

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petitions	:	
of	:	
<b>HARMUKH, INC.</b>	:	DECISION
<b>AND</b>	:	DTA Nos. 822281
<b>SUKHWANT SINGH</b>	:	AND 822282
for Revision of Determinations or for Refund of	:	
Sales and Use Taxes under Articles 28 and 29 of	:	
the Tax Law for the Period March 1, 2005 through	:	
February 28, 2007.	:	

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Petitioners, Harmukh, Inc., and Sukhwant Singh, filed an exception to the determination of the Administrative Law Judge issued on February 11, 2010. Petitioners appeared by Roman and Singh, LLP (Hector M. Roman, Esq.). The Division of Taxation appeared by Daniel Smirlock, Esq. (Osborne K. Jack, Esq., of counsel).

Petitioners did not file a brief in support of their exception. The Division of Taxation filed a letter stating its reliance on the brief filed with the Administrative Law Judge, below. Petitioners did not file a reply brief. 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 audit methodologies employed by the Division of Taxation, and the results derived therefrom that petitioners owed additional sales tax, plus penalty and interest, 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 Harmukh, Inc. is a non-brand gasoline service station located in Jamaica, New York. The service station reported sales of regular, premium and diesel motor fuels. The service station's supplier for unleaded regular and premium gasoline was Pallvi Fuel Oil, Inc., and its supplier for diesel motor fuel was OK Petroleum International. Petitioner, Sukhwant Singh, was the president and 50 percent shareholder of Harmukh, Inc. The other 50 percent of the shares of the corporation were owned by Mr. Singh's brother.

On October 19, 2007, the Division of Taxation (Division) sent a letter to Harmukh, Inc. stating that a sales and use tax field audit of the business operation was to be conducted for the period December 1, 2004 through February 28, 2007. 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, inventory records, purchase invoices, exemption documents, federal income tax returns, New York State corporation tax returns, cash register tapes, bank statements, service station records, pump meter readings, and canceled checks.

The corporation did not provide the auditor with any business records, including source documentation detailing the amount of retail sales of the business operation.

The auditor accepted the amount of gallons of fuel sold as reported by the corporation. Petitioner did not supply any information as to the price charged for its gasoline sales. Therefore, for each tax quarter of the audit period, the auditor used an average price per gallon for regular gasoline for petitioners' zip code as obtained 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. Selling prices for premium gasoline and diesel motor fuel were based upon the difference between regular, premium and diesel motor fuel prices for a nearby non-brand service station as reported in a Motor Trend Magazine administered web-site dated January 12, 2008. The auditor multiplied the gallons purchased by the taxable base price per gallon for each grade of motor fuel 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 previously remitted, resulting in additional audited sales tax due on motor fuel sales of \$244,677.68 for the period March 1, 2005 through February 28, 2007. No credit was given for prepaid sales tax on the purchases of motor fuel, as no records were provided to substantiate the claim that such payments were made.

Petitioner Sukhwant Singh, as president, signed on May 30, 2002, and filed on behalf of Harmukh, Inc., an Application for Registration as a Sales Tax Vendor, Form DTF-17. All New York State and local quarterly sales and use tax returns filed by Harmukh, Inc. during the period of the audit, except the final quarter, were signed by Sukhwant Singh. Mr. Singh also signed the checks on behalf of Harmukh, Inc., in payment of the sales and use tax due that accompanied the returns filed for the entire audit period.

Sukhwant Singh, along with his wife, were responsible for the daily operations of the service station, including the pricing of the fuel sold, comparing the actual amount of fuel delivered to the amount indicated on the purchase invoices and ordering the motor fuel as needed. Mr. Singh was the only person authorized to sign checks on behalf of the corporation.

Mr. Singh and his wife recorded the amount of gallons purchased and the purchase price per gallon paid for the fuel deliveries in a book, which served as the official record of the business operation. Mr. Singh and his wife did not record any information in the book regarding prepaid sales tax on purchases or the sales price of the motor fuel.

The accounting firm that prepared the corporation's sales and use tax returns was not provided with the purchase invoices from the suppliers but only the amount of gallons purchased and the purchase price paid per gallon as recorded in the book. These were the only two figures used by the accounting firm in its computations on the sales and use tax returns as to the amount of sales tax due on the corporation's sales of motor fuel and the amount of credit claimed for prepaid sales tax on the purchases of the motor fuel.

On April 28, 2008, the Division issued to petitioner Harmukh, Inc. a Notice of Determination asserting additional sales tax due for the period March 1, 2005 through February 28, 2007 in the amount of \$244,677.68, plus penalty and interest.

On May 1, 2008, the Division issued to petitioner Sukhwant Singh, as an officer or responsible person of Harmukh, Inc., a Notice of Determination asserting additional sales tax due for the period March 1, 2005 through February 28, 2007 in the amount of \$244,677.68, plus penalty and interest.

During the course of the hearing, petitioners' representative requested additional time to submit certain documentation, including purchase invoices of the corporation's suppliers.

Petitioners were granted until June 5, 2009 to submit such documentation, after which the record in these matters was closed. Following the hearing, and prior to June 5, 2009, petitioners produced 40 purchase invoices from OK Petroleum International for purchases of diesel motor fuel during the audit period. In addition, petitioners produced documents entitled New York Sales Tax Reports from FLEETCOR. The Division concedes that based upon its review of the purchase invoices from OK Petroleum International, petitioners are entitled to a prepaid sales tax credit of \$7,040.34 for the audit period, reducing the amount of sales tax due on audit to \$237,637.34. The revised amount of tax due per quarter is as follows:

<b>QUARTER ENDED</b>	<b>REVISED TAX DUE</b>
5/31/05	\$27,676.14
8/31/05	\$30,563.17
11/30/05	\$33,807.25
2/28/06	\$37,189.23
5/31/06	\$34,457.52
8/31/06	\$27,392.93
11/30/06	\$28,040.07
2/28/07	\$18,511.03
<b>TOTAL</b>	<b>\$237,637.34</b>

Attached to petitioners' reply brief, mailed on August 22, 2009, were purchase invoices alleged to be from Pallvi Fuel Oil, Inc. Petitioners' representative had not requested any additional time past June 5, 2009 to submit additional evidence. Accordingly, no part thereof was considered for purposes of the determination.

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

The Administrative Law Judge found that the Division made a clear and unequivocal written request for books and records of Harmukh, Inc.'s sales, and that the corporation failed to produce such books and records for the Division's review. The Administrative Law Judge further found that the auditor reasonably concluded that petitioners' records were insufficient to conduct a detailed audit, as the business did not maintain purchase invoices, cash register tapes, sales invoices (i.e., source documents) or other books and records sufficient to verify its gross and taxable sales for the audit period.

Having established the insufficiency of the corporation's books and records, the Administrative Law Judge noted that the Division determined the audited amount of sales of motor fuel by using the corporations reported purchases, together with the selling price of regular gasoline as reported by OPIS for the corporation's location and a comparison of a similar service station's prices for premium gasoline and diesel motor fuel. 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.

Petitioners, in essence, argued that the Division's audit results were not precise and did not include prepaid sales tax. The Administrative Law Judge noted 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. Here, petitioners complained that prepaid sales tax had not been credited by the auditor in the calculation of the amount of sales tax due. The Administrative Law Judge pointed out that the auditor used the corporation's own purchases and local selling prices to determine the amount of fuel sales and that petitioners presented no documentation to establish the actual sales prices. In

addition, the corporation failed to maintain or present any records that would establish the amount of prepaid sales tax, except the purchase invoices from OK Petroleum International. In addition to the invoices from OK Petroleum International, petitioners produced New York Sales Tax Reports from FLEETCOR “The Fleet Card Company” indicating that FLEETCOR claimed prepaid sales tax credits for gasoline and diesel purchased from Harmukh, Inc. Without an explanation of the nature of FLEETCOR and its relationship to Harmukh, Inc., as well as the lack of purchase invoices or other documents establishing that the credits claimed by FLEETCOR were actually paid by Harmukh, Inc. on its purchases, the Administrative Law Judge found no additional credit could be allowed for claimed prepaid sales tax. The Administrative Law Judge noted that because petitioners failed to maintain or provide any records of their sales, they have provided no basis for further modification of the Division’s audit results.

The Administrative Law Judge found that the record established that Mr. Singh had broad authority with respect to the management of the corporation and, thus, found this fact as indicative of responsible officer status. The Administrative Law Judge stated that Mr. Singh was a person responsible for the collection and payment of sales tax pursuant to Tax Law §§ 1131 and 1133 and personally liable for the sales taxes due on behalf of Harmukh, Inc. for the period March 1, 2005 through February 28, 2007.

The Division asserted penalties pursuant to Tax Law § 1145(a)(1)(i) and (vi). Such penalties must be sustained unless the failure to remit the taxes was due to reasonable cause and not to willful neglect. The Administrative Law Judge found that petitioners failed to provide evidence or arguments sufficient to constitute reasonable cause or support abatement or cancellation of penalties.

Moreover, the Administrative Law Judge rejected petitioners' attempt to place evidence into the record after the record was closed.

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

Petitioners, on exception, argue that the Administrative Law Judge erred in determining that they are liable for penalties for failure to show reasonable cause. Petitioners urge that the additional evidence that was submitted after the Administrative Law Judge closed the record would have resulted in a reduction of the tax due. Petitioners claim that their wholesaler, Pallvi Fuel Oil, Inc., failed to timely provide petitioners with copies of invoices, which resulted in petitioners forwarding such invoices to the Administrative Law Judge after the record was closed.

### ***OPINION***

The only issue raised on exception is whether the Administrative Law Judge should have admitted into evidence the documents petitioners attempted to file after the record was closed.

In *Matter of Saddlemire* (Tax Appeals Tribunal, June 14, 2001), we stated:

[w]e have held that in order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing. Further, the submission of evidence after the closing of the record denies the adversary the right to question the evidence on the record (*Matter of Emerson*, Tax Appeals Tribunal, May 10, 2001; *Matter of Schoonover*, [Tax Appeals Tribunal, August 15, 1991]).

We affirm the determination of the Administrative Law Judge.

We note that the hearing in this matter was held on May 8, 2009 and petitioners were given until June 5, 2009 to submit additional evidence. At that point, the record was closed. The Administrative Law Judge observed that petitioners did not ask for, nor were they granted, a

further extension of time to submit evidence after June 5, 2009. Thus, we find that the Administrative Law Judge properly refused to consider these additional documents.

Therefore, we find that the Administrative Law Judge fully and correctly addressed all of the issues and evidence presented. Petitioners have offered no 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 Harmukh, Inc. and Sukhwant Singh is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of Harmukh, Inc. and Sukhwant Singh are granted to the extent that they are to receive a prepaid sales tax credit of \$7,040.34, but otherwise are denied; and
4. The Division of Taxation is directed to modify the notices of determination issued to Harmukh, Inc. on April 28, 2008 and to Sukhwant Singh on May 1, 2008 in accordance with paragraph "3," above.

DATED: Troy, New York  
September 30, 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