STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
SILVER DOLLAR SHOWS, INC., ROBERT DESTEFANO, JR. AND WILLIAM REISS	:	DETERMINATION DTA NOS. 818169, 818170 AND 818171
for Revision of Determinations or for Refunds of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 1991 through May 31, 1996.	:	

Petitioners, Silver Dollar Shows, Inc., 63 Pine Street, East Moriches, New York 11940, Robert DeStefano, Jr., 5 Olympia Lane, Stony Brook, New York 11790 and William Reiss, 83 Shafter Street, Ronkonkoma, New York 11779, filed petitions for redetermination of deficiencies or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1991 through May 31, 1996.

A hearing was commenced before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, State Office Building, Veterans Memorial Highway, Hauppauge, New York, on November 19, 2001 at 10:30 A.M. and continued to conclusion at the same location on January 9, 2002 at 10:30 A.M., with all briefs to be submitted by July 26, 2002, which date began the six-month period for the issuance of this determination. Petitioner appeared by Katz, Bernstein & Katz, LLP (Neil D. Katz, Esq. and Lara R. Chwat, Esq., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (Robert A. Maslyn, Esq., of counsel).

ISSUES

I. Whether the audit performed by the Division of Taxation was unreasonable because the auditor failed to physically inspect the fixed assets determined to be subject to the imposition of sales and use tax.

II. Whether petitioners' purchases of trailer rides are exempt from the imposition of sales and use tax pursuant to Tax Law § 1115(a)(26).

FINDINGS OF FACT

1. On August 14, 1998, the Division of Taxation ("Division") issued to petitioner Silver Dollar Shows, Inc. ("Silver Dollar") a Notice of Determination of sales and use taxes due for the period March 1, 1991 through May 31, 1996 in the amount of $169,479.43, plus penalty and interest. On August 25, 1998, the Division issued to petitioners Robert DeStefano, Jr. and William Reiss, notices of determination of sales and use taxes due for the same period and amount, including penalty and interest, stating that petitioners were officers or responsible persons of Silver Dollar Shows, Inc.[1]

2. The corporation is in the business of providing amusement rides at fairs and carnivals. Silver Dollar brought the rides to the events, set up the rides, operated them, took them down and transported them to another carnival or to a holding area. The rides are self-contained trailers which are pulled to and from the carnival or fair location by tractors or trucks. The tractors and trailers are on the road traveling from carnival to carnival or from carnival to a holding area approximately two or three days a week. The trailers travel on the public roads and highways. Most of the carnivals for which petitioner provided rides during the audit period were located in

[1]Petitioners Robert DeStefano, Jr. and William Reiss do not contest the Division's position that they were officers or responsible persons of Silver Dollar Shows, Inc. Accordingly, unless otherwise indicated, all references to "petitioner" herein shall refer to Silver Dollar Shows, Inc.

New York State, Connecticut and Florida, and at times there were two or more carnivals occurring at the same time. No documentation was presented which detailed the carnival or fair to which a particular ride went, nor the amount of time rides were in transit or the routes taken. Robert DeStefano, Jr. was the secretary/treasurer and 50-percent owner of the corporation and responsible for soliciting accounts, signing up new carnivals and assisting with purchases. William Reiss was the president and 50-percent shareholder of the corporation and responsible for maintaining the equipment, supervising employees and promoting the carnivals.

3. On August 25, 2000, the Bureau of Conciliation and Mediation Services issued conciliation orders to petitioners which canceled the penalties assessed on audit.

4. In July 1996, the Division of Taxation began a sales tax field audit of Silver Dollar. An appointment letter, dated July 19, 1996, was mailed to petitioner advising that a sales tax field audit was being conducted by the Division. The letter requested that all books and records pertaining to the sales tax liability of Silver Dollar be made available on the appointment date, August 14, 1996, including financial statements, journals, ledgers, sales invoices, purchase invoices, cash register tapes, sales and use tax returns, Federal income tax returns and exemption certificates for the period of the audit, June 1, 1990 through May 31, 1996.

5. As the purchase invoices for the audit period were not provided, the auditor performed a detailed review of the depreciation schedules which were part of petitioner's Federal income tax returns in order to identify fixed assets acquired during the audit period. Because petitioner was unable to establish that sales tax was paid on these acquisitions, the auditor determined that petitioner had taxable fixed asset purchases of $2,053,090.00 for the period, and computed tax due on such purchases to be $169,479.43. The auditor was familiar with the rides as he had seen them at a carnival prior to performing the audit of Silver Dollar, but during the course of the

audit he did not observe the rides in their closed positions, observe the process of the rides opening or request an opportunity to examine the ride trailers. The auditor did consider the position presented by petitioner that the amusement rides were exempt from the imposition of sales and use taxes by reason of Tax Law § 1115(a)(26), reviewed cases and advisory opinions and discussed the issue with his supervisor.

6. At hearing, petitioner conceded that the following items were subject to the imposition of sales and use taxes:

Fixed Asset	Acquisition Date	Cost
Generator	May 15, 1991	$31,000.00
Generator	October 15, 1992	48,500.00
Misc. Equipment	October 15, 1992	1,600.00
Spin the Apple[2]	January 15, 1993	39,713.00
Berries[3]	January 15, 1993	39,713.00
Computer	March 15, 1993	2,608.00
Ticket Booths	May 1, 1994	9,000.00
Ride	May 15, 1995	6,000.00
Generator	May 15, 1995	45,000.00
Ride	October 15, 1995	3,530.00
Truck Stop	April 17, 1996	47,336.00
Total		$274,000.00

7. The following rides were considered by the auditor to be subject to the imposition of the sales and use taxes:

[2]The components are separated from the trailer when converted into a ride. The trailer portion cost $6,675.00 and the removable components cost $39,713.00.

[3]The components are separated from the trailer when converted into a ride. The trailer portion cost $6,675.00 and the removable components cost $39,713.00.

Fixed Asset	Acquisition Date	Weight (lbs)	Cost
Zipper[4]	May 15, 1991	43,000	184,554.00
Gravitron[5]	May 15, 1991	34,000	129,338.00
Zummer	May 15, 1991	16,600	10,000.00
Office Trailer[6]	October 15, 1992	12,000	45,000.00
Fire	March 17, 1993	22,000	130,000.00
Bunkhouse[7]	September 29,1993		26,070.00
Kamikaze ("Komi")[8]	July 31, 1993	64,000	325,933.00
Spin the Apple	January 15, 1993	8,520	6,675.00
Berries	January 15, 1993	8,520	6,675.00
Dragon	May 1, 1994	14,000	60,000.00
Bunkhouse[9]	May 1, 1994		29,480.00
Uniglide Ticket[10]	May 1, 1994	28,000	45,075.00
Century Wheel[11]	May 1, 1994	63,000	290,904.00
Office Trailer	May 15, 1995	14,000	40,000.00
Himalaya[12]	April 12, 1996	59,000	245,000.00
Raiders[13]	April 12, 1996	36,000	140,792.00

[4]The wheels and axles do not come off the trailer when it is converted into a ride.

[5]The wheels and axles do not come off the trailer when it is converted into a ride.

[6]The trailer does not provide rides and does not carry people when traveling between locations.

[7]The trailer does not contain a kitchen or a bathroom.

[8]The wheels and axles do not come off the trailer when it is converted into a ride.

[9]The trailer does not contain a kitchen or a bathroom.

[10]The ticket boxes were separate from the trailer, and when in use, were removed from the trailer.

[11]The wheels and axles do not come off the trailer when it is converted into a ride.

[12]The wheels and axles do not come off the trailer when it is converted into a ride.

[13]The wheels and axles do not come off the trailer when it is converted into a ride.

Yo-Yo[14]	February 14, 1996	43,000	44,785.00
Bunkhouse[15]	April 2, 1996	10,500	18,809.00
Total			$1,779,090.00

Petitioner registered the Zipper trailer and the Century Wheel trailer with the New York State Department of Motor Vehicles. Petitioner did not pay sales tax upon registering the vehicles. The remaining trailers were registered in Maine by petitioner because Maine provides for registration for a five-year period and allows for self-inspection of the trailers. The amusement rides are classified as "trailers" by the United States Department of Transportation.

8. Petitioner owned the following tractors during the years indicated:

Year Owned	Tractor	Unladen Weight (lbs)
1993	1987 International	16,500
1993	1987 International	16,500
1993	1983 International	16,500
1993	1978 Diesel	9,000
1993	1979 GMC	12,000
1993	1979 GMC	12,000
1993	1985 International	16,500
1995	1989 International	17,000
1996	1983 International	16,500
1996	1985 International	16,500
1996	1987 International	16,500
1996	1987 International	16,500
1996	1989 Ford	19,000

[14]The wheels and axles do not come off the trailer when it is converted into a ride.

[15]The bunkhouse did not contain a kitchen or a bathroom.

1996	1993 International	12,000

Silver Dollar filed New York State highway use tax returns for its tractors, but failed to produce individual annual mileage figures for the vehicles.

SUMMARY OF THE PARTIES' POSITIONS

9. Petitioner first contends that the decision by the auditor to base his determination of tax due on a review of the depreciation schedules contained on the Federal income tax returns was unreasonable where the assets involved were of such a highly specialized nature. The argument of petitioner is that the failure of the auditor to physically inspect the fixed assets to determine the eligibility of an exemption was unreasonable where the exemption issue was raised during the course of the audit and the property was available for inspection.

Petitioner further contends that its purchases of the rides were not subject to the imposition of sales and use taxes because the assets in issue qualify for the exemption provided for under Tax Law § 1115(a)(26), which provides an exemption for the purchase of tractors and trailers as such terms are defined in the Vehicle and Traffic Law.

10. It is the position of the Division that the audit methodology used was proper under the circumstances and that there is no requirement that an auditor physically inspect assets before determining sales and use tax liability. The Division contends that the auditor properly concluded that petitioner had purchased tangible personal property without the payment of sales and use taxes and that such purchases did not qualify for the exemption provided by Tax Law § 1115(a)(26).

CONCLUSIONS OF LAW

A. It is well established that every person required to collect tax must maintain and make available for audit upon request records sufficient to verify all transactions in a manner suitable

to determine the correct amount of tax due (Tax Law § 1135[a]; 20 NYCRR 533.2[a]). Failure to maintain and make available such records, or the maintenance of inadequate records, will result in the Division's estimating tax due (Tax Law § 1138[a]; ***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). To determine the adequacy of a taxpayer's records, the Division must first request and thoroughly examine the taxpayer's books and records for the entire period of the proposed assessment. The purpose of such an examination is to determine whether the records are so insufficient as to make it virtually impossible for the Division to verify taxable sales receipts and conduct a complete audit ***(Matter of Adamides v. Chu***, 134 AD2d 776, 521 NYS2d 826, ***lv denied*** 71 NY2d 806, 530 NYS2d 109; ***Matter of King Crab Rest. v. State Tax Commn.,*** 134 AD2d 51, 522 NYS2d 978).

B. Petitioner received an audit appointment letter specifying the sales tax records requested for audit review. No cash register tapes, purchase invoices or other source documents to substantiate that sales and use taxes were paid were provided to the auditor. In fact, very few records were provided. Given the clear, written request for records, and the minimal response thereto by petitioner, it would have been entirely appropriate and reasonable for the Division's auditor to conduct a test-period audit (***see, Matter of Cedar Brook Contracting Corp.,*** Tax Appeals Tribunal, September 14, 1989). However, in the present matter, the auditor conducted a detailed audit using the depreciation schedules attached to petitioner's Federal income tax return and provided to the auditor by petitioner.

The reasonableness of an audit is determined by reviewing the information available to the Division before the assessment was issued (***Matter of Continental Arms Corp. v. State Tax Commission***, 72 NY2d 976, 534 NYS2d 362; ***Matter of Tango Boutique***, Tax Appeals Tribunal,

April 28, 1994). At the time of the audit the auditor was not provided with any source documentation relating to the purchases at issue, and it was therefore reasonable for him to review the depreciation schedules in order to make a determination of whether sales and use taxes had been paid on such purchases. Furthermore, the auditor did consider whether the assets at issue were exempt from sales and use taxes under Tax Law § 1115(a)(26). He reviewed cases and advisory opinions and discussed the matter with his supervisor. The legal conclusion he reached is distinguishable from the method he used to arrive at tax due. As the Tribunal stated in ***Matter of Artex Systems, Inc.***, (Tax Appeals Tribunal, February 20, 1997), "[t]he problem with the audit was not so much the utilization of a flawed methodology, but rather a misapplication or misrepresentation of the law in a few instances. The remedy in such a situation is not to cancel the assessment, but to give credit to petitioners for those errors which they can prove." It is incumbent upon petitioner to establish that the auditor erred in his conclusion that the purchases were not exempt from the imposition of sales and use taxes.

C. Tax Law § 1115(a)(26) provides an exemption from sales and use taxes for the receipts from the retail sale of:

> [t]ractors, trailers or semi-trailers, as such terms are defined in article one of the vehicle and traffic law, and property installed on such vehicles for their equipping, maintenance or repair, provided such vehicle is used in combination where the gross vehicle weight of such combination exceeds twenty-six thousand pounds.

Vehicle and Traffic Law § 156 defines "trailer" as:

> [a]ny vehicle not propelled by its own power drawn on the public highways by a motor vehicle as defined in section one hundred twenty-five operated thereon, except motorcycle side cars, vehicles being towed by a non-rigid support and vehicles designed and primarily used for other purposes and only occasionally drawn by such a motor vehicle.

D. It is presumed that the purchases made by petitioner were taxable and it is petitioner's burden to prove that such purchases were exempt (Tax Law § 1132[c]). The issue is one of statutory interpretation as to whether the statute as applied by the Division in this case comports with its intent. It is well established that when the issue to be decided is whether the taxpayer is entitled to an exclusion or exemption from tax, the taxpayer is required to prove that its interpretation of the statute is the only reasonable interpretation, or that the Division's interpretation is unreasonable (***Matter of Blue Spruce Farms v. Tax Commn.***, 99 AD2d 867, 472 NYS2d 744, ***affd*** 64 NY2d 682, 485 NYS2d 526; ***Matter of Grace v. State Tax Commn.***, 37 NY2d 193, 371 NYS2d 715). These principals of statutory construction also apply to the interpretation of regulations ***(see***, ***Cortland-Clinton v. Dept. Of Health****,* 59 AD2d 229, 399 NYS2d 492).

As an exemption provision, Tax Law § 1115(a)(26) is construed narrowly and most strongly against the party claiming its benefit, with such party being required to show specific entitlement to the exemption (***Matter of Federal Deposit Insurance Corp. v. Commissioner of Taxation and Finance***, 83 NY2d 44, 607 NYS2d 620; ***Matter of Grace v. State Tax Commn***, 43 AD2d 263, 360 NYS2d 802, ***revd*** 37 NY2d 193, 371 NYS2d 715, ***rearg denied*** 37 NY2d 708, 375 NYS2d 1027).

E. First, the plain language of the statute clearly contradicts petitioner's assertion. When construing a statute the primary focus is on the intent of the Legislature in enacting the statute (McKinney's Cons Laws of NY, Book 1, Statutes § 92[a]; ***see***, ***Matter of Sutka v. Connors***, 73 NY2d 395, 541 NYS2d 191; ***Matter of American Communications Technology v. State of New York Tax Appeals Tribunal***, 185 AD2d 79, 592 NYS2d 147, ***affd*** 83 NY2d 773, 611 NYS2d 125). When that intent is clear from the wording of the statute itself, the inquiry ends

(McKinney's Cons Laws of NY, Book 1, Statutes § 76; ***see***, ***Matter of American Communications Technology v. State of New York Tax Appeals Tribunal***, ***supra***). In enacting Tax Law § 1115(a)(26), the legislative findings and purpose were set forth as follows:

> The Legislature finds that changes in the tax and vehicle and traffic laws are desirable to promote tax equity, to simplify administrative requirements and to encourage the development and expansion of the trucking industry in New York State. In accordance with these purposes, an exemption for certain purchases of vehicles, parts and services from the sales and use tax is enacted . . . (L 1987 ch 755, § 1).

A basic consideration in the interpretation of a statute is the general spirit and purpose underlying its enactment, and that construction is to be preferred which furthers the object, spirit and purpose of the statute (McKinney's Cons Laws of NY, Book 1, Statutes, § 96). As stated by the Legislature, the legislative purpose behind the enactment of tax Law § 1115(a)(26) was to encourage the development and expansion of the trucking industry in New York State.

F. The analysis of whether petitioner was engaged in the trucking industry requires an evaluation of the equipment in the context in which it was used. In the present matter, although the trailer rides are pulled over the public highways by tractors, it is clear that petitioner is primarily engaged in providing amusement rides to fairs and carnivals, and is not involved in the trucking industry. The equipment does not transport goods, but instead provides amusement rides. The transportation component of the trailer rides is ancillary to its primary purpose of providing amusement rides (***see, Matter Envirogas, Inc. v. Chu***, 114 AD2d 38, 497 NYS2d 503, ***affd*** 69 NY2d 632, 511 NYS2d 228; ***Matter of Miron Rapid Mix Concrete Corp.***, Tax Appeals Tribunal, January 9, 1992). Therefore, petitioner is not entitled to the exemption provided for in Tax Law § 1115(a)(26), as the trailer rides are primarily engaged in the providing of amusement rides, and petitioner is not involved in the trucking business as contemplated by the Legislature.

G. As to the expert testimony presented by petitioner, which concluded that the auditor erred in not physically reviewing the rides and that the amusement rides qualified for the exemption provided in Tax Law § 1115(a)(26), it is well established that an expert witness may direct the judge to relevant legal authority, but his conclusion as to the law is irrelevant (***Owensby & Kritikos v. Commissioner***, 819 F2d 1315; ***Matter of Sumitono Trust and Banking Co. (USA)***, Tax Appeals Tribunal, September 9, 1999). Neither the Administrative Law Judge nor the Tribunal are bound by legal conclusions of witnesses or affiants.

H. The petitions of Silver Dollar Shows, Inc., Robert DeStefano, Jr. and William Reiss are denied, and the Notices of Determination dated August 14 and 25, 1998, as modified by the Bureau of Conciliation and Mediation Services, are sustained.

DATED: Troy, New York
November 27, 2002

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE