

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MANUEL A. ALMANZAR	:	DETERMINATION
	:	DTA NO. 817125
	:	
for Redetermination of a Deficiency or for Refund of	:	
New York State and New York City Personal Income	:	
Taxes under Article 22 of the Tax Law and the New York	:	
City Administrative Code for the years 1990 through	:	
1993 and 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, 1991 through February	:	
28, 1993.	:	

Petitioner, Manuel A. Almanzar, 438 61st Street, Brooklyn, New York 11220, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 1990 through 1993 and 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, 1991 through February 28, 1993.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on March 16, 2000 at 10:30 A.M., with all briefs to be submitted by June 30, 2000, which date began the six-month period for the issuance of this determination. Petitioner appeared by Ismael Gonzalez, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Herbert M. Friedman, Esq., of counsel).

ISSUES

I. Whether petitioner filed a New York State Resident Income Tax Return for each of the years 1990 through 1993.

II . Whether petitioner was a person required to collect sales and use taxes pursuant to Tax Law § 1131(1) for the period at issue.

III. Whether the Division of Taxation properly imposed fraud penalty on the sales and use tax assessment.

FINDINGS OF FACT

1. On January 4, 1999, the Division of Taxation (“Division”) issued to petitioner, Manuel A. Almanzar, four notices of deficiency asserting New York State and New York City personal income taxes as follows:

YEAR	STATE/CITY	FEDERAL AGI	TAX AMOUNT
1990	State	\$102,750.00	\$ 7,260.31
1990	City	\$102,750.00	3,558.93
1991	State	\$14,975.00	404.00
1991	City	\$14,975.00	231.00
1992	State	\$48,275.00	8,640.67
1992	City	\$48,275.00	4,764.29
1993	State	\$118,585.00	2,970.00
1993	City	\$118,585.00	1,639.00
TOTAL			\$29,468.20

Penalties were assessed for failure to file a tax return (Tax Law § 685[a][1]), underestimation of income tax (Tax Law § 685[c]) and negligence or intentional disregard of the Tax Law (Tax Law

§ 685[b][1], [2]). Interest was imposed pursuant to Tax Law § 684(a). The figures for Federal adjusted gross income (“AGI”) are taken from audit results determined by the Brooklyn District Office of the Internal Revenue Service as shown on Income Tax Examination Changes (Federal form 4549-C6) for the years at issue.

2. Petitioner introduced into the record copies of U.S. individual income tax returns (Form 1040) and New York State resident income tax returns (Form IT-201) for the years 1991, 1992 and 1993. The returns are undated, unsigned and identify petitioner as being self-employed. Attached to each Federal return is a Profit or Loss from Business Statement (Schedule C) which indicates petitioner’s business as “grocery helper” and business address as “473 St Johns Place, Apt 2A, Brooklyn, NY 11238,” the address of his residence. Business income for the years 1991, 1992 and 1993 is stated to be \$4,255.00, \$4,685.00 and \$5,125.00, respectively. Petitioner could not remember filing a personal income tax return for the years at issue. Pursuant to a Certificate of Non-filing, the Division indicates that a search of its personal income tax files for the personal income tax returns for the years 1990, 1991, 1992 and 1993 of Manuel A. Almanzar revealed that no such returns were located.

3. On May 29, 1995, the Division issued to petitioner a Notice of Determination of sales and use taxes due for the period May 1, 1991 through February 28, 1993 assessing tax due of \$47,710.77, plus interest and fraud penalty (Tax Law § 1145[a][2]). The notice is based upon an audit of Almanzar Grocery, located at 73 Troy Avenue, Brooklyn, New York 11213.

4. The Division of Taxation (“Division”) commenced the sales tax audit of the Almanzar Grocery business by sending an appointment letter on January 18, 1995 to the business address. The letter provided that:

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.

The period under audit was listed as March 1, 1992 through November 30, 1994. The date scheduled for the appointment was March 17, 1995.

On February 10, 1995, the auditor went to the place of business to conduct a pre-audit survey. He discovered that a different individual was now conducting business at this address. The auditor was informed that Almanzar Grocery had gone out of business in July 1993 when the new owners purchased the store. The appointment letter was returned to the Division by the United States Postal Service as unclaimed on February 16, 1995.

Since the auditor could not contact petitioner and was therefore unable to obtain any books and records to verify the reported sales, the auditor used third-party verification as a basis to identify inventory purchases. Specifically, the Division obtained purchases from two beverage distributors who together had reported purchases by petitioner in the amount of \$143,764.00 for the year 1991. The auditor applied a mark-up of 50% to the purchases to arrive at taxable sales for the year 1991 of \$215,646.00. Reported taxable sales of \$1,719.00 were subtracted from this figure, and the difference of \$213,927.00 was divided by the taxable sales reported to determine an error rate of 12,444.85%. This ratio was deemed to be the ratio of underreported sales based on the business's inventory purchases. Taxable sales reported for the audit period of June 1, 1991 through February 28, 1993 in the amount of \$4,647.00 were multiplied by the error rate resulting in additional taxable sales of \$578,312.18 and additional sales tax liability of \$47,710.77.

5. During the sales tax audit period, petitioner was employed at a grocery store owned by his brother located at 628 Nostrand Avenue, Brooklyn, New York, earning \$225.00 per week. Almanzar Grocery, located at 73 Troy Avenue, Brooklyn, New York, was owned by petitioner's cousin, Nelson Rosario. Although Mr. Rosario owned the Troy Avenue grocery store, he requested of petitioner that the store be placed in Mr. Almanzar's name because Mr. Rosario had an arrest record related to gambling at another grocery store and because Mr. Rosario had immigrated to this country illegally. Mr. Almanzar has a 7th grade education achieved in the Dominican Republic and has a limited command of the English language. Not appreciating the ramifications of his decision, and wanting to help his cousin, Mr. Almanzar gave his permission to put the business in his name, but did not consent to Mr. Rosario's incurring any debt in petitioner's name. A New York State Department of Taxation and Finance Sales Tax Certificate of Authority was obtained under the name "Manuel A. Almanzar/Almanzar Grocery." The New York State Sales and Use Tax Returns for the period June 1, 1991 through February 28, 1993 were filed under the same name and bore the signature of "Manuel A. Almanzar" (although signed by someone other than Mr. Almanzar) and indicated Mr. Almanzar to be the "owner." A Notification of Sale, Transfer or Assignment in Bulk filed with the Division on August 3, 1993 listed the seller as "Manuel Antonio Almanzar."

Petitioner never worked at the grocery store owned by his cousin, had no authority to hire or fire employees who worked there, and did not do so, and he had no authority nor was he involved in the purchasing of inventory or other supplies. He had no authority to pay any bills of his cousin's store and did not do so, and he had no check-signing authority. In addition, Mr. Almanzar did not sign any of the grocery store's sales and use tax returns for the period at issue.

Nelson Rosario was shot and killed in a robbery attempt on August 12, 1992. Following the death of his cousin, Mr. Almanzar's name does not appear on the sales and use tax returns submitted by the Troy Avenue business operation.

CONCLUSIONS OF LAW

A. Petitioner was required to file a New York State personal income tax return for the years 1990 through 1993 (*see*, Tax Law § 651[a]). During these proceedings petitioner maintained that he could not remember whether he filed the required returns. The returns that were produced on his behalf were undated and unsigned. No proof was offered by petitioner as to the filing of any returns. A Certificate of Non-filing introduced by the Division indicates that a search of its personal income tax files for the personal income tax returns for the years 1990, 1991, 1992 and 1993 of Manuel A. Almanzar revealed that no such returns were located.

The testimony of Mr. Almanzar and the returns offered are legally insufficient, without proof of mailing, to establish that petitioner's 1990, 1991, 1992 and 1993 New York State personal income tax returns were filed (*Matter of Schumacher*, Tax Appeals Tribunal, February 9, 1995; *Matter of Savadjian*, Tax Appeals Tribunal, December 28, 1990).

B. In general, the Division must assess a deficiency of personal income tax within three years after a return is filed (Tax Law § 683[a]). However, an assessment may be made at any time if the taxpayer fails to file a return as required by Tax Law § 651(a)(1) or a taxpayer fails to report Federal changes as required by Tax Law § 659 (Tax Law § 683[c][1][A], [C]). Here, petitioner failed to both file returns and file reports of Federal changes for the years at issue. Thus, the notices of deficiency could be issued at any time and were timely.

C. The Division placed into evidence the Income Tax Examination Changes for the years at issue which showed that an audit of petitioner by the Internal Revenue Service

resulted in additional Federal adjusted gross income. Since the additional income was subject to Federal personal income tax, it was rational for the Division to rely on the Federal audit changes as a basis for issuing the assessment (*see, Matter of Karayannides*, Tax Appeals Tribunal, March 13, 1970). Therefore, the burden of proof was upon petitioner to show that the Notice of Additional Tax Due was incorrect (Tax Law § 689[e]; *see, e.g., Matter of Delia v. Chu*, 106 AD2d 815, 484 NYS2d 204). Here, petitioner has not presented any evidence which would satisfy this burden. Therefore, the notices of deficiency for the years at issue, which were not challenged by petitioner as to the tax amounts claimed to be due, are sustained.

D. Tax Law § 1133(a) provides that “every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article.” Pursuant to Tax Law § 1131(1), persons responsible for the collection of tax include “every vendor of tangible personal property.” Finally, a vendor is defined at Tax Law § 1101(a)(8) as “ [a] person making sales of tangible personal property or services, the receipts from which are taxed by [Article 28].”

E. Petitioner allowed the business operation of the grocery store to be carried out in his name. The business was presented to the Division as a sole proprietorship owned by petitioner through the filing of sales tax returns for a portion of the audit period. The notification of bulk sale listed petitioner as the seller. Most importantly, petitioner obtained a certificate of authority to collect sales tax in his name and the name of the grocery store thereby establishing petitioner as a “vendor” required to collect sales tax (*see, Matter of Franklin Mint Corp. V. Tully*, 94 AD2d 877, 463 NYS2d 566, *affd* 61 NY2d 980, 475 NYS2d 280; *Matter of Adrienne Goldstein dba Meals on Wheels*, Tax Appeals Tribunal, June 25, 1992; Tax Law § 1131[1]), and personally liable for the tax imposed, collected or required to be collected (Tax

Law § 1133[a]). To hold otherwise would allow a taxpayer such as petitioner to either mislead the Division during the operation of the business or at such time as the Division determines or demands additional tax due.

F. Tax Law § 1145(a)(2) provides for civil penalties in a case where failure to pay tax is the result of fraud. The burden of showing that such failure occurred as a result of fraud rests with the Division (*Matter of Iler Sener d/b/a Jimmy's Gas Station*, Tax Appeals Tribunal, May 5, 1988). While fraud is not defined in the statute, a finding of fraud requires the Division to show:

clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representation, resulting in deliberate nonpayment or underpayment of taxes due and owing. (*Matter of Iler Sener, supra*, citing, *Matter of Shutt*, State Tax Commn., July 13, 1982.)

The Division has not established that the business's failure to pay the sales tax due was the result of fraud. The intent of Mr. Almanzar in placing the grocery store business in his name was to assist Mr. Rosario, not to deliberately underpay the sales tax due. Considering petitioner's educational background and his lack of contact with the business operation, it cannot be found that petitioner fraudulently acted to deprive the Division of the additional sales tax determined to be due. Therefore, the fraud penalty is canceled.

G. The petition of Manuel Almanzar is granted to the extent indicated in Conclusion of Law "F", and the notice of determination issued on May 19, 1995 is to be modified accordingly; in all other respects the petition is denied, and the notices of deficiency issued on January 4, 1999 are sustained.

DATED: Troy, New York
November 16, 2000

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE