

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
IRA KANARICK : **DETERMINATION**
 : **DTA NO. 816128**
for Revision of Determinations or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period September 1, 1991 through August 31, 1994. :

Petitioner, Ira Kanarick, 354 Hungry Harbor Road, North Woodmere, New York 11581-2805, 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, 1990 through August 31, 1994.

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on May 21, 1998 at 10:30 A.M., with all briefs to be submitted by July 22, 1999, which date began the six-month period for the issuance of this determination. Petitioner appeared by Wallace Musoff, Esq., and Frederick Schulman, Esq. The Division of Taxation appeared by Terrence M. Boyle, Esq. (John E. Matthews, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation was required to subpoena the books and records of the customers of a business under audit in order to establish that the sales were exempt from tax.

II. Whether it was proper for the Division of Taxation to disallow all of the reported tax exempt sales on the basis that the business under audit was unable to substantiate that the sales were exempt from tax.

III. Whether the amount of tax assessed by the Division of Taxation should be reduced.

FINDINGS OF FACT

1. During the periods in issue, petitioner, Ira Kanarick, was the president of Multigas Distributors Ltd. (“Multigas”). Multigas was a distributor of compressed gasses such as oxygen, nitrogen, carbon dioxide, nitrous oxide and helium. The company used the trade names High Grade Compressed Gasses of Atlas and Atlas Gas & Service Corp. As president, petitioner was responsible for the overall operation of the business.

2. On October 11, 1994, the Division of Taxation (“Division”) mailed a letter to Multigas which scheduled an appointment on November 22, 1994 to conduct a sales and use tax audit for the period September 1, 1991 through August 31, 1994. The letter requested that Multigas have all of the books and records pertaining to its sales and use tax liability available on the appointment date including “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.*” (Emphasis added.) The letter included a separate page which set forth an extensive list of documents to be made available for the audit including various kinds of exemption certificates. Specifically, Multigas was asked to provide resale certificates, exempt organization certificates, capital improvement certificates, exempt use certificates, contractors exempt purchase certificates and documents showing purchases by diplomats and governmental entities. The

following statement appeared below the list of exemption documents Multigas was asked to provide: “[e]xemption certificates not made available may be disallowed in which case you will be held liable for the tax on the transactions.”

3. When petitioner received notice of the sales and use tax audit, he discussed it with the controller of Multigas, Elliot Rubinfeld. Petitioner told Mr. Rubinfeld to advise him when the books and records would be ready for the audit. At the time petitioner spoke to Mr. Rubinfeld, Multigas was operating under Chapter 11 of the Bankruptcy Code. However, petitioner was hopeful that the corporation would emerge from Bankruptcy as a viable corporation.

4. On November 4, 1994, the Division mailed a letter to petitioner which requested that petitioner execute a waiver of the statute of limitations. In response, petitioner signed a consent to extend the statute of limitations to September 20, 1995. Petitioner also included a cover letter on the stationery of Multigas Distributors Ltd. which stated in part:

Per our discussion, I hereby make a formal request to postpone starting the audit until sometime after March 15, 1995. As I have informed you, Mr. Elliot Rubinfeld, the former Controller for our firm, has suddenly left our employ leaving us without a replacement for him. At the present time my son, a recent college graduate, is the only person we have working at the Multigas offices.

Please know that I am a Certified Public Accountant and the President of Multigas. However, because of the unusual circumstances at Multigas, I need until at least March 15, 1995 to locate and assemble all of the information required to properly prepare for this audit. I am currently in the process of preparing for the audit but know that it will be impossible to complete this task in time for the scheduled audit date of December 13, 1994.

5. On May 17, 1995, the Division sent a second letter to Multigas scheduling an appointment on June 22, 1995 to conduct a sales and use tax audit for the period September 1, 1991 through February 28, 1995. The Division requested the same documents in this letter as were requested in the previous letter.

6. On May 17, 1995, the Division's auditor called the telephone number of Multigas and learned that Multigas had been split into several entities and sold as a result of a bankruptcy proceeding. The telephone receptionist told the auditor that there was no way to contact the previous owner. On the same day, the auditor's team leader instructed the auditor to prepare to issue the assessment of sales and use taxes in two discrete periods - September 1, 1991 through May 31, 1991 and June 1, 1992 through August 31, 1994. The reason for the two periods was to have one period prior to the bankruptcy and a second period during the bankruptcy. The auditor was also told to update the periods and to assess additional quarters.

7. On May 18, 1995, the auditor checked with the Division's bankruptcy unit and learned that Multigas filed under Chapter 11 of the Bankruptcy Code on May 5, 1992 and that in January 1995 the proceeding was converted to a proceeding under Chapter 7 of the Bankruptcy Code. On the same day, the Division prepared and mailed to petitioner a Statement of Proposed Audit Adjustment ("Form AU-3"). The Division issued the Statement of Proposed Audit Adjustment because it did not receive a response to its requests for books and records.

8. On June 15, 1995, the Division received a letter from petitioner bearing a Multigas letterhead. Among other things, petitioner expressed his disagreement with the audit adjustments. The Division then tried to call petitioner using the phone number of Multigas on the letterhead and was told that petitioner was no longer employed at Multigas. Thereafter, the Division called petitioner at Euro-American Marketing, which was the company listed on the envelope in which the letter arrived, and left a message to return the call.

9. The Division issued notices of determination, dated July 31, 1995, to petitioner and to Multigas which assessed a deficiency of sales and use taxes for the period September 1, 1991

through May 31, 1992 in the amount of \$142,104.92, plus interest in the amount of \$71,628.90 and penalty in the amount of \$42,631.47, for a balance due of \$256,365.29. The Division also issued a Notice of Determination dated July 31, 1995 which assessed a deficiency of sales and use taxes for the period June 1, 1992 through August 31, 1994 in the amount of \$359,727.47, plus interest in the amount of \$91,169.08 and penalty in the amount of \$98,291.46, for a balance due of \$549,188.01. The assessments were premised upon the Division's position that Multigas failed to substantiate its claimed exempt sales and therefore petitioner was liable for the tax on the transactions.

10. Petitioner filed a Request for Conciliation Conference. The request did not mention that Multigas's books and records were being held by a third party or that there was a problem in obtaining the books and records of Multigas.

11. During the conference before the Bureau of Conciliation and Mediation Services, petitioner requested time to obtain the books and records from the trustee in bankruptcy because the trustee took charge of the company's books and records when Multigas converted the proceeding to Chapter 7 of the Bankruptcy Code. Several months after the first conference was held, the team leader, an auditor, petitioner and a representative of the trustee went to a warehouse where the records were stored. The warehouse containing the records was an old, poorly-maintained building.

12. At the warehouse, several boxes which contained the books and records of Multigas were located. The contents of the boxes were unmarked and an index was not available. As a result, the Division could not determine the contents of the boxes. Further, the trustee gave only a limited period of time to physically examine whatever records existed.

13. After considering the physical conditions in which the records were kept and the fact that it was difficult to access them, Mr. Kanarick told the team leader that he would return to the warehouse at another time, go through the records, extract what was needed, make photostatic copies and bring them to his office in New York where the Division could review them at a later time.

14. When he returned to the warehouse, Mr. Kanarick discovered that no invoices were maintained by the trustee. The trustee had kept payroll records, disbursement records and canceled checks. However, it appeared to Mr. Kanarick that the trustee was primarily interested in how the money was spent and not how the money was earned. Therefore, he did not keep any records concerning income. Petitioner made copies of those records that were available which he felt were pertinent to the determination of sales tax for the periods involved.

15. Thereafter, a meeting was held in petitioner's office at which time petitioner presented summary documents consisting of four or five sheets. Petitioner explained to the auditor's team leader that no invoices were available at the warehouse because they had been disposed of by the trustee in bankruptcy. Petitioner further explained that he took the control sheets for the various ledgers of the books and records of Multigas and photocopied them so he could show the Division that the sales tax returns would tie into the books and records of the corporation and that the books and records reflected exactly what was set forth on the sales tax returns. At this time, Mr. Kanarick also provided copies of sales tax returns that had been filed by Multigas with work sheets attached showing how the figures on the sales tax returns were obtained.

16. After the meeting in petitioner's office, the conciliation conferee sustained the assessment because the books and records of Multigas were never submitted for an audit.

17. At the hearing, petitioner estimated that 85 to 92 percent of the sales were to tax exempt entities. The tax exempt entities included Telesector Resources which is associated with New York Telephone Company,¹ Brooklyn Union Gas Company, Consolidated Edison Company, NYNEX and all of the various nursing homes and hospitals to which Multigas supplied oxygen and breathing air. Later, petitioner stated that he was not sure whether the entities were tax exempt or whether they paid the tax themselves.

18. According to petitioner, he was familiar with the requirements of the New York State sales tax law; the books and records of Multigas reflected the collection and remission of New York State sales tax; and the New York State sales tax returns filed by Multigas were accurate.

19. Petitioner submitted documents at the hearing in order to establish that the amount of tax assessed should be reduced. He was also given additional time after the hearing to submit documents for the same purpose. The following is a brief description of the documents which were submitted either at or after the hearing:

(a) A series of schedules which show, among other things, that during the year 1991, Multigas had combined sales to Bell Atlantic and Consolidated Edison Company of \$216,597.00;

(b) Voluminous documents from Consolidated Edison Company of New York, Inc. which included a Direct Payment Permit, canceled checks, and invoices;

(c) A letter from National Lens Coating Corp. stating that it made exempt purchases in the amounts of \$83,645.00 in 1992, \$85,853.00 in 1993 and \$88,639.00 in 1994;

(d) Two letters from Bell Atlantic. One letter was dated August 11, 1998 and was addressed to petitioner. This letter included five pages of schedules which were entitled

¹ The conversion of the bankruptcy proceeding from Chapter 11 to Chapter 7 of the Bankruptcy Code on January 25, 1995 was prompted by the loss of Telesector Resources as a customer.

“SPECIFIED CONTRACT PURCHASES FOR CONTRACTED SUPPLIER # Q2364.” Among other things, these schedules indicated that petitioner made sales to Bell Atlantic of \$1,599,792.00 in 1991. The first letter from Bell Atlantic provided as follows:

Per our conversation of earlier today, I am forwarding to you documents reflecting purchases by Telesector Resources [sic] Group (d/b/a Bell Atlantic Services) from Atlas Gas & Services Company between 1991 and 1994 pursuant to the contract numbers you provided. As promised, I will endeavor to determine whether these purchases were made under our tax exemption certificates. As I made you aware, however, Bell Atlantic is in the mist of a job top page [sic] by our craft employees. As a result, I can make no commitment as to when I am likely to track down an answer to your inquiry. I will, however, contact you when I ultimately receive an answer.

The second letter was dated August 25, 1998 and stated:

Concerning the purchases by Telesector Resources Group, Inc. (d/b/a Bell Atlantic Network Services)'s from the above-referenced company [Atlas Gas & Service Co.], which were listed in my August 11, 1998 letter to Ira H. Kanarick, it is likely that such purchases were made under the tax exemption certificates of Telesector Resources Group. Though this is in conformance with our usual business practices, I have not as yet been able to confirm that such normal business practice was adhered to in connection with these purchases. I have and continue to pursue such confirmation and I assure you that I will contact [you] as soon as I have received an answer.

(e) Copies of an exempt organization certificate and ledgers showing purchases in the amount of \$112,042.45 by Cobble Hill Nursing Home;

(f) Invoices from Airweld Inc. showing that Airweld Inc. and Consolidated Oxygen, a division of Airweld Inc., made purchases of \$8,101.22 in 1991, \$5,232.17 in 1992 and \$18.96 in 1993. A cover letter which accompanied the invoices stated that all purchases were nontaxable because Airweld Inc. and Consolidated Oxygen were resellers of the products that Multigas, through Atlas Gas, provided. Airweld Inc. and Consolidated Oxygen submitted resale tax certificates to Atlas Gas to cover these purchases.

(g) Canceled checks from Cal-Tran Associates, Inc. of West Caldwell, New Jersey showing purchases in the amount of \$8,832.77. A letter which accompanied the checks stated, in part:

As further discussed, please be advised that as a public works contractor, Cal-Tran is tax-exempt on certain material purchased for the incorporation into public works projects; Cal-Tran is not however, tax-exempt on certain perishable items purchased for public works projects. With respect to the purchase of those items and/or materials for which it is not tax exempt, it has always been Cal-Tran's standard practice to customarily pay all appropriate sales tax obligations as billed by its outside vendors.

SUMMARY OF THE PARTIES' POSITIONS

20. Initially, petitioner argues that at the time the assessment was issued, the corporation had filed for bankruptcy and petitioner was no longer in control of the corporation. Petitioner states that the first time he was able to compel a response to his request for tax exemption certificates and records of the purchases made from Multigas by its customers was at the time a hearing date was set so that he had a return date which could be placed into an administrative subpoena. Petitioner submits that, under these circumstances, the Division should have issued subpoenas to Multigas's customers to secure the desired information. Petitioner also argues that the assessment failed to take into account Multigas's tax exempt sales.

21. Upon the submission of these documents, the Division offered the following comments regarding the tax assessed on the transactions with the customers of Multigas:

(a) Consolidated Edison - The Division concluded that the canceled checks, as well as other documents, from Consolidated Edison, establish that Consolidated Edison purchased supplies worth \$5,533.50 from Multigas. Petitioner did not provide an exemption certificate from Consolidated Edison. However, the Division ascertained that Consolidated Edison had a

New York State Direct Payment Permit. Therefore, the Division has agreed to remove \$5,533.50 in sales from the assessment resulting in a reduction in tax in the amount of \$465.51.

(b) National Lens Coating - The Division has accepted a letter from National Lens Coating as proof that purchases in the amount of \$258,137.00 during the audit period were used for exempt purposes. This results in a reduction in tax in the amount of \$21,296.30.

(c) Bell Atlantic - The Division states, among other things, that the materials from Bell Atlantic indicate that it made purchases in 1991 of \$1,599,792.00. The Division then notes that this figure does not correspond to the schedule which petitioner was able to secure from the warehouse. According to the Division, the last column of the schedule provided by petitioner appears to be a combined sales figure of \$216,597.00 for Bell Atlantic and Consolidated Edison Corporation. Therefore, the Division states that in order for it to agree to a reduction in tax for this customer, petitioner would need to separate the Bell Atlantic sales from the Consolidated Edison sales and explain the discrepancy between its reported sales figures and Bell Atlantic's much greater sales figures.

The Division also notes that the audit period included only the last five months of 1991 and that according to the schedule that petitioner secured from the warehouse, the sales for these five months were \$59,742.73. The sales tax on this figure is \$4,928.77. The Division also states that an exemption certificate was not provided² and that the cover letters from Bell Atlantic do not clearly state that the supplies were used in a tax exempt fashion.

² It is possible that a copy of the exemption certificate was not included in with the documents sent to the Division.

(d) Cobble Hill Nursing Home - The Division regards the proof provided by petitioner, consisting of an exemption certificate and a transcript of purchases, to be acceptable and has agreed to reduce the assessment by \$9,243.50.

(e) Cal-Tran Associates - The Division concluded that as an out-of-state purchaser, Cal-Tran Associates' purchases of \$8,832.77 are allowable as exempt out-of-state sales. Therefore, the Division has agreed to reduce the assessment by \$728.70 to reflect these sales.

(f) Air-Weld, Inc. - Upon reviewing the invoices showing purchases in the amount of \$13,352.35 from Multigas, the Division has agreed to reduce the tax assessed by \$1,101.57. The Division based this decision upon a cover letter from Air-Weld, Inc. stating that the materials were used in an exempt manner.

CONCLUSIONS OF LAW

A. 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. A "retail sale" is "a sale of tangible personal property to any person for any purpose, other than . . . for resale as such . . ." (Tax Law § 1101[b][4][i]). Tax Law § 1138(a)(1) provides, in relevant part, that if a sales tax return was not filed, "or if a return when filed was incorrect or insufficient, the amount of tax due shall be determined [by the Division of Taxation] 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].) When acting pursuant to section 1138(a)(1), the Division is required to select a method reasonably calculated to reflect the tax due. The burden then rests upon the taxpayer to demonstrate that the method of audit or the amount of the assessment was erroneous (*Matter of Surface Line Operators Fraternal Org. v. Tully*, 85 AD2d 858, 446 NYS2d 451).

B. In order to foster the proper administration of the sales tax and to prevent tax evasion, Tax Law former § 1132(c) presumed that all receipts from the sale of property or services of any type (mentioned in subdivisions [a], [b], [c] and [d] of Tax Law § 1105) are subject to tax until the contrary is established, and the burden of proving that any receipt is not taxable is on the person required to collect the tax or the customer. For the period at issue, former section 1132(c) provided two exceptions to this presumption of taxability: 1) where a vendor takes a resale or exemption certificate from the purchaser to the effect that the property was purchased for resale or for some use by reason of which the sale is exempt from tax; and 2) where a vendor takes “an affidavit, statement or additional evidence” from a purchaser to the effect that the purchaser is an entity exempt from sales tax. Where such materials were in proper form, the vendor was protected and the burden was on the purchaser to prove that the receipt was not taxable. However, unless such a certificate was taken by the vendor, "the sale [was] deemed a taxable sale at retail" (Tax Law former § 1132[c]). Here, since Multigas did not present any documentary evidence on audit substantiating its claim that certain sales were exempt from tax, the Division properly relied upon the presumption of taxability to disallow the claimed exempt sales (Tax Law former § 1132[c]; *see, Matter of Academy Beer Distribs.*, Tax Appeals Tribunal, January 21, 1993, *confirmed* 202 AD2d 815, 609 NYS2d 108, *lv denied* 83 NY2d 759, 616 NYS2d 14).

C. Petitioner’s first argument, that the Division should have subpoenaed the records of Multigas’s customers in order to establish Multigas’s tax exempt sales, is contrary to the statutory scheme. The Legislature has placed the burden upon the vendor to establish that a sale is not subject to tax (*see, Matter of Academy Beer Distribs., supra*). Moreover, if petitioner felt that offering additional documents was important to his case, they could have been subpoenaed for

presentation at the hearing (*see generally, Matter of Seguin*, Tax Appeals Tribunal, October 22, 1992; *Matter of Anray Serv.*, Tax Appeals Tribunal, December 1, 1988; *Matter of 3 Guys Elec.*, Tax Appeals Tribunal, September 9, 1988).

D. It is also noteworthy that at the time the Division first asked to review the books and records of Multigas, they were at the business premises. If Multigas had been more forthcoming in making those records available for an audit, it is possible that the problem of the records being in the possession of a third party might not have arisen.

E. The only issue which remains is whether the amount of tax assessed should be reduced. Here, the Division has agreed to a reduction in tax as set forth in Finding of Fact 21(a), (b), (d), (e) and (f), and these items are no longer in dispute.

F. Petitioner has not established that he is entitled to an adjustment for the sales made to Bell Atlantic. First, the evidence presented does not show that the materials were used in a tax exempt manner. Secondly, there is a large discrepancy between the amount of sales which petitioner claims Multigas had with Bell Atlantic and the amount of purchases which Bell Atlantic claims it had from Multigas. In the absence of any way of reconciling this difference, there is no way to determine what adjustment, if any, is warranted.

G. The petition of Ira Kanarick is granted to the extent of Conclusion of Law "E" and the Division is directed to modify the notices of determination mailed to petitioner accordingly; except as so granted, the petition is otherwise denied and the notices of determination are sustained together with such penalties and interest as may be lawfully due.

DATED: Troy, New York
January 20, 2000

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE