

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
ALDE TAXI METER SERVICE, INC. : DETERMINATION  
AND ALVARO GALLEG0, AS OFFICER :  
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, 1983 :  
through February 28, 1986. :

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Petitioners, Alde Taxi Meter Service, Inc. and Alvaro Gallego, as officer, 43-05 Vernon Boulevard, Long Island City, New York 11101, 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, 1983 through February 28, 1986 (File No. 807075).

A hearing was held before Marilyn Mann Faulkner, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on September 12, 1990 at 9:15 A.M., with all briefs to be submitted by February 20, 1991. Petitioners appeared by Morton L. Coren, P.C. (Robert M. Markman, C.P.A.). The Division of Taxation appeared by William F. Collins, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUES

- I. Whether the test period audit used to determine sales tax due should be rejected as nonrepresentative.
- II. Whether petitioners presented sufficient evidence to establish certain sales as sales for resale.

FINDINGS OF FACT

Petitioner Alde Taxi Meter Service, Inc. is a business involved in the assembling, selling, installing and repairing of taxi meters.

Petitioner Alvaro Gallego is president of Alde Taxi Meter Service, Inc. responsible for

the supervision of the business's employees.

On June 4, 1986, a tax auditor for the Department of Taxation and Finance, Harold Kaplan, sent an appointment letter to petitioner Alde Taxi Meter Service, Inc. informing it that a field examination of its sales tax returns would be performed on June 18, 1986. The letter also requested that all books and records pertaining to the audit period of June 1, 1983 to the present be available on June 18, 1986 including "journals, ledgers, Sales invoices, purchase invoices, cash register tapes, exemption certificates and all Sales Tax records."

Mr. Kaplan was referred by petitioners to their accountant. After reviewing the records available, the tax auditor determined that the books and records were inadequate to perform a full period audit because the corporation did not offer invoices for the entire audit period or resale certificates for all the nontaxable sales claimed.

Mr. Kaplan compared the cash receipts statements with the Federal corporate returns and New York sales tax returns (ST-100's) for the period June 1, 1983 through February 28, 1986. The auditor determined that the sales reported in the cash receipts statements agreed with those in the Federal corporate return for the period ending April 30, 1985, but that there were large discrepancies between the gross sales reported in the cash receipts statements and in the New York sales tax returns for the audit period. However, the taxable sales reported in the cash receipts statements were in agreement, with minor discrepancies, with those reported in the New York sales tax returns.

The auditor selected two consecutive quarters for the test period -- the quarters ending May 31, 1984 and August 31, 1984. The auditor deemed these two quarters as representative, taking into account the corporation's notable increase in sales due to the installation of new printer receipts meters which replaced the older mechanical/digital meters.<sup>1</sup> According to the auditor, the first quarter represented the normal volume of sales prior to the changeover in taxi meters, whereas the second quarter represented the peak volume in sales for the entire audit

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<sup>1</sup>The replacement of the older meters with the printer receipts meters apparently resulted from a ruling by the Taxi and Limousine Commission.

period.<sup>2</sup>

For the quarter ending May 31, 1984, the auditor determined that only 28.63% of the nontaxable sales reported in the cash receipts statements could be substantiated by virtue of resale certificates or as payments from a sublet tenant (which consisted of non-sale income).

For the quarter

ending August 31, 1984, the auditor found that only 49% of the nontaxable sales claimed in the cash receipts statements could be substantiated. Treating the two quarters as a six-month test period resulted in a disallowance rate of 69.33%. The auditor, therefore, determined the tax deficiency by applying the 69.33% disallowance rate to the nontaxable sales claimed in the cash receipts statements for each quarter of the audit period.

On August 21, 1986, petitioner Gallego signed a consent form extending until March 20, 1987 the period of limitations for assessment of sales and use taxes for the taxable period June 1, 1983 through February 28, 1984.

Four notices of determination and demands for payment of sales and use taxes due, dated March 9, 1987, were issued to petitioners. Petitioners each received a notice assessing tax

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<sup>2</sup>According to the auditor's workpapers, the total sales for the quarters of the audit period per the cash receipts statements and sales tax returns (ST-100's) were as follows:

<u>Quarter Ending</u>	<u>Cash Receipts</u>	<u>ST-100's</u>
August 31, 1983	\$ 36,253.00	\$ 37,080.00
November 30, 1983	36,856.00	35,675.00
February 28, 1984	52,209.00	36,980.00
May 31, 1984	145,935.00	40,180.00
August 31, 1984	325,508.00	295,970.00
November 30, 1984	326,235.00	190,270.00
February 28, 1985	99,202.00	103,989.00
May 31, 1985	101,433.00	88,942.00
August 31, 1985	75,056.00	83,021.00
November 30, 1985	75,072.00	84,675.00
February 28, 1986	79,035.00	84,976.00

due in the following amounts for the respective tax quarters:

<u>Period Ending</u>	<u>Tax Due</u>	<u>Penalty</u>	<u>Interest</u>	<u>Amount Due</u>	
8/31/83	\$ 1,036.04		\$ 259.01	\$ 533.67	
11/30/83	1,110.86		277.72	522.61	
2/28/84	1,957.81		489.45	837.14	
5/31/84	7,185.75		1,796.44	2,766.99	
8/31/84	6,429.47		1,607.37	2,210.50	
11/30/84	11,720.69		2,930.17	3,565.50	
2/28/85	2,321.96		580.49	618.08	
5/31/85	3,846.07		923.06	878.71	
8/31/85	811.39		170.39	155.69	
11/30/85	711.98		128.16	111.60	
2/28/86	762.14		114.32	93.77	
Total	\$37,894.16		\$9,276.58	\$12,294.26	\$59,465.00

A second notice sent to each petitioner assessed an omnibus penalty in the total amount of \$228.54 for the period June 1, 1985 through February 28, 1986.

In a petition dated May 20, 1987, petitioners challenged the four notices stating that the test months were not representative of business activity and that additional records and certificates were now available.

A conciliation conference was held on November 1, 1988. The conferee sustained the statutory notices by order dated March 31, 1989.

By petition dated June 27, 1989, petitioners alleged that the Division of Taxation ("Division") erred in using a non-representative sample, disallowing sales made for resale and misapplying receipts by counting the same amounts twice during the sample period. Petitioners did not challenge in their petition, nor during the hearing, that Alvaro Gallego was a "person required to collect tax" under the Tax Law.

During the hearing on September 12, 1990, petitioners submitted into evidence two documents. One document was a resale certificate dated February 6, 1989, indicating Alde Taxi Meter Service, as vendor, and signed by the president of Kafka Management, as purchaser. The second document was a sheet of paper prepared by petitioner listing dates, taxi companies and the amount paid by Kafka Management. According to the testimony by Alvaro Gallego, this list represented sales for resale to Kafka Management from May 16, 1984 through August 28, 1984 for work performed on cabs owned by each of the separate taxi companies listed which were

managed by Kafka Management.

During the hearing, petitioners' representative requested that he be permitted time to submit additional invoices and other documents that were not available at the time of the audit for the Division to review. Petitioners were to submit these additional documents by November 21, 1990. To date, no further documentation has been submitted.

Both parties declined to make closing arguments at the conclusion of the hearing, but reserved until February 20, 1991 to submit memoranda of law in support of their respective positions. Neither party has submitted a memorandum of law.

#### CONCLUSIONS OF LAW

##### A. Under Tax Law § 1135(a):

"[e]very person required to collect tax shall keep records of every sale...in such form as the commissioner of taxation and finance may by regulation require."

These records must be kept in a manner suitable to determine the correct amount of tax due and must be available for the Division's inspection upon request (Tax Law § 1135[d]; 20 NYCRR 533.2[a][2]). The regulations provide that among the sales records required to be maintained are:

"sales slip, invoice, receipt, contract, statement or other memorandum of sale, ...cash register tape and other original sales document" (20 NYCRR 533.2[b][1]).

When a taxpayer's records are incomplete and unreliable for determining accurate sales, the Division may resort to a test-period audit using a method that is reasonably calculated to reflect the tax due (Matter of Urban Liquors, Inc. v. State Tax Commn., 90 AD2d 576, 456 NYS2d 138; Matter of Grant Co. v. Joseph, 2 NY2d 196, 159 NYS2d 150, 157, cert denied 355 US 869; Matter of Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858, 446 NYS2d 451). Petitioners then have the burden of demonstrating by "clear and convincing" evidence that the method of audit or amount of tax assessed was erroneous (*id.*).

Petitioners argued that the test period was not representative of normal business activity because it represented a higher than normal volume of sales due to the changeover from the older mechanical/digital meters to the newer printer receipts meters. While the record indicates

that the total number of sales was unusually high during the test period used, petitioner has presented no basis for assuming that the percentage of verifiable nontaxable sales of the nontaxable sales claimed during that test period would not be representative of the audit period. The tax auditor determined that the books and records were adequate for the purpose of calculating total sales during the entire audit period, but were inadequate to verify the nontaxable sales claimed. The auditor used the test period to determine only the percentage of verifiable nontaxable sales of the nontaxable sales claimed and applied that percentage to the actual nontaxable sales claimed in each quarter of the audit period. Although the test period would not be representative of the general business activity or quarterly sales for the entire audit period, there is no reason to assume that this percentage would change depending on the volume of sales or that the derivation of this percentage from a test period with a higher than normal volume of sales is in any way skewed. Moreover, this percentage was not applied to the total amount of sales for each quarter but only to the nontaxable sales claimed for each quarter. Therefore, if petitioners claimed a lower percentage of nontaxable sales to total sales in one quarter, then the percentage of additional taxable sales to total sales would also be lower.

Furthermore, when it is the taxpayer's own faulty record keeping that prevents exactness in the determination of the tax liability, "neither exactness in an audit nor an item-by-item analysis is required" (Matter of Day Surgical, Inc. v. State Tax Commn., 97 AD2d 865, 469 NYS2d 262, 265; see, Matter of Skiadas v. State Tax Commn., 95 AD2d 971, 464 NYS2d 304, 305; Matter of Korba v. New York State Tax Commn., 84 AD2d 655, 444 NYS2d 312, 314, lv denied 56 NY2d 502, 450 NYS2d 1023; Matter of Convissar v. State Tax Commn., 69 AD2d 929, 415 NYS2d 305, 306). Here, the auditor utilized the records that were available in a reasonable manner and petitioners have not met their burden of demonstrating that the audit method was erroneous.

B. 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. Tax Law § 1101(b)(4)(i)(A) defines a retail sale as a sale of tangible personal property to any person for

any purpose, other than "for resale as such or as a physical component part of tangible personal property." There is a statutory presumption that all receipts for property or services are subject to tax and the burden to prove otherwise rests with the taxpayer (Tax Law § 1132[c]; see, Matter of Savemart, Inc. v. State Tax Commission, 105 AD2d 1001, 482 NYS2d 150, 152, lv denied 65 NY2d 604).

Here, petitioners presented no further documentation to warrant changing the percentage of nontaxable items found by the Division for the test period. While the resale certificate submitted by petitioners during the hearing indicates a blanket certificate and identifies the corporation as the vendor and Kafka Management as the purchaser, it is dated February 6, 1989 and does not indicate that the certificate is to cover any sale items prior to that date. Tax Law § 1132(c) provides that a sale is presumed taxable unless the "vendor, not later than ninety days after delivery of the property or the rendition of the service; shall have taken from the purchaser a certificate in such form as the tax commission shall prescribe, signed by the purchaser and setting forth his name and address and...the number of his registration certificate, together with such other information...to the effect that the property or service was purchased for resale...." (Emphasis added.) Indeed, the general instructions appearing on the back of the certificate also stated the following:

"When you make a sale which is tax exempt as a sale for resale, you must obtain this certificate from your customer, properly completed, no later than 90 days after the delivery of the property sold or service rendered, or the sale will be deemed to have been a taxable sale at the time of the transaction. Where a certificate is received later than 90 days after delivery of the property sold or service rendered, the burden of proof that the sale was for resale will fall on both the seller (vendor) and purchaser and additional information may be required to substantiate that the sale was for resale" (emphasis added).

Inasmuch as the certificate does not even make a reference to the items in question, it is inadequate as evidence to prove that the sales in question constituted sales for resale.<sup>3</sup>

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<sup>3</sup>In his testimony, Mr. Gallego indicated that although he made numerous requests, Kafka Management failed to present him with timely resale certificates. Although Mr. Gallego's testimony was credible, and I am sympathetic to his plight, his limited testimony nonetheless was not adequate to establish "sales for resale" (see, Matter of Savemart, Inc. v. State Tax Commission, supra, 482 NYS2d at 152; Matter of RAC Corp. v. Gallman, 39 AD2d 57, 331

Similarly, the second document offered by petitioners is also inadequate to establish that the sales listed were sales for resale. The document was prepared by petitioner and merely lists services performed by the corporation on behalf of Kafka Management with regard to the companies listed. Again, there is no evidence to verify the relationship between Kafka Management and the companies listed or that the sales by petitioners to Kafka constituted sales for resale. Although petitioners requested, and were granted, additional time to submit further documentation in support of their position, no further documentation was received (see, Finding of Fact "14"). Therefore, absent a resale certificate with respect to the items in question or other evidence establishing actual resale by Kafka Management, petitioners have not proved that any further adjustments should be made to the tax assessed (see, Matter of Savemart, Inc. v. State Tax Commission, supra; Matter of RAC Corp. v. Gallman, supra).

C. The petition of Alde Taxi Meter Service, Inc. and Alvaro Gallego, as officer, is denied and the four notices of determination and demands for payment of sales and use taxes due, dated March 9, 1987, are sustained.

DATED: Troy, New York  
4/18/91

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ADMINISTRATIVE LAW JUDGE