

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MALSON, LTD.	:	DETERMINATION
AND JACK MALEH AND ALAN	:	
MALEH, AS OFFICERS	:	
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, 1983	:	
through February 28, 1987.	:	

Petitioners, Malson, Ltd., formerly located at 436 5th Avenue, New York, New York 10018, Jack Maleh, 2902 Logan Road, West Deal, New Jersey 07712, and Alan Maleh, 2601 Avenue S, Brooklyn, New York 11229, filed a petition 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, 1983 through February 28, 1987 (File No. 807007).

A hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on June 20, 1990 at 1:15 P.M., with all briefs to be submitted by August 29, 1990. Petitioners appeared by Isaac Sternheim, CPA. The Division of Taxation appeared by William F. Collins, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly determined that all of the sales of Malson, Ltd., the corporate petitioner, were subject to the imposition of sales tax.

II. Whether the Division of Taxation properly determined that Malson, Ltd. had additional gross sales based upon a reconciliation of sales per its books to sales reported on its tax returns.

III. Whether the Division of Taxation is barred from assessing petitioners because it failed to mail copies of the statutory notices to petitioners' representative.

VI. Whether the failure of Malson, Ltd. to accurately report and pay over sales tax was due

to reasonable cause and not due to willful neglect so that penalty and interest in excess of the minimum should not be imposed.

FINDINGS OF FACT

Malson, Ltd. (hereinafter "Malson"), during the period at issue, was a retailer of cameras, household electronic equipment and other general merchandise with a store located at 436 Fifth Avenue in Manhattan. It apparently went out of business in February of 1987. Malson has never notified the Division of Taxation of any new business address.

Jack Maleh and Alan Maleh were the president and vice-president, respectively, of Malson during the period at issue. They did not contest their status under Tax Law § 1133 as persons required to collect sales tax "imposed, collected or required to be collected" by Malson.

Malcolm Stokes, the tax auditor assigned to this matter, was employed by the New York City Department of Finance. He performed the audit, which took 82½ hours, on behalf of the Division of Taxation.¹

On or about December 23, 1985, the auditor sent a letter to Malson scheduling a field examination on January 13, 1986 and requesting the production for his review with regard to the audit period March 1, 1983 through February 28, 1986 of the following:

"All books and records pertaining to your Sales Tax liability.... This would include journals, ledgers, sales invoices, purchase invoices, cash register tapes, exemption certificates, etc. and all Sales Tax Records."

Subsequently, on or about January 13, 1986, the auditor made another written request for Malson to produce the following records for his review with regard to the audit period March 1, 1983 through February 28, 1986:

"copies [sic] of return filed for period ended November 30, 1985; corporation income tax returns for 1983 and 1984; general ledgers; cash receipts and cash disbursements books/records; daily cash register tapes; daily sales invoices to substantiate sales; evidence supporting any deductions claimed; purchase invoices; and bank statements and cancelled checks."

¹Mr. Stokes had also conducted a prior audit of Malson for an earlier period.

The auditor also noted in this second request that "additional information may be required subsequently and will be requested on like form." On or about June 4, 1986, the auditor made a third written request for Malson to produce the following records for his review with regard to the audit period March 1, 1983 through February 28, 1986:

"1983 corporate income tax return; general ledgers; sales books; daily cash register tapes; daily sales invoices; evidence to support any non-taxable sales claimed; purchase invoices; bank statements and cancelled checks; copy of or example of taxpayer's method of preparing quarterly sales tax returns; and schedule of any/all additions and or deductions to fixed asset account."

The records provided by petitioners to the auditor were limited. The auditor's log discloses that he was provided with only the following: sales book (cash receipts book), certain income tax returns including Federal returns, and cash disbursements book. Petitioners failed to provide, in particular, cash register tapes, daily sales invoices, bank statements and cancelled checks, general ledgers, and any evidence supporting alleged nontaxable sales.

For the period March 1, 1983 through November 30, 1986, the auditor increased Malson's gross sales by \$106,957.00, from the amount reported of \$2,114,725.00 to \$2,221,682.00. This increase, as explained in the narrative portion of the audit report, was calculated as follows:

"A comparison of total sales per records provided for period 3/1/83 - 2/28/86 of \$1,663,993.39 to gross sales reported for some [sic] period of \$1,583,593.00 resulted in an increase in sales of \$80,400.39, which amounted to a percentage of 5%. Application of the 5% to sales reported for period 3/1/86 to last return filed per computer of 11/30/86, resulted in an increase of sales by \$26,556.60. This amount added to the \$80,400.39 resulted in total increase in sales of \$106,956.99. This amount, in the absence of evidence to the contrary, was presumed taxable. Tax due on \$106,956.99 at 8¼% amounts to \$8,823.94."

For the period March 1, 1983 through November 30, 1986, Malson reported taxable sales of \$1,270,583.00. The difference between gross and taxable sales was claimed as exempt sales. The auditor disallowed Malson's exempt sales because they were unsubstantiated as exempt:

"The difference between gross and taxable sales of \$844,142.00, being unverifiable [sic], assessed at 8¼% results in additional tax due of \$69,641.72.

* * *

As result of the above, gross sales per audit of \$2,221,681.99...became taxable sales per audit. Taxable sales per audit were compared to taxable sales by quarter to arrive at additional taxable sales of \$951,098.99 and additional tax due of \$78,465.66."

The auditor extended his audit to Malson's final sales tax return:

"Subsequent to submission of audit, taxpayer's 'final' return appeared on computer. Auditor required to update assessment to include final return.

Auditor application of foregoing percentages to amounts reported per final return resulted in additional assessment for period 12/1/86 - 2/28/87 as follows:

	Tax <u>Due</u>
Gross sales increase [of] \$5,800.30	- \$ 478.53
Unsubstantiated exempt sales [of] \$48,233.00	- <u>3,979.22</u>
Total	\$4,457.75"

The Division of Taxation² issued nine notices of determination and demands for payment of sales and use taxes due. Two notices, both dated March 20, 1987, were issued against Malson showing tax due of \$68,635.31 plus penalty and interest for the period March 1, 1983 through August 31, 1986 and tax due of \$9,830.35 plus penalty and interest for the period September 1, 1986 through November 30, 1986, respectively. A third notice, dated May 20, 1987, was issued against Malson showing tax due of \$4,457.75 plus penalty and interest for the period December 1, 1986 through February 28, 1987.

Two notices, both dated March 20, 1987, were issued against Jack Maleh, showing tax due of \$68,635.31 plus penalty and interest for the period March 1, 1983 through August 31, 1986 and tax due of \$9,830.35 plus penalty and interest for the period September 1, 1986 through November 30, 1986 plus penalty and interest, respectively. A third notice, dated May 20, 1987, was also issued against Jack Maleh showing tax due of \$4,457.75 plus penalty and interest for the period December 1, 1986 through February 28, 1987. All three notices issued against Jack Maleh included the following explanation:

"You are personally liable as responsible officer of Malson Ltd. under Sections 1131 and 1133 of the Tax Law for the following taxes determined to be

²The nine notices of determination each reference the New York office of the New York State Department of Taxation and Finance as the office to which payment of New York State sales tax should be made promptly.

due in accordance with Section 1138(a) of the Tax Law."

Two notices, both dated March 20, 1987, were issued against Alan Maleh, showing tax due of \$68,635.31 plus penalty and interest for the period March 1, 1983 through August 31, 1986 and tax due of \$9,830.35 plus penalty and interest for the period September 1, 1986 through November 30, 1986 plus penalty and interest, respectively. A third notice, dated May 20, 1987, was also issued against Alan Maleh showing tax due of \$4,457.75 plus penalty and interest for the period December 1, 1986 through February 28, 1987. All three notices issued against Alan Maleh included the following explanation:

"You are personally liable as responsible officer of Malson Ltd. under Sections 1131 and 1133 of the Tax Law for the following taxes determined to be due in accordance with Section 1138(a) of the Tax Law."

At the conciliation conference conducted in this matter, petitioners' representative stated that he had additional records to substantiate nontaxable sales disallowed. The auditor reviewed such records and advised that tax due was reduced. The notices dated March 20, 1987 were reduced from \$68,635.31 plus penalty and interest to \$51,320.28 plus penalty and interest (for the period March 1, 1983 through August 31, 1986) and from \$9,830.35 plus penalty and interest to \$7,335.18 plus penalty and interest (for the period September 1, 1986 through November 30, 1986). The notices dated May 20, 1987 were reduced from \$4,457.75 plus penalty and interest to \$3,325.82 plus penalty and interest (for the period December 1, 1986 through February 28, 1987). Conciliation orders dated May 26, 1989 were issued in conformance with these reductions.

The Division of Taxation, by its representative at the hearing herein, conceded³ that the tax due for the period March 1, 1986 through February 28, 1987 should be cancelled because the Division of Taxation did not request for its examination Malson's records for such later

³In making his concession, the representative cited Adamides v. Chu (134 AD2d 776, 521 NYS2d 826).

period.

In the course of the audit, Malson was dilatory with regard to providing a properly completed power of attorney authorizing Mr. Sternheim to represent it. As early as January 1986, there is an indication in the auditor's log that he was having difficulty obtaining a power of attorney from Malson appointing Mr. Sternheim. The log shows that on February 18, 1986, the auditor received a "purported" power of attorney for Isaac Sternheim which, according to the auditor, was an "altered" copy of an earlier power. By a letter dated February 25, 1986, the auditor notified Jack Maleh that this "altered" power of attorney was rejected because it was not an original, it was an altered form, no specific individual representative was specified, and the period for representation shown on the power was not related to the period under audit. Mr. Sternheim was also notified by a separate letter dated February 25, 1986 that Malson's power of attorney was unacceptable. Subsequently, the auditor called Jack Maleh and told him that he would accept a letter from him concerning his desire to have Mr. Sternheim represent Malson. Apparently, a properly completed power of attorney by Malson appointing Mr. Sternheim was never provided to the auditor. In fact, properly completed powers of attorney by Malson and Alan

Maleh were submitted late to the Division of Tax Appeals. On January 15, 1991, the Administrative Law Judge wrote to Mr. Sternheim as follows:

"I have also reviewed the Division of Taxation's Exhibit 'B' which consists of 3 powers of attorney. The corporate power of attorney remains defective in that Jack Maleh's signature was not properly notarized or witnessed. It has been nearly a year since this office requested that a properly notarized or witnessed power of attorney be provided. Please do so by January 31, 1991. If you do not, I may have to default the corporate taxpayer.

Further, the power of attorney appointing you to represent Alan Maleh, also part of Exhibit 'B', is not in proper form. The notary failed to note that 'Alan Maleh' personally came before her and Alan Maleh's signature is not dated. Consequently, please also submit a properly completed power of attorney for Alan Maleh by January 31, 1991. If you do not, I may have to default Alan Maleh."

It is noted that Jack Maleh filed a properly executed power of attorney appointing Mr. Sternheim which is dated May 17, 1989. Jack Maleh was also present at the hearing herein,

although he did not testify. Alan Maleh was not present at the hearing.

In response to the Administrative Law Judge's letter of January 15, 1991, adequate powers of attorney authorizing Mr. Sternheim to represent Malson and Alan Maleh have finally been submitted.

SUMMARY OF THE PARTIES' POSITIONS

Petitioners contend that the assessments were issued improperly by the City of New York instead of the State. They also assert that the Division of Taxation should be barred from assessing petitioners because it failed to mail copies of the statutory notices to petitioners' representative and mailed the corporate assessment to an invalid address. Further, petitioners contend that there is nothing in the record that shows petitioners' intent was to avoid payment of sales taxes due.

The Division of Taxation argues that the assessments were properly issued and that penalties and interest were properly imposed given the lack of cooperation on the part of petitioners and the difficulty of obtaining records.

CONCLUSIONS OF LAW

A. The auditor's testimony and his audit report demonstrated a rational basis for his calculations (see, Matter of Grecian Square v. State Tax Commn., 119 AD2d 948, 501 NYS2d 219). It is noted that the auditor did not estimate sales. Rather, as noted in Finding of Fact "5", supra, he merely reconciled sales per Malson's records to sales reported. Therefore, the burden is upon petitioners to show that the amount of tax assessed was erroneous (see, Matter of Meskouris Bros. v. Chu, 139 AD2d 813, 526 NYS2d 679). Petitioners failed to sustain this burden.

Further, petitioners have the burden to substantiate the exempt status of their sales reported as tax exempt. It appears that at the conciliation conference they offered some proof of certain tax-exempt sales which resulted in a reduction in the assessment. However, no proof of additional exempt sales was provided at the hearing herein. Tax Law § 1132(c) creates a presumption that all receipts from the sale of tangible personal property are subject to tax until

the contrary is established and places the burden of proving that any receipt is not taxable upon the taxpayer. Given the lack of any proof of additional exempt sales, there can be no further reduction in the assessment (see, Matter of Maximilian Fur Co., Inc., Tax Appeals Tribunal, August 9, 1990; Matter of Lefkowitz, Tax Appeals Tribunal, May 3, 1990).

B. The specious arguments raised by petitioners, as noted in Paragraph "12", supra, must also be addressed. First, as noted in Finding of Fact "7", supra, the statutory notices were properly issued by the State. Employees of the New York City Department of Finance are authorized under Chapter 771 of the Laws of 1971 to perform sales tax audits on behalf of the State. Mr. Stokes, as an employee of the New York City Department of Finance, properly conducted the audit at issue.

In addition, petitioners offered no proof that Mr. Sternheim was their properly authorized representative at the time of the audit and/or at the time the statutory notices dated March 20, 1987 were issued. In fact, as noted in Finding of Fact "11", supra, Malson and Alan Maleh submitted properly executed powers of attorney very late in this proceeding, and the power of attorney executed by Jack Maleh authorizing Mr. Sternheim to represent him is dated May 17, 1989, well after the date of the statutory notices. Consequently, although the Tax Appeals Tribunal has recognized that a taxpayer's representative must be served with the statutory notice (Matter of Multi Trucking, Inc., Tax Appeals Tribunal, October 6, 1988), it was not necessary in this instance because Mr. Sternheim was not an authorized representative of any of the petitioners at the time the statutory notices at issue herein were issued.

Even if there were a failure to serve the statutory notice on a duly authorized representative, this would merely serve to bar the Division of Taxation from claiming that the petition was untimely. It would not bar the Division from assessing petitioners, or relieve petitioners of their liability. Petitioners' contention that the statute of limitations for assessments had run would not apply.

Furthermore, petitioners' argument that the statutory notices issued against Malson were sent to an incorrect address is wholly without merit. In fact, Malson's own petition herein, dated

May 31, 1989, shows 436 Fifth Avenue as its address. This was the address for Malson shown on the corporate statutory notices dated March 20, 1987. It is preposterous for petitioners to fault the Division of Taxation for sending the statutory notices to this address when no other address for Malson was provided by petitioners to the Division.

C. Furthermore, petitioners failed to sustain their burden of offering evidence that would support the cancellation of penalty and interest in excess of the minimum (see, Matter of Echo Bay Yacht Club, Tax Appeals Tribunal, December 28, 1990). To the contrary, the auditor's testimony and audit report support a conclusion that petitioners were uncooperative in the course of the audit, and petitioners' inadequate recordkeeping (as well as their failure to provide any explanation for such inadequate recordkeeping) must also be held against them.

D. As noted in Finding of Fact "2", supra, neither Jack Maleh nor Alan Maleh raised an issue concerning their personal liability for sales tax owed by Malson. Therefore, personal liability is properly imposed on Jack Maleh and Alan Maleh (see, Gage v. State Tax Commission, 73 AD2d 635, 422 NYS2d 757).

E. The petitions of Malson, Ltd., Jack Maleh and Alan Maleh are granted to the following extent: (1) the notices of determination and demands for payment of sales and use taxes due dated March 20, 1987 for the period March 1, 1983 through August 31, 1986, as previously modified by a conciliation order dated May 26, 1989, are further modified in accordance with Finding of Fact "10" by cancelling that portion of the tax assessed which is attributable to the quarters ending May 31, 1986 and August 31, 1986; (2) the notices of determination and demands for payment of sales and use taxes due dated March 20, 1987 for the period September 1, 1986 through November 30, 1986 are cancelled in accordance with Finding of Fact "10"; and (3) the notices of determination and demands for payment of sales and use taxes due dated May 20, 1987 for the period December 1, 1986 through February 28, 1987 are cancelled in accordance with Finding of Fact "10". In all other respects the petitions of Malson, Jack Maleh and Alan Maleh are denied, and the notices of determination and demands for payment of sales and use taxes due dated March 20, 1987 for the period March 1,

1983 through August 31, 1986 as modified are sustained.

DATED: Troy, New York

2/22/91

ADMINISTRATIVE LAW JUDGE