

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>IBRAHIM BASIR</b>	:	DECISION
		DTA NO. 822667
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, 2004 through November 30, 2005.	:	

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Petitioner, Ibrahim Basir, filed an exception to the determination of the Administrative Law Judge issued on August 19, 2010. Petitioner appeared *pro se*. The Division of Taxation appeared by Mark Volk, Esq. (Osborne K. Jack, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a letter brief in lieu of a formal brief in opposition. Petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on June 15, 2011 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 audit method employed by the Division of Taxation was reasonable or whether petitioner has shown error in either the audit method or result.

II. Whether petitioner was a person responsible for the collection and payment of sales and use taxes on behalf of La Naj Home Furnishings, Inc., within the meaning and intent of Tax Law §§ 1131(1) and 1133(a).

### ***FINDINGS OF FACT***

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

Petitioner, Ibrahim Basir, was, at all times relevant herein, president and sole shareholder of La Naj Home Furnishings, Inc. (La Naj), a retail furniture business.<sup>1</sup> Petitioner owned and operated the business for over 21 years.

By letter dated January 27, 2008, the Division of Taxation (Division) scheduled an appointment with La Naj to commence a sales and use tax field audit for the period March 1, 2003 through November 30, 2005. The Division's letter requested that all of La Naj's books and records pertaining to its sales and use tax liability for the audit period be available for review. The letter specifically requested, among other records, the general ledger, sales invoices, bank statements, federal income tax returns, and purchase invoices.

In response to the Division's written request for records, petitioner, on behalf of La Naj, produced sales invoices, federal income tax returns, an incomplete set of bank statements, some expense invoices and a computer-generated document entitled "Transactions by Account," which listed in detail expenses and purchases under various categories for 2004. The sales invoices that were provided were in boxes organized only by year. Petitioner did not provide any general ledger, sales journal or any other summary of sales.

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<sup>1</sup> Lanaj filed sales tax returns as La Naj Home Furnishings, Inc., and is referred to by that name in the Division's audit report and in the Notice of Determination and Statement of Proposed Audit Changes referenced herein. Federal and New York S corporation returns for the years 2003 and 2004, however, report the corporation's name as Central Convertibles, Inc. d/b/a Lanaj Furniture. In any event, the legal name of the subject corporation is not at issue, and even if it were, any such error under the instant circumstances is properly deemed inconsequential (*see Matter of Pepsico, Inc. v. Bouchard*, 102 AD2d 1000, 477 NYS2d 892 [1984]).

The Division concluded that the records produced by La Naj in response to its request were inadequate for the purpose of verifying its tax liability with respect to both sales and purchases. With respect to sales, the Division found that the lack of a general ledger or any other books of original entry precluded the Division from tracing specific transactions back to their original source and also precluded the Division from determining whether a complete set of sales invoices had been provided. The Division deemed the purchase records provided by La Naj incomplete because no invoices were provided with respect to many of the purchases listed on the "Transactions by Account."

Having concluded that La Naj failed to maintain or provide adequate books and records of its sales, the Division proceeded to estimate La Naj's sales tax liability for the audit period by first reviewing in detail and totaling La Naj's sales as indicated by the approximately 630 sales invoices dated within the test period of March 1, 2004 through May 31, 2004. The total of such invoices was \$1,036,327.52. Next, the Division subtracted \$126,265.63 from this total for undelivered items, returned merchandise, and invoices used for training purposes and thus calculated audited gross sales for the test quarter of \$910,061.89. This subtracted amount was based on a review of the invoices themselves and discussions with petitioner and his representative, but there is no indication in the record as to which specific invoices were included in this amount.

We modify finding of fact "6" of the Administrative Law Judge's determination to read as follows:

La Naj reported gross sales of \$513,608.00 on its sales tax return for the quarter ended May 31, 2004. The Division calculated an error rate by dividing the difference between audited gross sales and reported gross sales for the test quarter by reported gross sales for the test quarter. The Division then multiplied the error rate by reported gross sales for all quarters of the audit period and thereby

determined additional gross sales. Next, the Division added additional gross sales to reported gross sales to reach audited gross sales for each of the sales tax quarters of the audit period. A taxable ratio of 84.49 percent for the audit period was determined by calculating the ratio of taxable sales to gross sales as indicated by the sales invoices for the test period. The Division applied this taxable ratio to audited gross sales, resulting in audited taxable sales, which, after subtracting reported taxable sales, resulted in additional taxable sales.

The Division also adjusted for La Naj's sales in jurisdictions other than New York. Utilizing La Naj's sales tax return for the quarter ended May 31, 2004, the Division calculated an average sales tax rate by dividing sales tax paid by taxable sales indicated by the test period invoices. The Division then applied the calculated average tax rate to additional taxable sales for each quarter of the audit period to reach additional sales tax due. As calculated in this manner, the Division asserted \$636,686.89 in additional tax due on sales from La Naj for the period March 1, 2003 through November 30, 2005.<sup>2</sup>

With respect to purchases, the Division reviewed in detail La Naj's purchases for 2004 as indicated by the "Transactions by Account" and the expense invoices for 2004 provided on audit. Following such review, the Division assessed additional tax on purchases where no invoice was provided or where the improper amount of tax was paid. In total, the Division found \$4,439.73 in additional tax due on expense purchases for the 2004 tax year. The Division then developed an error rate using as a base the total of expenses as indicated by La Naj's 2004 federal return (Form 1120) in those categories in which errors were found on audit. Application of the error rate to base amounts in the selected expense categories for the entire audit period resulted in additional tax due of \$10,984.42 on La Naj's purchases for the audit period.

The Division subsequently issued to La Naj a Statement of Proposed Audit Change for Sales and Use Tax dated August 30, 2007, which asserted additional tax due on sales and expenses as noted above and thereby asserted a total of \$647,671.31 in tax due, plus interest, for the period March 1, 2003 through November 30, 2005.

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<sup>2</sup> We modify this fact to in order to clarify the record.

On August 31, 2007, petitioner, on behalf of La Naj, executed a consent to the assessment of tax as indicated by the Statement of Proposed Audit Change.

On September 27, 2007, the Division issued to petitioner, Ibrahim Basir, a Notice of Determination, which assessed tax due of \$416,996.49, plus interest, for the period June 1, 2004 through November 30, 2005.<sup>3</sup> The notice advised petitioner that the Division had determined that he was a corporate officer or a person responsible for the collection and payment of sales and use taxes due from La Naj and therefore personally liable for La Naj's sales and use tax liability.

La Naj had stores in Yonkers, New York (two stores), Rockland, New York, and Paramus, New Jersey, during the period at issue. Customer purchases were frequently ordered from suppliers because La Naj did not stock much inventory and also because La Naj did a lot of custom orders. As a result, the delivery date for merchandise was often several months after the order or invoice date.

La Naj's corporate income tax returns indicate that petitioner received compensation from La Naj in the amount of \$102,000.00 in 2003 and \$106,000.00 in 2004.

Petitioner did not prepare La Naj's sales tax returns, but he did sign sales tax returns and he did pay sales tax for La Naj.

At the hearing, petitioner offered into evidence a sample of sales invoices, more specifically described as follows:

a) 23 sales invoices dated within the test period and which indicate a delivery date subsequent to the test period.

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<sup>3</sup> The September 27, 2007 notice is premised on the audit described herein, but encompasses fewer sales tax periods and is therefore less than the La Naj assessment. As indicated by the Division in its brief, sales tax periods were eliminated from the responsible officer assessment because the date of the statutory notice was beyond the three-year limitations period. It is noted that the audit file contains consents extending the limitations period for assessment with respect to La Naj, but not petitioner.

b) Five invoices that showed small or zero deposits. In contrast to the invoices showing a delivery date outside the test period noted above, these five invoices do not contain a signature of the customer indicating receipt.

c) A few invoices indicating orders that were rewritten and orders with multiple delivery dates outside the test period.

d) Three invoices that showed merchandise that was returned in whole or part.

e) One invoice that indicated sales tax paid, but for which the audit workpapers indicate no tax paid and tax due. The audit workpapers did include the amount charged for merchandise on this invoice within taxable sales in the audit calculations.

Workpapers from the Division's audit file, which were entered into evidence, indicate that La Naj's sales tax return for the period ended August 31, 2004 was filed on September 22, 2004.

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

The Administrative Law Judge found that the Division made a proper request and, upon review, properly determined that the records were insufficient to conduct a full audit, due to insufficient documentation of petitioner's sales. As a result, the Administrative Law Judge held that the Division was authorized to use an estimated audit method, so long as such method was reasonably calculated to reflect the taxes due. The Administrative Law Judge noted that, as no documentation was provided to enable the Division to trace the invoices to the sales tax returns, the Division properly resorted to external indices and the resulting audit was supported by a rational basis.

The Administrative Law Judge noted that with respect to the audit of La Naj's purchases, the record is clear that the purchase invoices were incomplete. However, petitioner did not

contest the Division's use of an estimated audit methodology, the reasonableness of the audit method, or the result with respect to purchases.

The Administrative Law Judge observed that the burden rested with petitioner to present clear and convincing evidence that the audit method chosen by the Division led to unreasonably inaccurate results or that the amount of tax assessed was erroneous. The Administrative Law Judge noted that exactness in the outcome is not required, for any imprecision that arises from the taxpayer's failure to maintain adequate books and records is properly borne by the taxpayer. The Administrative Law Judge determined that petitioner failed to meet its burden of proving that the audit method was unreasonably inaccurate.

The Administrative Law Judge found that petitioner was the president and shareholder of La Naj, derived substantial income and signed sales tax returns on behalf of La Naj. The Administrative Law Judge noted that petitioner executed a consent fixing La Naj's sales tax liability at the conclusion of the audit. The Administrative Law Judge concluded that petitioner was, in fact, a responsible officer.

Based on the statute of limitations, the Administrative Law Judge cancelled the assessment with respect to the quarter ended August 31, 2004, but otherwise sustained the Notice.

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

Petitioner raises the same arguments on exception as he did below. Specifically, petitioner argues that: a) adequate books and records were provided to the auditors and the use of a test period audit was not justifiable; b) the auditors used written sales when they should have used delivered sales; and c) he did not run the day to day operations of the business nor did

he calculate or collect sales tax. Petitioner also argues that his managers hired bookkeepers, accountants and administrators who were responsible to maintain the books and records.

The Division argues that petitioner's exception fails to demonstrate any grounds for reversal of the Administrative Law Judge's determination. The Division requests that the exception be denied and the Notice be sustained in full.

### **OPINION**

We have often restated the standard for reviewing a sales tax audit where the Division estimates sales tax liability. In *Matter of Your Own Choice* (Tax Appeals Tribunal, February 20, 2003), we stated as follows:

To determine the adequacy of a taxpayer's records, the Division must first request (*Matter of Christ Cella, Inc. v. State Tax Commn., supra*) 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 this procedure, thereby demonstrating that the records are incomplete or inaccurate, the Division may resort to external indices to estimate tax (*Matter of Urban Liqs. v. State Tax Commn., supra*). The estimate methodology utilized must be reasonably calculated to reflect taxes due (*Matter of W.T. Grant Co. v. Joseph*, 2 NY2d 196, 159 NYS2d 150, *cert denied* 355 US 869, 2 L Ed 2d 75), but exactness in the outcome of the audit method is not required (*Matter of Markowitz v. State Tax Commn.*, 54 AD2d 1023, 388



NYS2d 176, *affd* 44 NY2d 684, 405 NYS2d 454; *Matter of Cinelli*, Tax Appeals Tribunal, September 14, 1989). The taxpayer bears the burden of proving with clear and convincing evidence that the assessment is erroneous (*Matter of Scarpulla v. State Tax Commn.*, 120 AD2d 842, 502 NYS2d 113) or that the audit methodology is unreasonable (*Matter of Surface Line Operators Fraternal Org. v. Tully*, 85 AD2d 858, 446 NYS2d 451; *Matter of Cousins Serv. Station*, Tax Appeals Tribunal, August 11, 1988). In addition, “[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, 501 NYS2d 219, 221).

Petitioner’s argument that adequate books and records were provided to the auditors is unfounded. The record proves that the Division requested La Naj’s records pertaining to its sales and use tax liability for the entire audit period. However, with respect to sales records,<sup>4</sup> petitioner did not present books and records sufficient to allow the Division’s auditors to perform a detailed audit. Specifically, petitioner did not provide a general ledger, sales journal or complete bank statements to the auditors, making it difficult to verify whether the sales invoices represented all of petitioner’s sales. Accordingly, we agree with the Administrative Law Judge that the records provided were insufficient to trace petitioner’s invoices through to the sales tax returns. As such, the Division was authorized to use an estimated audit method, so long as such method was reasonably calculated to reflect the taxes due (*see Matter of AGDN, Inc.*, Tax Appeals Tribunal, February 6, 1997).

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] from such information as may be available.” It is well-settled that such audit methodologies may employ external indicies (*Matter of Urban Liqs. v. State Tax Commn.*, *supra*). When acting pursuant to section 1138(a)(1), the Division is required to select a method

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<sup>4</sup> Petitioner did not contest the Division’s use of an estimated audit methodology with respect to purchases and offered no evidence to contest the reasonableness of the audit method or result with respect to purchases.

of audit reasonably calculated to reflect the tax due (*Matter of Bernstein-On-Essex St.*, Tax Appeals Tribunal, December 3, 1992). The burden then rests upon the taxpayer to demonstrate that the method of audit or the amount of the assessment was erroneous (*see Matter of Your Own Choice, supra*).

We reject petitioner's argument that the audit methodology was inaccurate in that the Division used the "written" sales as opposed to the "delivered" sales to determine the amount of tax due. We agree with the Administrative Law Judge that petitioner has not established the method by which La Naj calculated its gross and taxable sales on its sales tax returns. Although petitioner testified that La Naj used delivery dates to calculate sales, no documentation was presented. Further, even if petitioner had established that La Naj used delivery dates in the preparation of its sales tax returns, it would not render the audit inaccurate. As the Administrative Law Judge noted, the computation of sales based on delivery dates would include sales invoices dated before the test period but delivered during it. Accordingly, the inclusion of sales would offset the exclusion of sales invoices dated within the test period but delivered after.

Tax Law § 1133(a) imposes personal liability for taxes required to be collected under Articles 28 and 29 of the Tax Law upon a person required to collect such tax, which includes "any officer, director or employee of a corporation . . . who as such officer, director [or] employee . . . is under a duty to act for such corporation . . . in complying with any requirement of [Article 28]" (Tax Law § 1131[1]).

Whether an individual is under a duty to act for a corporation with regard to its tax collection responsibilities, such that the individual would have personal liability for the taxes not collected or paid, depends on the particular facts of the case (*see Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022 [1987]).

The question to be resolved in a particular case:

is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee (*Matter of Constantino*, Tax Appeals Tribunal, September 27, 1990).

We find, as the Administrative Law Judge did, that during the period in question, petitioner was indeed a responsible officer of La Naj. Petitioner was the president and sole shareholder of La Naj, signed sales tax returns and paid sales tax on behalf of La Naj. Petitioner also executed the consent fixing La Naj's sales tax liability at the conclusion of the audit.

We reject petitioner's argument that he was not a responsible officer because he hired bookkeepers, accountants and administrators, whom he claims were responsible to maintain the books and records. Corporate officers responsible as fiduciaries for tax revenues cannot absolve themselves of liability by merely disregarding their duty and leaving it to someone else to discharge (*see Matter of Blodnick v. State Tax Commn.*, 124 AD2d 437 [1986], *appeal dismissed* 69 NY2d 822 [1987]; *Matter of Ragonesi v. State Tax Commn.*, 88 AD2d 707 [1982]; *Matter of Laschever*, Tax Appeals Tribunal, March 23, 1989). Rather, petitioner would be required to show that he was precluded from acting on behalf of the corporation by the acts of another (*see eg. Matter of Constantino, supra; Matter of Coppola*, Tax Appeals Tribunal, September 15, 2005). Petitioner has made no such showing here.

We find that the Administrative Law Judge has fully and correctly addressed the issues raised in this matter and correctly applied the relevant law to the facts of this case. Petitioner has offered no evidence below, and no argument on exception, that demonstrates that the Administrative Law Judge's determination is incorrect. As a result, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Ibrahim Basir is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Ibrahim Basir is granted to the extent indicated in conclusion of law “M” of the Administrative Law Judge’s determination, but in all other respects is denied; and
4. The Notice of Determination, dated September 27, 2007, as modified in paragraph “3” above, is sustained.

DATED: Troy, New York  
November 23, 2011

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

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