit periods commencing from December 1996 through June 2003. Among the information provided in this listing was the

credit card percentage of 23 of the 25 diners listed thereon. The credit card percentages ranged from a low of 2.11% (the next lowest percentage was 14.94%) to a high of 48.36%. The average credit card percentage of all of the diners listed was 27.268%. Of the 17 diners with gross sales per quarter of less than \$400,000.00 (petitioner was in this category), the average credit card percentage was 24.879%. The auditor indicated that the lower the credit card percentage, the higher the assessment of additional tax due.

Due to the auditor's conclusion that the Bohemia diner was similar to petitioner's operation, an observation test² of the Bohemia diner was utilized whereby the auditor computed the percentage of credit card receipts for the one day, i.e., every sale was recorded and at the end of the day, a percentage of credit card receipts to total receipts was calculated.

To determine net credit card receipts, it was necessary to deduct tips from the credit card revenue. The tips percentage (the percentage of tips from credit card receipts) was also calculated from the observation test of the Bohemia, New York diner. This tips percentage was computed to be 5.98%. The credit card percentage (credit card receipts excluding tips divided by total receipts) was found to be 30.20%.

From petitioner's subpoenaed bank statement, the auditor calculated petitioner's total credit card revenue (including settlement fees) to be \$1,660,770.06 for the audit period. By applying the tips percentage of 5.98% obtained from the audit of the Bohemia diner, petitioner's net credit card receipts were determined to be \$1,561,479.13. The net credit card receipts were then divided by the credit card percentage determined from the audit of the Bohemia diner (30.20%) to arrive at total audited receipts of \$5,170,460.69. Sales tax of \$410,542.91 was

² The auditor indicated that while he was not personally involved in the conduct of the observation test, the test was conducted by other members of his office staff. The auditor did, however, review all of the records, such as guest checks, utilized in the observation test.

deducted, thereby resulting in audited taxable sales of \$4,759,917.78. Petitioner had reported taxable sales of \$1,918,233.00 for the audit period, which was subtracted, leaving a balance of \$2,841,684.78 in additional taxable sales. Tax due thereon was determined to be \$245,095.31.

Accordingly, on September 10, 2007, the Division issued a Notice of Determination to petitioner assessing additional sales tax in the amount of \$245,095.31, plus penalty and interest, for a total amount due of \$352,371.83 for the period September 1, 2005 through May 31, 2007.

On September 13, 2007, the Division issued a Notice of Determination to George Rekkas as an officer or responsible person of petitioner assessing tax in the amount of \$245,095.31, plus penalty and interest, for a total amount due of \$352,692.45, for the period September 1, 2005 through May 31, 2007. As previously noted, at the hearing held in this matter, it was conceded that George Rekkas was, in fact, an officer or responsible person of petitioner.

At a conciliation conference held by the Division's Bureau of Conciliation and Mediation Services (BCMS), petitioner provided information to the conciliation conferee that indicated that the settlement fees for Visa, MasterCard and Discover Card, which had been included in the auditor's computations (*see*, above), had already been paid by petitioner and, therefore, should not have been added by the auditor. For American Express Card sales, the settlement fees for periods prior to August 1, 2006 should also have been excluded from the auditor's computations. Accordingly, the conferee determined that total credit card revenue should have been \$1,626,683.45 rather than \$1,660,770.06 as originally computed, with the result being that additional taxable sales were \$2,743,989.46 (instead of \$2,841,684.78 as initially computed by the auditor), with tax due thereon in the amount of \$236,669.09.

We have modified finding of fact "8 " of the Administrative Law Judge's determination to read as follows:

The Division introduced into evidence a listing of other audits conducted at the Suffolk Diner location. An audit of Cronos Enterprises, Inc., was conducted for the period March 1, 2001 through November 30, 2003 and an audit of Parnasos, Inc., was conducted for the period March 1, 2004 through November 30, 2005, in addition to the audit at issue in this matter.

The auditor in the present matter also conducted the audit of Parnasos, Inc., and he employed the same audit method for both audits, which included utilization of the observation test conducted at the Bohemia, New York, diner. Petitioner's representative also represented Parnasos, Inc., during its audit.

We take official notice of the two earlier cases involving the Suffolk Diner in a previous corporate incarnation. The first is *Matter of Cronos Enters.* (Tax Appeals Tribunal, January 26, 2006), challenging sales tax asserted for the period December 1, 1998 through February 28, 2001. The second case is *Matter of Cronos Enters.* (Tax Appeals Tribunal, December 13, 2007) challenging sales tax asserted for the period March 1, 2001 through November 30, 2003. We find these matters noteworthy, since George Rekkas is a common denominator as an officer in this and in the previous two cases involving Suffolk Diner. In each of the two previous cases involving Suffolk Diner and George Rekkas, the taxpayers had inadequate books and records to verify taxable sales. In one case, the cash register tapes did not reflect what was sold, rather they only had handwritten dates (not machine printed dates), no opening daily transaction number, and no guest checks or other source documents were provided for the audit period. The taxpayer's records were found unreliable. In the other matter, there were only "sample" cash register tapes. These samples did not always match with the "sample" guest checks provided and, again, the source documentation was found insufficient and unreliable for a detailed audit.³

We make the following additional finding of fact.

The taxpayers' representative, Mr. Kalker, stated that his client provided all of the records it had maintained to the auditor (*see*, Tr., p. 18). Mr. Rekkas, President of petitioner, did not testify on behalf of his corporation.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

At the outset, the Administrative Law Judge pointed out that petitioners did not dispute that they failed to provide, after numerous requests by the auditor, books and records sufficient for the performance of a detailed audit. Source documents such as guest checks, cash register

³ We modified this fact to more accurately reflect the record.

tapes and expense purchase invoices were not provided to the auditor. The Administrative Law Judge pointed out that under such circumstances, the law provides that the amount of tax due shall be determined from such information as may be available and, if necessary, the tax may be estimated on the basis of external indices (*see*, Tax Law § 1138[a][1]). This authority is subject only to the limitation that the Division must select an audit method reasonably calculated to reflect the tax due. The burden of proof is then upon the taxpayer to demonstrate that the method of audit or the amount of the assessment was erroneous.

After having established the insufficiency of petitioner's books and records, the Administrative Law Judge found that the Division could properly resort to an estimate based on the auditor's audit experience to determine its taxable sales.

The Administrative Law Judge rejected petitioners' claim that the audit method utilized was arbitrary and capricious. First, the Administrative Law Judge noted that in arriving at the additional taxable sales and resulting additional sales tax due, the auditor applied the credit card percentage derived from his audit of a similar diner to petitioner's own receipts for the audit period. The records pertaining to petitioner's receipts (including credit card receipts) were not furnished to the auditor by petitioners but, instead, were obtained by means of a subpoena from HSBC.

The Administrative Law Judge also rejected petitioners' contention that the record does not contain enough specific information about the diner that the auditor chose as the comparable. Since petitioners presented no source documentation to prove taxable sales for the audit period nor refuted the audit findings, the Administrative Law Judge found that petitioners failed to sustain their burden of proving, by clear and convincing evidence, that the assessments were erroneous.

Finally, the Administrative Law Judge rejected petitioners' argument that penalties assessed herein should be abated.

ARGUMENTS ON EXCEPTION

On exception, petitioners argue, as they did below, that the audit method employed by the Division was unreasonable. The auditor, in computing the percentage of credit card receipts versus total receipts, chose to apply the actual percentage from one particular diner as opposed to an average of several diners. Thus, petitioners state that the Division's calculation was erroneous. Petitioners argue that they have satisfied their burden of demonstrating that the assessments are erroneous and that their books and records were adequate. Finally, petitioners assert that penalties be abated, since they have been erroneously calculated and assessed. Additionally, petitioners raise the claim on exception that petitioners provided adequate books and records for audit.

The Division argues that petitioner's books and records were inadequate and that its auditor properly arrived at the sales tax due. The Division requests that we affirm the determination of the Administrative Law Judge in its entirety.

OPINION

We begin by addressing petitioners' claim that they had adequate books and records. We note that petitioners were given three opportunities to produce evidence and make their arguments: i) at the audit; ii) at the BCMS conference and iii) at the hearing before the Administrative Law Judge. Although petitioners raised this issue in their petitions and at the outset of the hearing, the issue was not argued in their brief to the Administrative Law Judge. In his determination below, the Administrative Law Judge noted that this issue was no longer in dispute (Determination, conclusion of law "B"). We reject petitioners' attempt to resurrect this

issue. As no briefs were filed on exception, petitioners have not demonstrated that their books and records were sufficient.

Tax Law § 1105(a) imposes a sales tax on the receipts from every “retail sale” of tangible personal property except as otherwise provided in Article 28 of the Tax Law. 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]).

Tax Law § 1135(a) provides that “[e]very person required to collect tax shall keep records of every sale . . . and of all amounts paid, charged or due thereon and of the tax payable thereon, in such form as the commissioner of taxation and finance may by regulation require.”

20 NYCRR 533.2(b)(1) provides that the records that are required to be kept must contain a true copy of each:

(i) sales slip, invoice, receipt, contract, statement or other memorandum of sale;

* * *

(iii) cash register tape and any other original sales document.

We affirm the determination of the Administrative Law Judge.

As noted above, Suffolk Diner has been before us in its various corporate incarnations and, always, with George Rekkas as a responsible officer. Over the years, this taxpayer continuously fails to maintain and provide, upon request for audit by the Division, books and records sufficient for conducting a detailed audit. In the present matter, there is no dispute that petitioners failed to provide, after several written requests by the auditor,⁴ books and records sufficient to perform a

⁴The records were requested in letters dated February 13, 2007, March 28, 2007 and April 25, 2007 (*see*, Tr., pp. 24-26).

detailed audit. Source documents such as guest checks, cash register tapes and expense purchase invoices were not provided to the auditor.

Tax Law § 1138(a)(1) 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 acting pursuant to section 1138(a)(1), the Division is required to select a method of audit reasonably calculated to reflect the tax due. The burden of proof is then upon the taxpayer to demonstrate that the method of audit or the amount of the assessment was erroneous (*see, Matter of Your Own Choice*, Tax Appeals Tribunal, February 20, 2003).

Petitioners failed to provide adequate books and records to the Division for audit. They did not provide sales journals, day books, cash register tapes, purchase invoices, guest checks or any other records that would have enabled the auditor to conduct a detailed audit. Therefore, the Division was entitled to resort to an estimate based on the auditor’s audit experience to determine petitioner’s taxable sales (*see, Matter of Del’s Mini Deli v. Commissioner of Taxation and Fin.*, 205 AD2d 989 [1994]).

Moreover, there is no support in this record for petitioners’ argument that the audit method utilized in this case was arbitrary and capricious. Petitioners object that, in computing the percentage of credit card receipts versus total receipts, the auditor chose to apply the actual credit card percentage from one particular diner rather than apply an average of several diners.

It must be noted that in arriving at the additional taxable sales and resulting additional sales tax due herein, the auditor applied the credit card percentage derived from his audit of a similar diner to petitioner’s own receipts for the audit period. The records pertaining to

petitioner's receipts (including credit card receipts) were not furnished to the auditor by petitioners, but by HSBC under subpoena. The credit card percentage was calculated from an observation test conducted by the Division at the Bohemia, New York, diner. We note that had the auditor applied an average credit card percentage of all the diners audited in Nassau and Suffolk counties during the relevant period, such percentage (24.879% for diners similar to petitioners or 27.268% for all diners) would have been lower than the 30.20% percentage actually utilized in the present matter. If we accepted petitioners' argument, it would actually result in a greater assessment than the amount assessed.

We also reject, for the reasons stated by the Administrative Law Judge, petitioners' claim that the record does not contain enough specific information about the diner that the auditor chose as the comparable. Short of disclosing the actual name, address and audit information of the Bohemia diner (such disclosure would be in violation of the secrecy provisions of the Tax Law), the auditor's testimony was sufficiently detailed and his answers were sufficiently responsive to provide petitioners an opportunity for an effective cross examination. Since petitioners presented no source documentation whatsoever to prove taxable sales for the audit period or to refute the audit findings, we conclude that petitioners failed to sustain their burden of proving, by clear and convincing evidence, that the assessments were erroneous.

Finally, we address petitioners' contention that penalties should be abated. We have held that the failure to maintain and provide records is a reason to sustain the imposition of penalties (*see, Matter of Shukry v. Tax Appeals Tribunal*, 184 AD2d 874 [1992]; *see also, Matter of Rosemellia*, Tax Appeals Tribunal, March 12, 1992). Petitioners' representative, Mr. Kalker, stated that petitioners provided all of the books and records they maintained to the auditor. We note that the unsworn statement of a representative does not rise to the level of probative

evidence. In addition, we note that George Rekkas did not testify. In any event, providing all of the books and records a taxpayer maintains is meaningless where, as here, the taxpayer fails to maintain the source documents and other books and records required by law. There being no satisfactory testimony or evidence to explain what appears to be an ongoing pattern of inadequate record keeping, we conclude that petitioners have failed to show reasonable cause for the abatement of penalties.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exceptions of 2101 Diner Corp. d/b/a Suffolk Diner and George Rekkas are denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of 2101 Diner Corp. d/b/a Suffolk Diner and George Rekkas are denied;

and

4. The notices of determination issued to 2101 Diner Corp. d/b/a Suffolk Diner and George Rekkas on September 10, 2007 and September 13, 2007, respectively, as modified, are sustained.

DATED: Troy, New York
October 21, 2010

/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