

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
CITY LINEN AND TOWEL SUPPLY CO., INC.	:	DETERMINATION
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, 1981 through November 30, 1984.	:	

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Petitioner, City Linen and Towel Supply Co., Inc., 507-09 Pond Street, P.O. Box 198, Syracuse, New York 13208, filed a petition 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, 1981 through November 30, 1984 (File No. 802480).

A hearing was held before Daniel J. Ranalli, Administrative Law Judge, at the offices of the Division of Tax Appeals, W. Averill Harriman State Office Campus, Albany, New York, on September 16, 1987, with all briefs to be filed by January 4, 1988. Petitioner appeared by Richard V. D'Alessandro, Esq. The Audit Division appeared by William F. Collins, Esq. (Thomas C. Sacca, Esq., of counsel).

ISSUES

I. Whether petitioner's purchases of linens, uniforms, machinery parts and supplies were subject to sales and use taxes.

II. Whether, where actual figures were available, the use of average monthly figures to determine tax due per quarterly sales tax period was so improper as to defeat the assessment.

III. Whether, if tax due was not estimated, a declaration in the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, indicating that the tax assessed was estimated, rendered the notice void in its entirety.

FINDINGS OF FACT

1. On June 20, 1985, the Audit Division issued to petitioner, City Linen and Towel Supply Co., Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, for the period June 1, 1981 through November 30, 1984, assessing taxes due in the amount of \$23,744.63 plus interest. The notice declared that the tax assessed had been estimated in accordance with the provisions of section 1138(a)(1) of the Tax Law.

2. Petitioner operated a linen supply business which supplied commercial establishments with clean linen such as hand towels and uniforms. A field audit of petitioner's operations began in January 1985. The auditor met with petitioner's president, Robert Ross, explained the nature of the audit and requested certain books and records. Mr. Ross referred the auditor to petitioner's bookkeeper who provided the auditor with sales journals, purchase journals, income tax returns and purchase invoices. A review of petitioner's purchase invoices disclosed that petitioner had not paid sales tax to its suppliers on its purchases of linens, machinery parts and supplies used in its business. Because the auditor considered these purchases to be subject to the imposition of sales tax, she prepared a tax assessment based on petitioner's failure to pay tax on its taxable purchases. The auditor's methodology and calculations are summarized below:

(a) Using the purchase invoices supplied, the auditor prepared a schedule of purchases detailing the following information: purchase invoice date, purchase invoice number, supplier's name, merchandise subject to tax, and amount subject to tax. She then added all taxable purchases and arrived at a total of \$339,216.24.

(b) The auditor then aggregated the purchases by calendar year. This resulted in taxable purchases of \$31,911.00 for the period June 1, 1981 through December 31, 1981, \$120,761.00 for the year 1982, \$101,792.00 for the year 1983 and \$84,743.00 for the period January 1, 1984 through November 30, 1984. Total taxable purchases calculated in this manner amounted to \$339,207.00. (The discrepancy in the totals is explained by the auditor's practice of rounding figures to the nearest whole dollar.)

(c) Annual taxable purchases were divided by the number of months in that portion of each calendar year included in the audit period. These average monthly purchases were multiplied by three (reflecting the three months in each sales tax quarter) and the resulting three-month figures were then attributed to corresponding sales tax quarters. This method of attributing taxable purchases to quarterly periods was described as "straightlining" the purchases.

(d) Total purchases as calculated above amounted to \$339,209.00. A tax rate of 7% was applied to purchases per quarter to determine total tax due from petitioner of \$23,744.63.

3. After the completion of the audit, the auditor provided Mr. Ross with an oral summary and explanation of her conclusions and a copy of her workpapers, including the detailed schedule of purchases. Mr. Ross forwarded this schedule to his accountant. At a tax conference, the accountant demonstrated that sales tax had been paid on total purchases of \$2,549.00 as shown

on invoices from two suppliers. Based on these invoices, the Audit Division conceded that the total purchases should be reduced to \$336,653.00 with a tax due on that amount of \$23,565.71.

4. Petitioner submitted eight proposed findings of fact. Proposed findings 1, 2, 3, 4 and 7 were substantially incorporated into this determination. The remaining proposed findings were not accepted because they were not supported by the evidence.

#### SUMMARY OF PARTIES' POSITIONS

5. It is the Audit Division's position that the exact amount of tax due for the audit period was determined from petitioner's books and records. While conceding that straightlining the purchases resulted in certain transactions being attributed to the wrong sales tax quarter, it asserts that the total amount of tax assessed for the audit period accurately reflects petitioner's liability as shown by its purchase invoices. While the Audit Division concedes that the notice sent to petitioner erred in declaring that the tax assessment had been estimated, it contends that the error did not render the notice void in its entirety.

6. It is petitioner's position that straightlining the purchases was a method of estimating tax due and that the estimating of tax is not permitted where, as here, a taxpayer maintains adequate books and records from which the exact tax due can be computed. Furthermore, petitioner alleged that it was prevented by the methodology employed from tracing any particular invoice to a particular sales tax quarter; and therefore, it was prevented from competently challenging the assessment.

7. In the alternative, petitioner asserts that, if the assessment was not estimated, the notice was misleading and prejudicial because it failed to adequately inform petitioner of the basis for the assessment.

8. Petitioner argues that since laundering services are exempt from the imposition of sales tax, supplies and equipment purchases for use in the operation of such services are likewise exempt.

#### CONCLUSIONS OF LAW

A. Tax Law § 1105(a) imposes a sales tax on the receipts from every retail sale of tangible personal property unless otherwise exempt. A tax is also imposed on the receipts from the sale of certain services which involve the maintenance, service or repair of tangible personal property (Tax Law § 1105[c][3]). Receipts from laundering services are specifically excluded from the tax (Tax Law § 1105[c][3][ii]); however, tangible personal property purchased for use in performing laundering services is taxable (Matter of Atlas Linen Supply Co., State Tax Commn., August 28, 1987; 20 NYCRR 526.6[b][7]). Petitioner's argument that such purchases are exempt by extension of the exclusion granted to laundering services is not persuasive. An exemption from the imposition of tax "must clearly appear, and the party claiming it must be able to point to some provision of law plainly giving the exemption" (People ex rel. Savings Bank of New London v. Coleman, 135 NY 231, 234; see also, Matter of Grace v. State Tax Commn., 37 NY2d 193, 196).

B. In addition to the duties and liabilities placed on persons required to collect tax, the Tax Law imposes a duty directly on the customer to file a return and pay the tax imposed by Tax Law § 1105(a):

"Where any customer has failed to pay a tax imposed by this article to the person required to collect the same, then... such tax shall be payable by the customer directly to the tax commission and it shall be the duty of the customer to file a return with the tax commission and to pay the tax to it within twenty days of the date the tax was required to be paid" (Tax Law § 1133[b]).

C. In this case an audit of petitioner's books and records disclosed that petitioner routinely failed to pay to its suppliers the tax imposed by section 1105(a), and petitioner also failed to report or pay the tax directly to the tax commission. "If a return required by [article 28] is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission 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]). As required by

section 1138(a)(1), the Audit Division had requested and received certain books and records from petitioner (see \_\_\_, Matter of Christ Cella v. State Tax Commn., 102 AD2d 352). Those records provided the basis for the determination that petitioner had failed to file returns accurately reporting its tax liability. The Audit Division then proceeded to determine taxes due from petitioner on the basis of petitioner's own purchase invoices. As the audit properly proceeded under the statutory authority granted by Tax Law § 1138(a)(1), the burden was upon petitioner to show by clear and convincing evidence either that the audit method was flawed or that the amount of tax assessed was erroneous

(Matter of Surface Line Operators Fraternal Org. v. State Tax Commn., 85 AD2d 858).

D. Petitioner has shown, and the Audit Division has conceded, that the attribution of tax due to sales tax quarters, through the methodology described as straightlining, was improper in that it resulted in certain transactions being attributed to the wrong sales tax quarters. However, the entire audit cannot be characterized as an estimate based on this method of attributing taxable purchases to quarters. It is a settled principle that where a taxpayer maintains adequate and complete records from which the exact amount of tax due may be computed, the Audit Division is obliged to use those records to determine the tax (Matter of Chartair v. State Tax Commn., 65 AD2d 44). A tax is estimated, pursuant to Tax Law § 1138(a)(1), when it is determined from sources other than the taxpayer's books and records (i.e., external indices). The record shows that petitioner's records were adequate for the purpose of determining its tax liability and that the Audit Division computed taxes due from petitioner from those records. Therefore, the tax due was not estimated. Furthermore, the straightlining of purchases may have resulted in an inaccurate statement of tax due per quarter, thereby resulting in an inaccurate computation of interest, but it did not distort the calculation of tax due for the audit period. The auditor's detailed schedule of petitioner's purchase invoices shows total taxable purchases for the audit period of \$339,216.24. The straightlining of these purchases produced total taxable purchases of \$339,209.00. The difference is negligible and attributable to the auditor's rounding off of

numbers to the nearest whole dollar. Finally, while the audit methodology may have prevented petitioner from tracing an individual invoice to a particular quarterly period, it could not have stopped petitioner from adequately challenging the audit results. In addition to other workpapers, petitioner's president was provided with a schedule of purchase invoices detailing every item on every invoice upon which the Audit Division asserted tax due. Petitioner's accountant's ability to identify certain purchase invoices where sales tax had been paid and to bring about a reduction in tax on that basis demonstrates that petitioner was fully capable of addressing any claimed errors in the audit. As it has been shown that certain transactions were attributed to the wrong quarterly periods, the Audit Division is directed to recalculate tax and interest due based upon actual purchases per quarter.<sup>1</sup> The recalculation should take into account the \$2,549.00 reduction in purchases conceded by the Audit Division (see Finding of Fact "3").

E. The Audit Division is required by Tax Law § 1138(a)(1) to give notice of a determination of tax due to the person liable for the collection or payment of the tax. The content of the notice is not prescribed, except as follows:

"Whenever such tax is estimated as provided for in this section, such notice shall contain a statement in bold face type conspicuously placed on such notice advising the taxpayer: that the amount of the tax was estimated; that the tax may be challenged through a hearing process; and that the petition for such challenge must be filed with the tax commission within ninety days" (Tax Law § 1138[a][2]).

The notice issued to petitioner was wrong in declaring that the amount of the tax was estimated, when in fact the tax was calculated from petitioner's records; however, petitioner has not shown that it was prejudiced by the error. Petitioner was furnished with detailed workpapers and an explanation of the determination, and there was no showing that the notice confused or misled

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<sup>1</sup>The Audit Division submitted a schedule prepared for the hearing and purporting to show exact purchases per quarter. As there appear to be several errors in the schedule, it cannot form the basis for the recalculation.

petitioner regarding the basis of the assessment. Absent such a showing, the defect did not render the assessment void in its entirety (Matter of Pepsico, Inc. v. Bouchard, 102 AD2d 1000, 1001).

F. The petition of City Linen and Towel Supply Co., Inc., is granted only to the extent indicated in Conclusion of Law "D"; the Audit Division shall modify accordingly the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on June 20, 1985; and in all other respects, the petition is denied.

DATED: Albany, New York  
March 2, 1989

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ADMINISTRATIVE LAW JUDGE