

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**SYED HAKIMULLAH** : DETERMINATION  
for Revision of a Determination or for Refund of Sales : DTA NO. 818455  
and Use Taxes under Articles 28 and 29 of the Tax Law :  
for the Period September 1, 1995 through :  
September 30, 1998. :

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Petitioner, Syed Hakimullah, 133-01 Sanford Avenue, Apt #3A, Flushing, New York 11355, filed a petition 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, 1995 through September 30, 1998.

A small claims hearing was held before Winifred M. Maloney, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on April 4, 2002 at 10:30 A.M. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Vas D. Anand).

Petitioner submitted additional documentary evidence on April 29, 2002 and it is this date that commences the three-month period for the issuance of this determination.

***ISSUES***

I. Whether the audit methodology employed by the Division of Taxation in its audit of Hewlett 24 Hour Convenience Store, Inc. was reasonable or whether petitioner has shown error in either the audit method or result.

II. Whether petitioner is personally liable for sales tax, penalty and interest due from Hewlett 24 Hour Convenience Store, Inc. for the period September 1, 1995 through September 30, 1998.

III. Whether petitioner has established that reasonable cause exists so as to justify the waiver of penalties.

### ***FINDINGS OF FACT***

1. Hewlett 24 Hour Convenience Store, Inc. (“Hewlett Convenience Store” or “the corporation”) was incorporated in New York State on September 1, 1991. On or about September 19, 1991, Hewlett began business as a 24-hour convenience store. Petitioner, Syed Hakimullah,<sup>1</sup> as president and sole shareholder, executed and filed Hewlett’s Certificate of Registration with the Division of Taxation (“Division”). The corporation became a licensed vendor at that time.

2. During the period at issue, Hewlett Convenience Store was located at 1268 Peninsula Boulevard in Hewlett, New York. A small store with only one cash register, Hewlett Convenience Store made nontaxable sales of, among other items, food, newspapers, phone cards and Lottery tickets and taxable sales of, among other items, beer, soda, candy, cigarettes, cigars and coffee.

3. Sometime in August 1998, the Division received notification of the bulk sale of Hewlett Convenience Store to Macro-Developers, Inc. that was to take place on September 30, 1998.

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<sup>1</sup> Petitioner’s last name is spelled a number of different ways in the record including “Hakimullan” in the Notice of Determination and “Hakeemullah” in the Department of Taxation Certificate of Registration.

4. The Division commenced a sales tax audit of Hewlett Convenience Store by sending an appointment letter on August 28, 1998 to the business address. The letter stated in part:

Please bring all books and records pertaining to your sales and use tax liability, for the period under audit, on the appointment date. This includes financial statements, journals, ledgers, sales invoices, purchase invoices, cash register tapes, sales and use tax returns, federal income tax returns, and exemption certificates. . . .

During the course of the audit, you may be required to furnish additional records and/or information.

The period under audit was listed as September 1, 1995 through May 31, 1998. The date scheduled for the appointment was September 14, 1998. Attached to the letter was a checklist of records to be presented for audit. The checklist restated the items listed in the letter and requested additional records: cash disbursements journal, cash receipts journal, general ledger, expense purchase invoices, fixed asset purchase invoices, bank statements, canceled checks, deposit slips, contract of sale, closing statements, seller's certificate of authority and the registration number of the purchaser.

5. At the scheduled meeting petitioner did not provide any books and records to the auditor. Mr. Khan Azhar, manager of the convenience store, was also present at the meeting. Because the records were deemed to be inadequate the Division elected to conduct an observation test of sales.

6. An 18-hour observation test was performed on October 1 and 2, 1998.<sup>2</sup> During the observation the auditors recorded all taxable items purchased, the price paid for each item and whether tax was included in the amount paid. For the 18-hour period the auditors observed total

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<sup>2</sup> The observation test took place on October 1, 1998 during the hours of 8:00 P.M. through 11:00 P.M. and on October 2, 1998 during the hours of 6:00 A.M. through 7:00 P.M. - - the hours in which the convenience store was open.

taxable sales in which the tax was included of \$419.62 and total taxable sales without tax included of \$10.66. The auditor calculated the total taxable sales for the 18-hour observation period by performing the following calculations. First, he subtracted the bottle deposits of \$6.20 from the total sales with tax included of \$419.62, divided the resulting net sales with tax of \$413.42 by 1.085 to arrive at net sales without tax of \$381.03. The auditor then added the net sales without tax of \$381.03 and the total taxable sales without tax of \$10.66 to determine total taxable sales for the 18-hour observation period of \$391.69. The taxable sales observed were multiplied by 7 days and the result, \$2,741.83, was then multiplied by 13 weeks per quarter to arrive at total observed taxable sales for the quarter of \$35,643.79. After allowing for inflation, an error rate of 332.95% was calculated. The error rate was multiplied by the reported taxable sales for the period September 1, 1995 through May 31, 1998 of \$89,768.00 to arrive at audited taxable sales for that period of \$298,882.56. Added to that amount was \$47,525.05, the observed taxable sales figure computed for the period June 1, 1998 through September 30, 1998,<sup>3</sup> and taxable sales for the audit period were computed to be \$346,407.61. Taxable sales for the audit period were multiplied by the tax rate of 8.5% to determine sales tax liability of \$29,444.67, and subtracting the sales tax reported for the audit period of \$4,648.00 resulted in sales tax due of \$24,796.67.

Penalties were asserted for failure to report and pay the tax due. An additional penalty was asserted as a result of underreporting of tax due exceeding 25% of the amount of the taxes required to be shown on the returns for the audit period.

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<sup>3</sup> For the period June 1, 1998 through August 31, 1998, the observed taxable sales figure was \$35,643.79 and for the month of September 1998, the observed taxable sales figure was \$35,643.79/3 or \$11,881.26.

7. A letter dated October 2, 1998 was mailed to petitioner scheduling an appointment on October 19, 1998 and notifying him that the audit period was extended to cover the period September 1, 1995 through September 30, 1998. The letter requested that petitioner provide Hewlett Convenience Store's books and records pertaining to the sales tax liability for the period under audit including "financial statements, journals, ledgers, sales invoices, purchase invoices, cash register tapes, sales and use tax returns, federal income tax returns and exemption certificates." The letter included, among other things, a checklist of records to be provided to the auditor for review. The day book and a copy of the final sales tax return were specifically requested on the checklist.

8. At the meeting held on October 19, 1998, the auditor provided petitioner with the work sheets showing the amount of sales tax due. At that meeting, petitioner submitted copies of eleven months of the corporation's bank statements, copies of the corporation's Federal income tax returns for the fiscal years ending August 31, 1996 and August 31, 1997 and a copy of the final sales tax return for the period June 1, 1998 through September 30, 1998 on which tax was indicated as due and paid.<sup>4</sup> After reviewing the limited documents submitted, the auditor did not make any adjustments to his computations including giving any credit for the claimed sales tax payment for the period June 1, 1998 through September 30, 1998.

9. Based on the above-described field audit, the Division issued a Notice of Determination (Notice No. L-015759697) to the corporation asserting sales and use taxes due in the amount of \$24,796.67, plus interest and penalty. On November 30, 1998, the Division issued a Notice of Determination to petitioner, Syed Hakimullah, asserting additional sales and use taxes due in the amount of \$24,796.67, interest due of \$4,673.29 and penalty due of \$8,010.54, for a total amount

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<sup>4</sup> The final two quarters were apparently filed on one return.

due of \$37,480.50, for the period September 1, 1995 through September 30, 1998. The notice stated that petitioner was personally liable as an officer or responsible person of Hewlett 24 Hour Convenience Store, Inc. under Tax Law §§ 1131(1) and 1133 for taxes determined to be due in accordance with Tax Law § 1138(a).

10. Petitioner does not dispute that he was a person responsible for the collection of sales tax on behalf of Hewlett 24 Hour Convenience Store, Inc. in accordance with Tax Law §§ 1131(1) and 1133.

11. On January 19, 2001, the Bureau of Conciliation and Mediation Services (“BCMS”) issued a Conciliation Order (CMS No. 173047) which recomputed the tax assessed against petitioner to \$23,879.67. The conferee reduced the tax by the amount of tax paid with the final sales tax return (\$917.00). He sustained the remainder of the tax and the imposition of penalties and statutory interest.

12. Petitioner filed a petition with the Division of Tax Appeals which alleged that the Division made its determination on the basis of industry average rather than the corporation’s Federal income tax returns and the corporation’s bank statements and that he is financially unable to pay the assessment because he earns only \$250.00 as a messenger and has two small children to support.

13. At the small claims hearing, petitioner did not submit any of the corporation’s books and records or any other evidence concerning the corporation’s taxable sales.

#### ***SUMMARY OF PETITIONER’S POSITION***

14. Although he does not dispute that he was a person responsible for the collection of sales tax on behalf of the corporation, petitioner claims that he is unable to pay the assessment and requests that it be canceled. Petitioner contends that he did not receive any income from the

corporation during the audit period. Rather, he supported his wife and two young children by working as a messenger. Although he received the proceeds from the sale of the corporation to Marco-Developers, Inc., petitioner claims that he no longer has any of that money. Petitioner asserts that he continues to work as a messenger and that his income is insufficient to both support his family and pay the assessment.

### ***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 of Taxation'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). To determine the adequacy of a taxpayer's records, the Division of Taxation 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 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. Chu*, 134 AD2d 51, 522 NYS2d 978).

B. The original appointment letter and the subsequent appointment letter, which extended the audit period, sent by the Division to the corporation constituted an adequate request for books and records and, taken together, cover the entire audit period in issue. The records provided consisted of the corporation's Federal income tax returns for the fiscal years ending

August 31, 1996 and August 31, 1997 and eleven months of the corporation's bank statements. The corporation did not produce sales invoices, cash register tapes or any other records that would serve as a verifiable record of taxable sales. The records provided to the Division were reviewed and determined to be inadequate. On the basis of the foregoing, it is clear that the corporation's records were inadequate to conduct a complete audit. Therefore, the Division was justified in resorting to external indices for the purpose of estimating the corporation's tax liability (Tax Law § 1138[a][1]). However, the Division must select a method of audit reasonably calculated to reflect tax due (*Matter of Grecian Square v. State Tax Commission*, 119 AD2d 948, 501 NYS2d 219).

C. In this case, the Division elected to estimate tax due on the basis of an observation test. The courts have upheld the use of observation tests on numerous occasions (*see, Matter of Del's Mini Deli, Inc. v. Commissioner of Taxation and Finance*, 205 AD2d 989, 613 NYS2d 967; *Matter of Sarantopoulous v. Tax Appeals Tribunal*, 186 AD2d 878, 589 NYS2d 102; *Matter of Vebol Edibles v. State of New York Tax Appeals Tribunal*, 162 AD2d 765, 557 NYS2d 678, *lv denied* 77 NY2d 803, 567 NYS2d 643; *Matter of Club Marakesh v. State Tax Commission*, 151 AD2d 908, 542 NYS2d 881, *lv denied* 74 NY2d 616, 550 NYS2d 276; *Matter of Meskouris Bros., Inc. v. Chu*, 139 AD2d 813, 526 NYS2d 679). Since the method was reasonable, petitioner had the burden to establish by clear and convincing evidence that both the method used to arrive at the tax assessment and the assessment itself are erroneous (*Matter of Sol Wahba Inc. v. State Tax Commn.*, 127 AD2d 943, 512 NYS2d 542). In the instant matter petitioner has failed to adduce any credible evidence to show that the audit method utilized and the resulting assessment were in any way erroneous.



It is also noted that, where a taxpayer's own failure to maintain adequate, accurate and complete books and records requires resort to indirect audit techniques, exactness is not required of the Division in arriving at its determination and the consequences of the recordkeeping failures in this regard weigh heavily against the taxpayer (*Matter of Meskouris Bros. v. Chu, supra*).

D. Petitioner, Syed Hakimullah, is personally liable for the taxes due from Hewlett Convenience Store in accordance with Tax Law §§ 1131(1) and 1133. Petitioner is seeking relief from his tax liabilities by requesting that the Division of Tax Appeals cancel the Notice of Determination based upon his inability to pay the assessment. This is, in effect, requesting that this forum impose an "Offer in Compromise" solution upon the parties.

E. Tax Law § 171(18-a) gives the Commissioner of Taxation and Finance the authority to compromise civil liability where such liability arises under the Tax Law with certain qualifications and limitations including the following:

Whenever a compromise is made by the department of any such liability, there shall be placed on file in the office of the commissioner the opinion of the counsel for such department, with his reasons therefor, with a statement of: (a) the amount of tax and any other issues which may be the subject of such compromise, (b) the amount of interest, additions to the tax, or penalty imposed by law on the taxpayer. . . , and (c) the amount actually paid in accordance with the terms of the compromise. . . . [N]o such opinion shall be required with respect to the compromise of any civil liability in which the unpaid amount of tax which was the subject of the administrative action (including any interest, additions to tax, or penalty) is less than twenty-five thousand dollars.

F. In *Matter of Williams* (September 1, 1994), the Tax Appeals Tribunal noted: "As to petitioner's 'Offer in Compromise', the Tax Appeals Tribunal lacks statutory authority to accept or even consider said offer." As a result, the Division of Tax Appeals does not have the authority to consider Mr. Hakimullah's request to cancel the Notice of Determination based upon his current financial situation. Furthermore, a "compromise" is an "arrangement arrived at . . .

for settling a dispute upon what appears to the parties to be equitable terms, having regard to the uncertainty they are in regarding the facts, or the law and the facts together” (Black’s Law Dictionary 260 [5th ed 1979], and an “offer of compromise” is “[a]n offer to settle a dispute or difference amicably for the purpose of avoiding a lawsuit and without admitting liability” (Black’s Law Dictionary 976 [5<sup>th</sup> ed 1979]. For the Division of Tax Appeals to force an offer of compromise by a taxpayer on the Division would be counter to the idea of mutuality of agreement at the heart of the definition of compromise.

G. Section 1145(a)(1)(i) authorizes the imposition of penalty for the failure to file a return or to pay or pay over the sales and use taxes due within the time required. Section 1145(a)(1)(vi) of the Tax Law authorizes the imposition of penalty upon a taxpayer for its omission from the total amount of sales and use taxes required to be shown on a return an amount which is in excess of 25% of the amount of such taxes required to be shown on the return. The commissioner may abate all penalty, pursuant to section 1145(a)(1)(iii) and (vi), when it is determined that such omission was due to reasonable cause and not due to willful neglect. Petitioner bears the burden of establishing that there was reasonable cause, and not willful neglect, for the failure to report and pay the taxes in question (*Matter of F & W Oldsmobile, Inc. v. State Tax Commn.*, 106 AD2d 792, 484 NYS2d 188; *Matter of East End Student Transportation Corp.*, Tax Appeals Tribunal, March 26, 1992). Here, the record is devoid of any facts which establish reasonable cause for petitioner’s failure to pay the tax due. Thus, there is no basis to abate the penalty without such grounds.

H. The petition of Syed Hakimullah is denied and the Notice of Determination issued November 30, 1998, as modified by the Conciliation Order dated January 19, 2001, is sustained.

DATED: Troy, New York  
July 25, 2002

/s/ Winifred M. Maloney  
PRESIDING OFFICER