

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
VIRGINIA PERKINS	:	ORDER
	:	DTA NO. 815918
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 December 1, 1991 through August 31, 1994.	:	

Petitioner, Virginia Perkins, 328 Waterside Avenue, Northport, New York 11768-1258, 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 December 1, 1991 through August 31, 1994.

On September 25, 1997, the Division of Taxation, by Steven U. Teitelbaum, Esq. (John E. Matthews, Esq., of counsel), filed a motion for an order directing summary determination in favor of the Division of Taxation. Petitioner, appearing on her own behalf, filed a response in opposition to the motion for summary determination on October 24, 1997 which commenced the 90-day period for the issuance of this order. After review of the pleadings, motion papers, affidavits and supporting documents, Jean Corigliano, Administrative Law Judge, renders the following order.

FINDINGS OF FACT

1. On June 26, 1997, petitioner filed a petition with the Division of Tax Appeals protesting three notices of sales tax due, assessment numbers L010060987, L010060988 and L009693752. Petitioner alleged that the Division of Taxation (“Division”) failed to give her

credit for payments of sales tax that had been made and overestimated the amount of sales tax due for the periods covered by the notices.

2. Petitioner attached a copy of a Conciliation Order, dated April 4, 1997, which sustained the Division's notices after a conference.

3. The Division filed an answer denying petitioner's allegations. In addition, the Division affirmatively alleged (1) that petitioner was a person required to collect sales tax on behalf of Fair Dinkum Corporation ("Fair Dinkum") and personally liable for taxes due from that corporation; (2) that two of the assessments issued to petitioner were based on returns filed by the corporation without full payment of the amount of tax shown as due (L010060987 and L010060988); and (3) that the third notice was based on a field audit of the corporation (L009693752). The Division attached computer records to its answer corresponding to the notices issued to petitioner and the corporate assessments issued to Fair Dinkum.

4. On September 25, 1997, the Division filed a motion for summary determination with supporting documentation. Those documents consist of:

- (a) the affirmation of John E. Mathews, the attorney making the motion;
- (b) the petition;
- (c) the answer;
- (d) copies of letters, sales tax returns; and checks signed by petitioner as president of Fair Dinkum doing business as Australian Country Inn and Gardens;
- (e) quarterly sales tax returns filed by Fair Dinkum for the periods December 1, 1991 through February 29, 1992 and June 1, 1984 through August 31, 1994;
- (f) copies of the three notices of determination being protested by petitioner; and

(g) a copy of a field audit report for Fair Dinkum

5. Petitioner responded to the motion within 30 days, appearing on her own behalf.

Petitioner filed a signed document stating that adequate books and records were and are available for each sales tax quarter in issue to demonstrate that proper tax returns were filed and proper amounts were paid. In unsigned and unsworn documents, petitioner elaborates on her claims that the Division did not apply payments made for the periods ended February 28, 1992 and August 31, 1994 as directed and that the Division did not correctly determine the amount of tax due for the corporation during the audit period.

CONCLUSIONS OF LAW

A. The Division's motion for summary determination is denied. To obtain summary determination, the moving party must submit evidence sufficient to "show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor" (20 NYCRR 3000.0[b][1]). Summary determination is a "drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue" (*Moskowitz v. Garlock*, 23 AD 2d 943, 259 NYS 2d 1003; *see, Daliendo v. Johnson*, 147 AD2d 312, 543 NYS2d 987, 990). Because it is the "procedural equivalent of a trial" (*Crowley's Milk Co. v. Klein*, 24 AD2d 920, 264 NYS2d 680, 682), undermining the notion of a "day in court", summary judgement must be used sparingly (*Wanger v. Zeh*, 45 Misc 2d 93, 256 NYS2d 227, 229, *affd* 26 AD2d 729). It is not for the court "to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist" (*Daliendo v. Johnson, supra*, 543 NYS2d at 990). The issues raised by the pleadings and the documents submitted by the Division and petitioner establish that in this case material issues of fact exist which require a hearing to resolve.

B. There are triable issues of fact relating to the two notices of determination which purportedly assess tax due on the basis of sales tax returns filed without full payment of the tax shown as due on those returns. Petitioner claims that the Division failed to apply payments made by the corporation to the amounts shown as due on those returns as directed. The Division's attorney states in his affirmation: "Credit for any payment against the tax reported as due on either of those [sales tax] returns, whether timely or untimely remitted, was given by the Division and such credits are reflected in the computer records attached to the Division's answer" (Affirmation of John E. Mathews, September 24, 1997). Thus, the pleadings raised a triable issue of fact.

To prevail on this motion, it was incumbent upon the Division to make a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595, 597). The Division has not made such a showing. In his affirmation, Mr. Mathews states that he has knowledge of the facts of this case based on his review of the Division's files. Thus, he has no personal knowledge of the facts, and his affirmation can be given no more weight than the documents he submitted. The computer records attached to the Division's answer show that there were assessments of tax and payments applied to those assessments. They do not address petitioner's claim that payments of tax were misdirected. Furthermore, the Division did not offer evidence to establish that the computer records are complete and accurate. I do not know who in the Division keeps or maintains the records, how the information in them is obtained or recorded, or where the information in them was obtained. The Division submitted a number of checks signed by petitioner on behalf of Fair Dinkum. In addition, documents

produced by the Division's Tax Compliance Division were submitted without explanation. There are no affidavits from anyone with personal knowledge of the Division's computer record-keeping system or tax compliance program explaining how payments made by petitioner were applied to outstanding assessments, why they were applied as they were and the source of the affiant's knowledge. Without such affidavits or some equivalent evidence, I cannot conclude that the Division properly and accurately applied all payments of tax. Accordingly, I find that on this issue the Division has not made a prima facie showing that there are no material issues of fact remaining to be resolved.

C. The third notice of determination was issued as a result of a field audit. The Division has not made a prima facie showing that no triable issues of fact exist regarding this notice. A number of questions of fact exist concerning the field audit methodology and results. I will address these separately.

Vendors of taxable goods and services are required to keep records of sales from which the vendor's liability for sales tax can be accurately determined (Tax Law § 1135[a][1]). Where such records exist, the Division is required to use them to determine the amount of tax due, but if they are not available, the Division may resort to indirect means to determine the vendor's liability (*Matter of Chartair v. State Tax Commn.*, 65 AD2d 44, 411 NYS2d 41,43). Petitioner maintains that adequate books and records were available at the time of the audit and are still available. The Division maintains that no records were made available on audit and takes no position on whether records of sales may exist. Both petitioner and the Division submitted unsworn statements to support their positions. Petitioner submitted her own signed, but unwitnessed, statement. The Division submitted a field audit report of Fair Dinkum

unaccompanied by any affidavit or sworn statement. Since it is not within my province to resolve issues of credibility on a motion for summary determination, I am left with contradictory allegations which can only be resolved through a hearing.

Moreover, even if books and records were not made available to the auditor, petitioner has the right to introduce any records she may have which demonstrate that the results of the Division's audit were incorrect. The introduction and examination of such records necessarily entail issues of credibility and weight to be given to evidence. These are not matters which are appropriately decided on a motion for summary determination.

If it is shown that the Division was justified in resorting to an indirect audit method to determine the tax due, petitioner bears the burden of showing that the method of audit or the amount of tax assessed was erroneous (*Matter of Surface Line Operators Fraternal Org. v. Tully*, 85 AD2d 858, 859, 446 NYS2d 451, 453). In order to carry this burden, the petitioner must know what method was used. In this case, the audit report states that the Division used Federal income tax returns to estimate Fair Dinkum's taxable sales. In her statement, petitioner indicates that an observation test was conducted. Thus, the parties cannot agree to even the most elementary facts. While the audit report is admissible into evidence at an administrative proceeding, it is not appropriate for me to resolve issues of fact on a motion for summary determination based entirely on the basis of this hearsay document. In addition, the affirmation of Mr. Mathews simply summarizes the audit report. Mr. Mathews does not even claim to have personal knowledge of how the audit was conducted; therefore, no findings of fact can be made on the basis of his affirmation.

Petitioner has not disputed her status as a person responsible on behalf of Fair Dinkum

for collection and payment of sales and use taxes. Consequently, there is no need to address the Division's evidence on this issue, and it is concluded that there is no issue at all regarding petitioner's status as a responsible officer of Fair Dinkum.

D. The filing of a motion does not constitute cause for postponement of a hearing date (20 NYCRR 3000.5[e]) nor should it be a cause for delay in the scheduling of a hearing.

Accordingly, the motion of the Division of Taxation for summary determination is denied, and a hearing will be scheduled as soon as possible.

Dated: Troy, New York

Administrative Law Judge