STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
AUTO PARTS CENTER, INC.	:	DETERMINATION DTA NO. 815329
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 March 1, 1989 through February 29, 1992.	:	

Petitioner, Auto Parts Center, Inc., 246-06 51st Avenue, Douglaston, New York 11362, 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 March 1, 1989 through February 29, 1992.

On September 16, 1997, petitioner, by Alfred J. Parisi, Esq., and the Division of Taxation, by Steven U. Teitelbaum, Esq. (Robert Tompkins, Esq., of counsel), waived a hearing and agreed to submit this matter for determination based on documents and briefs to be submitted by March 27, 1998, which commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Frank W. Barrie, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly imposed sales tax against petitioner on certain sales of motor vehicles which it claimed to be exempt from tax.

FINDINGS OF FACT

1. During the period at issue, petitioner, Auto Parts Center, Inc. ("Auto Parts"), operated a used car and auto parts retail business at 1000 Long Island Avenue in Deer Park (Suffolk County), New York. Wholly owned by its president and sole shareholder, Gevik Atakhanian, Auto Parts had only two employees. The auditor's log includes a notation by the auditor, after his initial field visit on March 18, 1992 to the business location of Auto Parts, that the "premises seemed to be more of a junk yard than a used car dealership." Nonetheless, a review of petitioner's Federal income tax returns for 1989 and 1990 reveals that its gross receipts or sales were $3,948,379.00 and $3,175,138.00, respectively. In addition, although its business premises were located in Suffolk County, based upon a review of Auto Parts' sales and use tax return for the period ended November 30, 1991, as a representative sample, 85% of its reported taxable sales for sales tax jurisdictional purposes were attributable to New York City.

The Audit

2. By a letter dated February 25, 1992 to petitioner, the auditor advised that its sales and use tax returns "have been scheduled for a field audit at your office" on March 18, 1992. This letter made the following specific request for books and records:

> All books and records pertaining to your Sales and Use Tax liability for the period under audit are to be available on the appointment date. This would include journals, ledgers, sales invoices, purchase invoices, cash register tapes, federal income tax returns, and exemption certificates. Exemption certificates not made available may be disallowed in which case you will be held liable for the tax on the transaction.

In addition, the auditor included with his appointment letter, a checklist of requested records with the heading "Required Records for Sales Tax Audit," which had check marks next to the following 11 of 17 items on the list:

1. General ledger,
2. Cash receipts journal,
3. Cash disbursement journal,
4. Sales journal,
5. Purchase journal,
6. Federal income tax returns for years: 1990, 1991,
7. Sales tax returns and cancelled checks for quarters ended 3/1/88 - 2/28/91,
8. All fixed asset invoices for fixed assets acquired during audit period 3/1/81-2/28/92,
9. W-2/IT2102's for 1990, 1991,
10. W-3/IT2103/s for 1990, 1991,
11. WRS-2's for 1990, 1991.

Finally, the auditor also made a request that petitioner produce the following records:

1. Bank statements for 3/1/89-2/28/92,
2. Police books for 3/1/89-2/28/92,
3. MV 50 books for 9/1/91-11/30/91,
4. Sales folders for 9/1/91-11/30/91,
5. Proof for exempt sales 9/1/91-11/30/91, and
6. Part sales records.

3. Petitioner failed to make the following records available for the auditor's review:

1. Sales journal,
2. Cash receipt journal,
3. Purchase journal,
4. Check disbursements journal,
5. Exemption certificates,
6. Proof of out of state sales,
7. Folders on car sales, and
8. Additional sales tied into sales test.[1]

4. The auditor was unable to trace petitioner's bank deposits to its sales. Consequently, the auditor noted in his report that petitioner's records did not "allow an opportunity to trace any transaction back to the original source or forward to a final total." Nonetheless, the auditor accepted petitioner's gross sales reported on its sales tax returns for the audit period of $11,481,087.00.

[1]This item is not explained in the record.

5. In addition to petitioner's inability to provide, in the auditor's words, "most sale invoices for the full audit period," it could not provide:

> support . . . for sales going out of state except for resale certificates which were accepted. Petitioner could provide no Certificates for Purchase of Motor Vehicle By Non-Resident of New York or Non-Resident of Local Taxing Jurisdiction. Forms DTF 820 (or 174) or any documents that had the elements of those certificates or [of] Tax Law 1117.

6. In an attempt to verify out-of-state sales, the auditor also requested sales folders for each car sale which he hoped "would provide additional information to support the exemption for out of state sales but Mr. Singer [petitioner's accountant] could not provide them."

7. Petitioner provided the auditor with the following limited records:

1. State and federal income tax returns,
2. Bank statements,
3. Boxes of sales records,
4. Police books, and
5. Some resale certificates.

Test Period Audit

8. As a result of petitioner's failure to provide complete records for the audit period, the auditor conducted a close examination of the sales tax quarter ended November 30, 1991, as a test period. Petitioner was able to provide the auditor with approximately 25% of the sales invoices for this test period. However, the auditor could verify that only $20,500.00 of petitioner's exempt sales of $670,600.00 for the test quarter, as claimed on its sales tax return, were exempt from sales tax. Consequently, the auditor determined that petitioner should be allowed only 3.057% of its claimed exempt sales ($20,500.00 of verifiable exempt sales represents 3.057% of claimed exempt sales for the quarter of $670,600.00). This percentage was applied to petitioner's claimed exempt sales for the full audit period. As a result,

petitioner's reported taxable sales for the audit period of $6,922,881.00 were increased after audit by $4,418,861.66 to $11,341,743.00.

9. The Division of Taxation ("Division") issued a Statement of Proposed Audit Adjustment dated February 9, 1993 against petitioner asserting sales tax due as follows:

Period Ended	***Tax Due***
05/31/89	$ 23,351.75
08/31/89	25,151.62
11/30/89	21,103.28
02/28/90	26,363.65
05/31/90	27,899.23
08/31/90	23,181.25
11/30/90	21,890.34
02/28/91	12,302.07
05/31/91	23,022.75
08/31/91	25,072.08
11/30/91	52,007.98
02/29/92	56,873.74
Total	$338,219.74

The Division, in addition to imposing interest on the amounts of tax shown due above, also asserted penalties against petitioner, i.e., statutory penalty as well as penalty for omission in excess of 25% of sales tax required to be shown on returns.

10. The auditor's log notes that "repeated calls to discuss the case were not returned." Subsequently, the Division issued a Notice of Determination dated March 1, 1993 against petitioner asserting sales tax due of $338,219.74 plus penalty and interest.

11. A conciliation conference was held in this matter at which petitioner submitted documentation for exempt sales not submitted during the course of the audit, and the allowed exempt sale percentage was increased to 33.258%. As a result, a conciliation order dated August 9, 1996 reduced tax due from $338,219.74 to $232,852.93 plus penalty and interest.

12. As noted in Finding of Fact "8", the auditor performed a detailed audit of the sales tax quarter ended November 30, 1991. Included in the auditor's work papers are five pages of schedules which list total car sales by petitioner of 135 cars during this period: 55 in September, 1991; 50 in October, 1991; and 30 in November, 1991. The total dollar amount for these car sales was $661,500.00. The auditor noted that adding petitioner's sales of parts of $2,165.00, also claimed as exempt, equals $663,665.00, which left unexplained exempt sales of $6,935.00 claimed by petitioner (since exempt sales claimed by petitioner on its sales tax return of $670,600.00 less $663,665.00 equals $6,935.00). The auditor specifically noted on these five pages of schedules the 32 car sales, of the 135 total cars sold during the test period, which were treated as exempt from sales tax based upon the additional documentation provided by petitioner during the conciliation stage. Consequently, the record on submission includes a list of 103 specific car sales which have been treated as taxable based upon petitioner's failure to prove otherwise. On these five pages of schedules, the auditor has detailed the (i) customer's name, (ii) date of sale, (iii) stock number, and (iv) sales price. For example, on October 10, 1991, petitioner sold a car with a stock number of 05924 for $15,000.00 to a customer identified as Judith DeJesus.

13. The only evidence presented by petitioner[2] is a photocopy of a one-page document on the letterhead of the State of New York Department of Motor Vehicles, which petitioner's brief incorrectly referred to as a computer printout. Rather, this document is handwritten and includes an unidentified signature to a statement that "To the best of my knowledge, the VIN # [sic] on this sheet are not titled in New York State." Further, the 26 VIN #s on this document cannot be related to the auditor's schedule which lists the specific car sales at issue in the test period. Moreover, petitioner provided no evidence concerning the 103 car sales during the test period which remain at issue.

CONCLUSIONS OF LAW

A. Tax Law § 1101(b)(8)(i) defines "vendor" for purposes of the sales tax law, in part, as follows:

> (A) A person making sales of tangible personal property or services, the receipts from which are taxed by this article;
>
> (B) A person maintaining a place of business in the state and making sales, whether at such place of business or elsewhere, to persons within the state of tangible personal property or services, the use of which is taxed by this article. . . .

Petitioner is clearly a vendor for purposes of the sales tax law under the above definition.

B. Tax Law § 1131(1) and § 1132(a) provide that vendors of tangible personal property are responsible for collecting sales tax on the items they sell, and pursuant to Tax Law § 1105(a), retail sales of motor vehicles in New York State are subject to sales tax except as otherwise provided in Article 28 of the Tax Law. Consequently, petitioner was obligated to collect tax

[2]Petitioner also submitted a statutory excerpt and some instructions for registering a vehicle in New York State issued by the Department of Motor Vehicles.

upon its sales of the used cars in question unless it could establish that such sales were not subject to tax (Tax Law § 1132[c]).

C. Further, because it is a transaction tax, petitioner, as a vendor, became liable for sales tax when the sales occurred. The Tax Appeals Tribunal in ***Matter of BAP Appliance Corp.*** (June 29, 1989) noted as follows:

> The sales tax is a transaction tax; liability for the tax occurs when the transaction takes place. Generally, the taxed transaction consists of the transfer of title or possession of property or the rendition of services in exchange for consideration, and the vendor collects the tax from the customer when the transaction occurs. The time or method of payment is immaterial since the tax becomes due at the time of the transfer of property or rendition of services (***see generally***, 20 NYCRR 525.2).

D. Nonetheless, petitioner's receipts from its sale of cars would not be subject to sales tax if it complied with the requirements of Tax Law former § 1117,[3] which provides as follows:

> (a) Receipts from any sale of a motor vehicle shall not be subject to the retail sales tax imposed under subdivision (a) of section eleven hundred five, despite the taking of physical possession by the purchaser within this state, provided that the purchaser, at the time of taking delivery:
>
> (1) is a nonresident of this state,
>
> (2) has no permanent place of abode in this state,
>
> (3) is not engaged in carrying on in this state any employment, trade, business or profession in which the motor vehicle will be used in this state, and
>
> (4) prior to taking delivery, furnishes to the vendor: any affidavit, statement or additional evidence, documentary or otherwise, which the tax commission may require to assure proper administration of the tax imposed under subdivision (a) of section eleven hundred five.
>
> (b) A vendor shall not be liable for failure to collect tax on receipts from any sale of a motor vehicle provided that the vendor prior to making delivery

[3]Tax Law § 1117 has been amended since the audit period. The amendments do not directly affect the issues in this matter. Therefore, all other references to the statute in this determination will simply refer to Tax Law § 1117.

> obtains and keeps available for inspection by the tax commission any affidavit, statement or additional evidence, documentary or otherwise, as may be required to be furnished under subdivision (a) above; provided that such affidavit, statement or additional evidence is not known by the vendor, prior to making physical delivery of the motor vehicle, to be false.

E. The exemption contained in Tax Law § 1117 is not simply an exemption for sales of motor vehicles to nonresidents as mistakenly assumed by petitioner. Rather, the exemption is allowed for sales to nonresidents who ***also*** have no permanent place of abode in New York State and who have no business in which the motor vehicle purchased will be used in New York State. Even assuming that petitioner had introduced sufficient evidence to prove that the sales of the 103 cars during the test period were to nonresidents who also never sought to register such cars in New York State, it has failed to establish its right to an exemption under Tax Law § 1117 because it has not established that such nonresidents did not have permanent places of abodes in New York State or businesses in which the motor vehicles purchased would be used in New York State. Furthermore, petitioner also incorrectly assumed that evidence of reregistration with the Department of Motor Vehicles would relieve it of the burden to ensure that the correct amount of sales tax was collected (***see, Mendon Leasing Corp. v. State Tax Commn.,*** 135 AD2d 917, 522 NYS2d 315, ***lv denied*** 71 NY2d 805, 529 NYS2d 276).

F. It is observed that if petitioner had utilized the Division's prescribed form DTF-820, *Certificate for Purchase of Motor Vehicle by Non-Resident of New York State*, all of the required elements for obtaining an exemption under Tax Law § 1117 would have been addressed.

G. Furthermore, in light of petitioner's failure to provide the auditor with the requested records as noted in Finding of Fact "3", the auditor properly resorted to a test period audit, as detailed in Finding of Fact "8" (***cf., Markowitz v. State Tax Commn.***, 54 AD2d 1023, 388 NYS2d 176, ***affd*** 44 NY2d 684, 405 NYS2d 454).

H. Finally, it is noted that petitioner has introduced no evidence concerning the 103 car sales during the test period, which remained at issue following the adjustments made as a result of the conciliation order. As a result, there is no basis to modify further the results of the auditor's test period audit.

I. The petition of Auto Parts Center, Inc. is denied, and the Notice of Determination dated March 1, 1993, as modified by the conciliation order dated August 9, 1996, is sustained.

DATED: Troy, New York
July 23, 1998

/s/ *Frank W. Barrie*
ADMINISTRATIVE LAW JUDGE