

STATE OF NEW YORK

DIVISION OF TAX APPEALS

---

In the Matter of the Petition	:	
of	:	
<b>ANTHONY STODUT</b>	:	DETERMINATION DTA NO. 817172
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 September 1, 1985 through February 28, 1989.	:	

---

Petitioner, Anthony Stodut, 1 Kings Court, Valley Cottage, New York 10989, filed a petition for revision of a determination or for refund of sales and use taxes for the period September 1, 1985 through February 28, 1989.

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 January 18, 2000 at 10:30 A.M. Petitioner filed a final brief on May 31, 2000 which date began the six-month period for issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Andrew S. Haber, Esq., of counsel).

***ISSUES***

Whether the Division of Taxation properly applied all tax payments made by petitioner or the corporation of which he was president to certain outstanding tax liabilities.

***FINDINGS OF FACT***

1. The Division of Taxation ("Division") conducted a sales tax field audit of N.T.J. Liquors, Inc. ("N.T.J.") for the period September 1, 1985 through February 28, 1989. Petitioner, Anthony Stodut, was the president of N.T.J.

2. By letter dated September 26, 1988, the Division scheduled a field audit appointment and requested all books and records of N.T.J. pertaining to its sales tax liability for the audit period. N.T.J. did not provide any sales invoices or register tapes for the audit period. Purchase records were deemed inadequate because N.T.J. provided records only for the periods September 1985 through August 1986 and January 1988 through November 1988. N.T.J.'s purchases for the audit period were obtained from its third-party suppliers. A comparison of purchases reported by N.T.J.'s suppliers with purchases shown in N.T.J.'s records disclosed substantial discrepancies showing that N.T.J.'s purchases were greater than the amounts shown in its own records. Because of the inadequacy of N.T.J.'s records, the Division conducted a purchase markup audit which estimated sales for the period September 1, 1985 through August 31, 1989. Selling prices were obtained by checking the shelf prices of items for sale. An adjustment was made for the inclusion of sales tax in the shelf prices. Using purchase prices and adjusted selling prices, the Division calculated a markup of 25.16%. This markup was applied to N.T.J.'s purchases to arrive at total sales of \$1,440,839.36. N.T.J.'s reported sales of \$693,753.00 were subtracted from this amount yielding additional taxable sales of \$747,086.36 with a tax due of \$61,634.62.

3. As a result of the field audit, the Division issued to N.T.J. two notices of determination of sales and use taxes due, each dated September 5, 1990.<sup>1</sup> Because of changes in the Division's computer record keeping system, the assessment identification numbers which appear on the notices are different from the assessment identification numbers now in use. The following

---

<sup>1</sup> The Division issued a third notice for the period ending August 31, 1989, assessing tax of \$1,661.63 plus penalty and interest. There are no issues relating to this notice. However, the assessment explains the difference between the amount determined on audit and the amounts assessed on the notices which are in issue.

tables of notices issued shows the current assessment identification number with the older number in italics following it.

Notice No.	Period Ending	Tax	Penalty	Interest	Total
L004685528 <i>S900905019L</i>	February 28, 1989	\$59,972.98	\$17,991.87	\$34,376.96	\$112,341.81
L004685529 <i>S900905021L</i>	February 28, 1989		\$5,739.63		\$5,739.63

4. The Division issued to petitioner two notices of determination of sales and use taxes due, also dated September 5, 1990. Petitioner was assessed as the president of N.T.J. and as a person responsible for collection of tax on behalf of that corporation as follows:

Notice No.	Period Ending	Tax	Penalty	Interest	Total
L006593110 <i>S900905022L</i>	February 28, 1989	\$59,972.98	\$17,991.87	\$34,376.96	\$112,341.81
L006593111 <i>S900905024L</i>	February 28, 1989		\$5,739.63		\$5,739.63

Assessment number L-004685529 imposes a penalty for substantial underreporting of taxes due and may be referred to here as “the penalty assessment.”

5. During the audit, petitioner executed consents on behalf of N.T.J. extending the periods of limitation for assessment of sales and use taxes for the audit period to December 20, 1990. He executed no consents to extend the period of limitation for assessing taxes against him individually.

6. The Bureau of Conciliation and Mediation Services (“BCMS”) conducted a conciliation conference on April 5, 1999 which addressed the two notices of determination issued to petitioner. The conferee determined that the three-year statute of limitations for assessing sales

and use taxes pursuant to Tax Law § 1138(a)(1) barred the Division from assessing taxes against petitioner for any period before August 31, 1987. As a result, he canceled all taxes and penalties assessed against petitioner for the period September 1, 1985 through August 31, 1987. BCMS issued a Conciliation Order, dated May 21, 1999, which reduced assessment number L006593110 to \$14,856.81 plus penalty and interest and assessment number L006593111 to \$1,288.10.

7. Petitioner timely filed a petition with the Division of Tax Appeals requesting review of four notices: the two notices of determination of sales tax due issued to petitioner (L006593110 and L006593111) and two other notices (L005418082-1 and L009384436-3). Petitioner attached the May 21, 1999 Conciliation Order to his petition, but no notices were attached regarding the other assessment numbers. The only issue raised in the petition is whether the Division properly applied tax payments made by petitioner.

8. Petitioner submitted five canceled checks which evidence payment of sales tax to the Division as follows<sup>2</sup>:

Check No.	Payment Date	Tracking No.	Amount Paid	Assessment
271	12/01/92	C0100284387	\$ 500.00	133053480
320	04/05/93	C0100325545	\$ 500.00	133053480
137	10/17/91	39901892	\$ 500.00	S900905019L
141	11/05/91	C0100146545	\$ 500.00	133053480
249	10/01/92	C00100262334	\$ 500.00	133053480

---

<sup>2</sup> Each check indicates on the memo line or elsewhere on the check where the payment should be applied. Number "133053480" is N.T.J.'s taxpayer identification number indicating that the payment should be applied to the sales tax liabilities of N.T.J.

9. The Division maintains records of all taxpayer accounts in its Case and Resource Tracking System, also known as CARTS. CARTS includes accounts receivable records showing outstanding balances on assessments and applications of payments to particular assessments. CARTS records show that check numbers 320, 137, and 141 were applied to assessment number L-004685528, the sales tax assessment issued to N.T.J. All payments were applied to each tax quarter beginning with the oldest period first, to tax first, then interest and then penalty, in accordance with Division policy. Check numbers 279 and 141 were applied to assessment number L-004685529, the assessment issued to N.T.J. for penalty only.

10. Petitioner submitted two money order receipts evidencing payment of sales taxes of \$500.00 per money order on March 5, 1994 and April 14, 1994, respectively. Both money orders reference number 133053480, indicating that the payments were to be applied to the tax liabilities of N.T.J. CARTS records confirm that these payments were applied to assessment number L-004685529, the penalty assessment issued to N.T.J.

11. A Tax Compliance levy was served on Chemical Bank on the account of N.T.J. on or about June 7, 1991. Payment of \$5,172.00 was received by the Division which was applied as follows: \$2,234.59 to assessment L004685528; \$2,629.88 to assessment L004685529; and the remainder to two outstanding assessments for withholding tax.

12. The Division received payments totaling \$1,644.00 from other levies, dated March 15, 1991, served on Chemical bank. These payments were applied to personal income tax assessments for 1985.

13. In a letter to Mr. J. Odarti, a Division employee, dated March 21, 1996, petitioner requested that all payments made by him be applied to assessment number L-004685528-9, the

sales tax assessment issued to N.T.J. Petitioner also returned copies of consolidated statements of tax liabilities to the Division's Tax Compliance Division. One of these is dated March 11, 1996. It shows balances due on the two tax assessments issued to petitioner (L-006593111 and L-006593110) of \$239.63 and \$183,121.00, respectively. At the bottom of the page, petitioner wrote "Please apply to Tax Amount Assessment # L-006593110-9 (Tax only). The second consolidated statement is dated March 13, 1996. On the bottom of this document, petitioner wrote "apply all payments of \$5,500— to Tax only L-004685828-9." Petitioner offered no evidence that he submitted a payment of \$5,500.00 with these last two documents.

14. As of January 2000, CARTS records show payments of \$5,500.00 applied to assessment number L-004685529, the penalty assessment issued to N.T.J., and a balance due on that assessment of \$251.61.

15. As of January 2000, CARTS records show total payments of \$10,549.91 applied to assessment number L-004685528, the sales tax assessment issued to N.T.J. Of this total, \$7,662.47 was applied to tax, leaving a balance due of \$52,310.51, and \$2,877.44 was applied to interest leaving a balance due of \$209,576.25. No payments were applied to penalty.

16. CARTS records also show that payments of \$5,225.52 were applied to assessment number L-005418082, the personal income tax assessment issued to petitioner. Of that total, \$4,814.00 was applied to tax due, leaving a balance of zero; \$411.52 was applied to penalty, leaving a balance of \$1,861.83. The balance of interest due was \$5,463.57. The total balance due as of January 2000 was \$7,325.40.

17. CARTS records show no balance due on assessment number L-009384436, a personal income tax assessment issued to petitioner.

***SUMMARY OF THE PARTIES' POSITIONS***

18. Petitioner challenges the Division's use of a markup on purchases of 25.16%. He submitted a two-page selection from the July 1986 issue of Beverage Media which shows that at that time the legal minimum markup for liquor was 12%. The article also states: "SPECIAL NOTE: 12% prices herein are LEGAL MINIMUM published for the trade's protection — and are NOT recommended resale prices."

19. Petitioner claims that the Division did not properly subtract the sales tax which was included in the shelf price of all liquor sold by N.T.J.; however, the Field Audit Report and the auditor's testimony establish that an adjustment for sales tax was made.

20. Petitioner claims that all sales tax payments made by him or by N.T.J. should be applied to reduce his personal liability for sales taxes owed by N.T.J. In the alternative, petitioner asks that the Division accept an offer in compromise settling all of his outstanding tax liabilities for the amount of tax already paid.

21. The Division argues that petitioner has failed to show that the audit of N.T.J. was unreasonable or that the results were incorrect. It also asserts that payments made for sales tax and personal income tax liabilities were properly applied to the earliest periods first, in the order of tax, interest and penalty.

***CONCLUSIONS OF LAW***

A. Where a taxpayer's records are insufficient or inadequate to permit an exact computation of the sales and use taxes due, the Division is authorized to estimate the tax liability on the basis of external indices (Tax Law § 1138[a][1]; *see, Matter of Ristorante Puglia, Ltd. v. Chu*, 102 AD2d 348, 478 NYS2d 91, 93; *Matter of Surface Line Operators Fraternal Org. v.*

*Tully*, 85 AD2d 858, 446 NYS2d 451, 452). Here, it was appropriate for the Division to estimate sales tax due from N.T.J. because the corporation was unable to provide complete books and records for the audit period. Where the Division seeks to determine a taxpayer's sales tax liability on the basis of an indirect audit method, the methodology selected must be reasonably calculated to reflect the taxes due (*Matter of Ristorante Puglia, Ltd. v. Chu, supra*; *Matter of W. T. Grant Co. v. Joseph*, 2 NY2d 196, 159 NYS2d 150, 157, *cert denied* 355 US 869), but exactness in the outcome of the audit method is not required (*Matter of Markowitz v. State Tax Commn.*, 54 AD2d 1023, 388 NYS2d 176, 177, *affd* 44 NY2d 684, 405 NYS2d 454; *Matter of Lefkowitz*, Tax Appeals Tribunal, May 3, 1990). The burden rests with the taxpayer to show by clear and convincing evidence that the methodology was unreasonable or that the amount assessed was erroneous (*Matter of Meskouris Bros. v. Chu*, 139 AD2d 813, 526 NYS2d 679; *Matter of Surface Line Operators Fraternal Org. v. Tully, supra*).

Petitioner has shown no error in the audit methodology or results. The use of a purchase markup to determine sales taxes due for the audit period is a commonly used audit method which has been upheld where the taxpayer's books and records are inadequate (*see, e.g., Matter of Day Surgicals, Inc. v. State Tax Commn.*, 97 AD2d 865, 469 NYS2d 262). Petitioner has not shown that this methodology was incorrect or unreasonable. Contrary to petitioner's contention, the evidence shows that the Division did adjust for sales taxes included in N.T.J.'s selling prices. Moreover, petitioner has not established that the markup calculated by the Division using N.T.J.'s shelf prices was erroneous. The Beverage Media article relied on by petitioner merely shows the minimum legal markups allowed in July 1986. There is no evidence that N.T.J. sold its inventory at a markup of 12%.



B. The payments made by N.T.J. were appropriately applied by the Division. Petitioner submitted evidence of a limited number of payments delineated in Findings of Fact 8, 9, 10, 11 and 12. The Division accounted for the application of each of these payments. Check numbers 320, 137 and 141 were applied to the sales tax assessment issued to N.T.J. (L-004685528). Check numbers 279 and 141 were applied to the N.T.J. penalty assessment (L-004685529). A total of \$1,000.00 from two money orders, dated March 5, 1994 and April 14, 1994, respectively, were applied to the N.T.J. penalty assessment. A Tax Compliance levy resulted in the application of \$2,234.59 to the N.T.J. sales tax assessment and \$2,629.88 to the N.T.J. penalty assessment. Petitioner has not shown that he directed the Division to apply the payments other than in the way they were applied. In fact, any directions given by petitioner were to apply the payments to the N.T.J. assessments. The notes written by petitioner on consolidated statements of tax liability are the only indication that petitioner asked that payments be applied to his personal tax liability. But there is no evidence that payments of tax accompanied these requests. It appears that the requests may have been made long after the payments were made and applied.

Petitioner's real complaint is that none of the tax payments reduced his personal liability for sales taxes owed by N.T.J. The BCMS Conciliation Order canceled taxes assessed against petitioner for periods before August 31, 1987, reducing petitioner's liability for taxes owed by N.T.J. from \$59,972.98 to \$14,856.81. From the time the assessments were issued in 1989 to the time the Conciliation Order was issued, sales tax payments of \$16,049.91 were made by N.T.J. or petitioner. From petitioner's perspective, these payments should have been applied to satisfy the entire amount of sales tax he now owes, and he cannot understand why he continues to be liable for sales taxes due.

While petitioner's distress is understandable, there is no solution to his problem in the Tax Law. Petitioner's liability for sales tax due is separate and independent from that of N.T.J. (*Matter of Yellin v. New York State Tax Commn.*, 81 AD2d 196, 440 NYS2d 382; *see, Matter of Mustafa*, Tax Appeals Tribunal, December 27, 1991 [Administrative Law Judge's cancellation of assessment against corporation due to a procedural error on the part of the Division does not result in dismissal of assessment against petitioner]). In accordance with this principle, payments of sales tax which reduced the tax owed by N.T.J. for earlier sales tax quarters cannot now be reapplied to reduce petitioner's sales tax liability for later sales tax quarters.

In *Matter of Halperin v. Chu* (138 AD2d 915, 526 NYS2d 660, *appeal dismissed in part, denied in part* 72 NY2d 938, 532 NYS2d 845), the Appellate Division, Third Department, addressed the independent liability of an officer for taxes owed by the corporation. In *Halperin*, the petitioner was an officer who failed to timely file a petition for an administrative redetermination of his tax liability. The Court held that the issue of the personal liability of the officer could not be reviewed through the application of the corporation for a redetermination of its liability. The Court's decision makes clear that an officer may not depend on actions taken on behalf of a corporation to benefit the officer as well. In the present case, a procedural misstep by the Division, i.e., its failure to obtain a consent extending the period of limitation for assessment of sales and use taxes against petitioner, resulted in the cancellation of sales taxes assessed against petitioner for all periods ending before August 31, 1987.<sup>3</sup> However, payments applied to

---

<sup>3</sup> In fact, the case relied on by BCMS, *Matter of Bleistein* (Tax Appeals Tribunal, July 27, 1995) was not issued until long after taxes were assessed against both petitioner and N.T.J. At the time that the assessments were issued and during the time that payments were being applied against those assessments, the Division could not have known that the notices issued to petitioner would be modified to reflect the holding in *Bleistein* that a consent to extend the period of limitations executed on behalf of the corporation does not apply to responsible persons.

the corporation's tax liability for earlier sales tax quarters cannot now be reapplied to quarters beginning after September 1, 1987.

C. In his brief, petitioner objected to the Division's submission of evidence regarding two personal income tax assessments, arguing that the Division was merely trying to prejudice petitioner. There is no basis to this accusation. Petitioner raised the issue of whether payments were properly applied to personal income tax assessments by listing those assessments in his petition. While petitioner did not use the terminology, his petition presented an application of payments case, and the Division of Tax Appeals has the jurisdiction to review the records in such a case to determine if petitioner received proper credit for his payments (*Matter of O'Connor*, Tax Appeals Tribunal, February 24, 1994). The Division merely presented proof in response to the issue raised in the petition. That proof shows that a payment of \$1,644.00, dated March 15, 1991, was applied to the personal income tax assessments. Petitioner offered no proof to show that this application was in error.

D. The petition of Anthony Stodut is denied, and the notices of determination, dated September 5, 1990, as modified by the Conciliation Order, dated May 21, 1999, is sustained.

Dated: Troy, New York  
November 9, 2000

/s/ Jean Corigliano  
ADMINISTRATIVE LAW JUDGE