STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
MERBAUM ASSOCIATES, INC. AND JOEL MERBAUM	:	DETERMINATION DTA NOS. 816585 & 816586
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 1988 through November 30, 1994.	:	

Petitioners, Merbaum Associates, Inc. and Joel P. Merbaum, 115 Avalon Garden Drive, Nanuet, New York 10954, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1988 through November 30, 1994

A hearing was held before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on February 3, 1999 at 10:30 A.M., with all briefs to be submitted by June 1, 1999, which date began the six-month period for the issuance of this determination. Petitioners appeared *pro se*. The Division of Taxation appeared by Terrence M. Boyle, Esq. (Andrew Haber , Esq., of counsel).

ISSUES

I. Whether petitioners were vendors pursuant to Tax Law § 1101(b)(8) and, therefore, persons required to collect sales tax under Tax Law § 1131(1).

II. Whether, if petitioners were persons required to collect tax, they are liable for sales tax on the receipts from goods sold to various hotels and other customers.

III. Whether petitioners have established reasonable cause for failure to register as a vendor and to collect and pay over sales taxes during the audit period.

FINDINGS OF FACT

1. The Division of Taxation ("Division") issued to petitioner Merbaum Associates, Inc. a Notice of Determination, dated September 15, 1995, assessing sales taxes for the period December 1, 1988 through November 30, 1994 in the amount of $131,094.37 plus penalty and interest. A Notice of Determination, dated September 25, 1995, was issued to petitioner Joel Merbaum as a person responsible for taxes due from Merbaum Associates, Inc. The notice assessed tax of $131,094.37 plus penalty and interest.

2. An audit of Merbaum Associates, Inc. was triggered by information discovered in another audit. A Division auditor performing a sales tax audit of the Lake Placid Hilton Resort in Lake Placid, New York came across several invoices showing purchases of carpeting and chairs with no charge for sales tax. The invoices bore the name of Merbaum Associates, Inc., Georgetown Office Plaza, 339 North Main Street, New City, New York.

3. A review of the Division's records revealed that Merbaum Associates, Inc. was not registered as a sales tax vendor in New York State and did not file sales tax returns. A letter scheduling an audit appointment was mailed to Merbaum Associates, Inc. at the address shown on the sales invoice. This letter was returned to the auditor with notice from the United States Postal Service that it had no forwarding address for Merbaum Associates.

4. On April 13, 1994, the auditor, Mona Finn, visited the business address of Merbaum Associates, Inc. and learned that the company had been out of business for approximately six months and that its owner's name was Joel Merbaum.

5. On August 30, 1994, Ms. Finn sent a letter to Joel Merbaum at his home address scheduling an audit appointment on September 22, 1994. Ms. Finn visited Merbaum's home on that date and was told that he did not maintain the corporation's records and would try to get them from his accountant.

6. On November 1, 1994, the Division issued a subpoena for the sales records of Merbaum Associates, Inc., including: journals, ledgers, sales invoices, purchase invoices, Federal income tax returns, exemption certificates and shipping documents. Mr. Merbaum[1] was asked to produce these records at his home on November 9, 1994. Records were not produced at this time.

7. Since petitioner did not make any records available, the Division estimated the sales of Merbaum Associates, Inc. based upon Federal income tax returns (form 1040, schedule C) filed by petitioner for the years 1989 through 1991. In each of those years, Merbaum filed a schedule C reporting profits from doing business as follows:

Year	Gross Receipts	Cost of Goods Sold	Gross Profit	Expenses	Net Profit
1989	$ 405,622.00	$ 334,782.00	$70,840.00	--------	$ 17,282.00
1990	79,371.00	64,105.00	15,266.00	$10,653.00	4,613.00
1991	262,274.00	213,354.00	48,774.00	40,411.00	8,363.00

8. Because no other records were available, the Division assumed that gross receipts as shown on the schedule C's were taxable sales made in New York State, and sales tax due was calculated accordingly. Gross receipts for 1992, 1993 and 1994 were estimated to be the same as

[1] The evidence will show that Merbaum Associates, Inc. conducted business for only one of the six years in the audit period. During the remainder of the period, Joel Merbaum conducted business as a sole proprietor. Inasmuch as the majority of the evidence pertains to Joel Merbaum personally, he will be referred to in the remainder of this determination as the "petitioner" or as "Merbaum."

those reported for 1991, $262,274.00 per year. Annual gross receipts were allocated to sales tax quarters for each of the years in the audit period, and the Rockland County sales tax rate was then applied to gross receipts to determine sales tax due.[2] This resulted in tax due of $11,825.56 per quarter for the period December 1, 1988 through November 30, 1989; tax due of $ $2,261.00 per quarter for the period December 1, 1989 through November 30, 1990; tax due of $4,098.03 per quarter for the period December 1, 1990 through February 28, 1991; tax due of $4,425.87 per quarter for the period March 1, 1991 through August 31, 1991; and tax due of $4,753.72 per quarter for the period September 1, 1991 through November 30, 1994. Total sales tax due was determined to be $131,094.34.

9. The Division issued a Statement of Audit Changes to Merbaum Associates, Inc., dated December 5, 1994 asserting sales tax due as computed above. Petitioner returned a copy of the statement to the Division with the following message written on it: "As we discussed I was just a salesman and don't understand the above. Can we meet at my Accountant's office so to clarify this."

10. As requested the auditor contacted petitioner's accountant to schedule an appointment, and a meeting was scheduled on June 6, 1995. On May 23, 1995, the auditor mailed an audit appointment letter to the accountant confirming the date of the meeting and requesting that records of taxable sales be made available at that time.

11. A meeting was held as scheduled. The auditor, Merbaum, and his accountant, Mel Steir, were present. No books or records were made available to the auditor. They discussed what records would be needed to bring about an adjustment to the Statement of Proposed Audit

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[2] The tax rate changed from 6.25% to 6.75% as of March 1, 1991 and to 7.25% as of September 1, 1991.

Changes, and a second appointment was scheduled for June 29, 1995. At the request of Mr. Steir, this appointment was postponed to July 18, 1995. On July 17, 1995, Mr. Steir telephoned the auditor and canceled that appointment. Notices of determination were then issued as described in Finding of Fact "1."

12. Petitioner was a sales representative for five different manufacturers of furniture and carpeting. Among the companies he represented were American of Martinsville, Virginia, American Premiere Furnishings in Axton, Virgina and Value Line Company of Arkadelphia, Arkansas. His territory included Pennsylvania, New Jersey, New York, Connecticut, Vermont, New Hampshire and Maine.

13. Petitioner never provided copies of contractual agreements with the companies he represented. The only evidence he offered of a typical agreement was a letter to him from Value Line, dated January 8, 1991. The first paragraph of that letter confirms that petitioner was appointed as Value Line's sales representative in eight states. The second paragraph states:

> You will be paid a 12% commission upon our delivery to jobsite. At times we will request you to collect funds for us to expedite fast track orders. After payments are received, we will pay commission on the following 10th of the next month.

14. After getting a lead from one of the manufacturers, petitioner would visit a potential customer and solicit an order. If the customer placed an order, petitioner wrote it up on a Merbaum Associates sales invoice. Petitioner then placed the order with the manufacturer. After receiving an order, the manufacturers billed the customer directly. Petitioner did not receive his commission until the manufacturer was paid in full.

15. As a manufacturer's representative, petitioner facilitated relationships between the manufacturer and the customer. He was responsible for collection of monies, replacing or repairing broken furnishings, monitoring deliveries and negotiating with common carriers.

16. Merbaum Associates was incorporated in March 1991. Until that time, petitioner did business as a sole proprietor. Merbaum Associates actively transacted business for approximately one year, after which petitioner again conducted business as a sole proprietor.

17. Petitioner submitted four Value Line Company sales invoices showing sales made to customers in 1997, 1998 and 1999. The customers were all located outside of New York State. In each case, petitioner is shown as the salesman.

18. Petitioner filed a Chapter 7 petition in bankruptcy in the United States Bankruptcy Court, Southern District of New York on February 3, 1995. On or about July 17, 1995, the petition was amended to include the New York State Department of Taxation and Finance in the schedule of unsecured priority creditors.

19. The Division issued conciliation orders, dated April 10, 1998, to petitioner and Merbaum Associates, Inc. sustaining the notices of determination.

CONCLUSIONS OF LAW

A. Petitioner was issued a Notice of Determination for the period December 1, 1988 through November 30, 1994 as an officer of Merbaum Associates, Inc. or a person responsible to collect tax on behalf of that entity. In fact, Merbaum Associates was in existence as a corporate entity for only one year. Petitioner conducted business as a sole proprietor during most of the audit period. It is his contention that he cannot held liable for taxes assessed against him as a corporate officer since there was no corporation. This contention is rejected. The law in New York is clear; defects on the face of the notice will not invalidate the notice, absent evidence of

harm or prejudice to the petitioner (***Matter of Agosto v. Tax Commn.***, 68 NY2d 891, 508 NYS2d 934; ***Matter of Pepsico, Inc. v. Bouchard***, 102 AD2d 1000, 477 NYS2d 892; ***Matter of Mon Paris Operating Corp. v. Commissioner of Taxation & Fin***., Sup Ct, Albany County, March 16, 1988, ***affd on other grounds*** 151 AD2d 822, 542 NYS2d 61; ***Matter of A & J Parking Corp.***, Tax Appeals Tribunal, April 9, 1992). Here, there is no evidence that petitioner was prejudiced by receiving a notice issued to him as a responsible officer rather than as a sole proprietor.

Petitioner knew that he was being assessed for sales made by Merbaum Associates or by him personally, and he effectively responded to the notices of determination issued to Merbaum Associates and to him. He availed himself of the opportunity to be heard at a conciliation conference, and he filed timely petitions for a hearing. Moreover, petitioner was well aware of the basis of the notices of determination; he was provided with statements of proposed audit adjustment and he met personally with the auditor on two occasions. Thus, there is no evidence in the record that petitioner was misled or prejudiced by the error in the Notice of Determination issued to him personally.

B. The essence of petitioner's position is that he was never responsible for collection or payment of New York State sales taxes. He argues that either the manufacturers he represented or the customers he sold to should have paid any taxes due on New York State sales. This position is in conflict with the scheme of the New York State sales tax law.

Section 1105(a) of the Tax Law imposes a sales tax on the receipts from every retail sale of tangible personal property in New York State (unless otherwise provided in article 28). Persons responsible for collection of sales tax include "every vendor of tangible personal property" (Tax Law § 1131[1]). A vendor is defined as "[a] person making sales of tangible

personal property or services, the receipts from which are taxed by [article 28]" (Tax Law § 1101[a][8]).

Petitioner claims that he was a commissioned sales representative and not a vendor of tangible personal property. However, the Division's sales tax regulations state: " An independent manufacturer's representative, representing many clients and acting on his own behalf, who solicits orders from New York State customers is a vendor" (20 NYCRR 526.10[a][1][i]). Petitioner has offered no reason why this regulation should not apply to his circumstances. Accordingly, I conclude that petitioner was a vendor within the meaning of section 1101(a)(8) of the Tax Law.

As a vendor of tangible personal property, petitioner was a person responsible for collection of sales and use taxes. As such, he was required to file a certificate of registration with the Commissioner of Taxation and Finance (Tax Law § 1134[a][1]), to maintain records of sales (Tax Law § 1135[a][1]) and to file sales tax returns (Tax Law §1136). Moreover, he was personally liable for the sales tax imposed, collected or required to be collected under article 28 (Tax Law § 1133[a]).

Tax Law § 1133(a) provides, in pertinent part, that every person who is required to collect the tax imposed by article 28 of the Tax Law is personally liable for that tax. Construing Tax Law §§ 1131(a) and 1138, the Tax Appeals Tribunal has stated: "the general rule is that the liability of a responsible officer is separate and independent from that of the corporation" (***Matter of Kadish***, Tax Appeals Tribunal, November 15, 1990). In the same fashion, the liability of a manufacturer's representative is separate and independent from that of the manufacturer and the customer, each of which is also independently liable for the tax imposed (Tax Law § 1133). Inasmuch as petitioner was a vendor during the audit period and, therefore, a person required to

collect sales tax, his liability for the taxes not collected is separate and independent of the liability of his manufacturer clients and his customers. Petitioner cannot relieve himself of liability by pointing to others.

C. If a required return is not filed, or if it is incorrect or insufficient, the Commissioner of Taxation and Finance is directed to determine the amount of tax due from such records as are available (Tax Law § 1138[a][1]). Here, the Division made repeated attempts to obtain information and records from petitioner regarding sales made in New York, to no avail. In the absence of books and records, the Division was authorized to calculate sales tax due using any reasonable method (***Matter of Ristorante Puglia, Ltd. v. Chu***, 102 AD2d 348, 478 NYS2d 91). The methodology employed by the Division, an estimate of taxable sales based on Federal income tax returns filed by petitioner for the years 1989, 1990 and 1991, has been found to be reasonable where no other information is available (***Matter of Perkins,*** Tax Appeals Tribunal, July 22, 1999; ***Matter of Scotto***, Tax Appeals Tribunal, January 16, 1992).

Where, as here, the audit method has been shown to be reasonable, the burden rests with the taxpayer to show by clear and convincing evidence that the methodology was unreasonable or that the amount of tax assessed was erroneous (***Matter of Meskouris Bros. v. Chu***, 139 AD2d 813, 526 NYS2d 679; ***Matter of Surface Line Operators Fraternal Org. v. Tully***, 85 AD2d 858, 446 NYS2d 451, 452). Petitioner has failed to do either. Although he was given ample opportunity to provide evidence that the audit incorrectly stated the amount of his New York State sales, petitioner provided no relevant evidence. The Value Line invoices he submitted showed sales made well outside the audit period and have no probative value in this proceeding. In fact, petitioner has never offered any records of sales made during the audit period, either at

the time of the audit or in the course of this administrative hearing. Therefore, he has not demonstrated any error in the audit method or results.

D. Petitioner has not established that he was discharged from liability for the taxes due as a result of having filed a petition in bankruptcy. As a general matter, the sales taxes imposed by Article 28 are considered to be trust fund taxes and as such not dischargeable in bankruptcy (***De Chiaro v. New York State Tax Commn.***, 760 F2d 829). Although petitioner submitted a copy of his petition in bankruptcy showing that the Division was included as a creditor, he submitted no proof that the sales tax debt was ever discharged. Moreover, the subject matter of this proceeding is confined to whether petitioner is liable for the sales tax assessed under the relevant provisions of the Tax Law. If petitioner believes that the Division is barred from collection of sales tax based on the Federal Bankruptcy Code, his recourse is in the bankruptcy courts.

E. Petitioner has not presented any evidence warranting cancellation of the penalties imposed against him or against Merbaum Associates. Sales tax penalties may only be cancelled if the failure to pay was due to reasonable cause and not due to willful neglect (Tax Law § 1145[a][1][iii], [vi]). In determining whether reasonable cause exists, an important factor to consider is the extent of the taxpayer's efforts to ascertain his tax liability (***see***, ***Matter of KAL Associates***, Tax Appeals Tribunal, October 17, 1991). There is no evidence that petitioner made any attempt to determine whether he had a duty to collect sales tax on sales he solicited and made in New York State. Had he done so, he would have found that the duty of a manufacturer's representative to register as a vendor and collect sales tax is clearly set forth in the Division's regulations. His failure to make a good faith effort to ascertain his responsibilities as a New York State vendor and his failure to present any evidence at all of the amount of his taxable sales preclude a finding of reasonable cause.

F. The petitions of Joel Merbaum and Merbaum Associates, Inc. are denied, and the notices of determination dated September 15, 1995 are sustained.

DATED: Troy, New York
September 23, 1999

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE