

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
MOHAMED M. MAHMOUD : DETERMINATION
for Revision of a Determination or for Refund : DTA NO. 819071
of Sales and Use Taxes under Articles 28 and :
29 of the Tax Law for the Period March 1, 1998 :
through November 30, 2000. :

Petitioner, Mohamed M. Mahmoud, 2671 Kennedy Boulevard, Jersey City, New Jersey 07306-5860, 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 March 1, 1998 through November 30, 2000.

A small claims hearing was held before Dennis M. Galliher, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on March 30, 2004 at 2:45 P.M., which date began the three-month period for the issuance of this determination. Petitioner appeared by Ashraf A. Hanno. The Division of Taxation appeared by Mark F. Volk, Esq. (Varughese Thomas).

ISSUE

Whether the Division of Taxation properly determined, upon audit, that petitioner owed additional sales tax, plus penalty and interest.

FINDINGS OF FACT

1. Petitioner, Mohamed M. Mahmoud, is engaged in the business of operating a push cart selling hot dogs, sodas and other soft drinks, and hot pretzels in mid-town Manhattan. On

June 21, 2000, an investigator for the Division of Taxation (“Division”) conducted an observation of petitioner’s business activities. From this observation, the investigator concluded that petitioner worked five days per week, from 11:00 A.M. to 7:00 P.M., and that petitioner’s average daily sales totaled \$160.00.

2. On December 5, 2000, the Division’s auditor attempted to conduct a second observation of petitioner’s business activities, but was unable to locate petitioner on such date. In turn, the Division issued to petitioner a letter, dated December 7, 2000, scheduling an audit appointment at the Division’s Kew Gardens office on December 28, 2000 at 10:00 A.M. This letter advised petitioner to bring to the audit appointment all books and records pertaining to the sales and use tax liability of his business for the period December 1, 1997 through November 30, 2000, including financial statements, journals, ledgers, sales invoices, purchase invoices, cash register tapes, sales and use tax returns, Federal income tax returns and any exemption certificates. An accompanying one-page checklist of records reiterated the records petitioner was to bring to the audit appointment.

3. Petitioner, who had reported no taxable sales, did not respond to the audit appointment letter, appear on the scheduled appointment date, or submit any books and records to the Division. Accordingly, on June 19, 2001, the Division issued to petitioner a Notice of Determination assessing sales tax due for the period March 1, 1998 through November 30, 2000 in the amount of \$9,438.00, plus penalties (pursuant to Tax Law § 1145[a][1][i] and [vi]) and interest. The Division’s auditor calculated this liability on the basis of the June 21, 2000 observation. Specifically, the auditor multiplied estimated daily gross sales of \$160.00 (per observation) by five days per week, to arrive at weekly gross sales of \$800.00. In turn, weekly gross sales were multiplied by 13 (weeks per sales tax quarterly period) to arrive at gross sales

of \$10,400.00 for each of the sales tax quarterly periods covered by the audit, with a resulting sales tax liability of \$858.00 per quarter.

4. Petitioner requested a conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). As part of the conference process, petitioner provided a very limited number of receipts (purchase invoices) for his purchases of rolls, hot dogs, sodas, pretzels, and the like, as well as airline receipts and passport information to show that he was out of New York (in Egypt and in California) for some of the time period covered by the audit. Specifically, the times during the audit period when petitioner was not in New York covered January 16, 1998 through June 13, 1998 and January 15, 2000 through April 5, 2000. In view of this information, the Division reduced the amount of the assessment by approximately one-third, to \$6,005.51, plus penalties and interest thereon. This reduction was based on the time periods for which petitioner was out of the State, and is reflected on a Conciliation Order (CMS No. 187509) issued to petitioner on April 19, 2002.

5. Petitioner challenged the reduced assessment by filing a petition for a hearing with the Division of Tax Appeals, alleging that he only worked during the summer months, that he was out of the country for significant periods of time, that he did not always work five days per week due to weather conditions, and that he had expenses against his daily sales receipts, including the cost of his permit, the rental of his vendor's cart and the purchases of the rolls, pretzels, hot dogs and sodas he sold.

6. Petitioner did not appear in person at the hearing to provide testimony, nor was any additional documentary evidence supplied. Petitioner's representative asserted that it is difficult for a vendor such as petitioner to maintain records of sales on a daily basis, and estimated that

petitioner's sales averaged only \$100.00 to \$120.00 per day such that, after expenses, petitioner earned at most only \$50.00 to \$60.00 per day.

CONCLUSIONS OF LAW

A. During the period in issue, petitioner operated as a push cart vendor in New York City making sales of hot dogs, soft drinks and pretzels. Receipts from such sales of food are clearly subject to sales tax (Tax Law § 1105[d][i]), and petitioner raises no dispute in this regard. In this case, the Division conducted an initial observation of petitioner's business activities, and concluded that petitioner made taxable sales averaging \$160.00 per day. After attempting a second observation, but being unable to conduct the same for failure to locate petitioner, and noting that petitioner had reported no taxable sales during the audit period, the Division by letter requested an opportunity to examine petitioner's books and records, specifically with respect to his sales and sales tax liability. Petitioner did not respond to this request, appear on the scheduled audit appointment date, or otherwise provide any records to the Division, including records of sales. Under these circumstances the Division was clearly entitled to estimate petitioner's sales tax liability, as it did, based on its initial observation results and, in turn, to issue its determination of tax due accordingly (Tax Law § 1135[a][1]; 20 NYCRR 533.2[b][1]; ***Matter of Club Marakesh, Inc. v Tax Commn. of the State of New York***, 151 AD2d 908, 542 NYS2d 881, *lv denied* 74 NY2d 616, 550 NYS2d 276; ***Matter of Center Moriches Monument Co., Inc. v. Commissioner of Taxation and Finance***, 211 AD2d 947, 621 NYS2d 720).

B. The standard for reviewing a sales tax audit where external indices were employed was set forth in ***Matter of AGDN, Inc.*** (Tax Appeals Tribunal, February 6, 1997), as follows:

a vendor . . . is required to maintain complete, adequate and accurate books and records regarding its sales tax liability and, upon request, to make the same available for audit by the Division (*see*, Tax Law §§ 1138[a]; 1135; 1142[5]; *see, e.g., Matter of Mera Delicatessen*, Tax Appeals Tribunal, November 2, 1989). Specifically, such records

required to be maintained 'shall include a true copy of each sales slip, invoice, receipt, statement or memorandum' (Tax Law § 1135). It is equally well established that where insufficient records are kept and it is not possible to conduct a complete audit, 'the amount of tax due shall be determined by the commissioner of taxation and finance from such information as may be available. If necessary, the tax may be estimated on the basis of external indices . . .' (Tax Law § 1138[a]; see, *Matter of Chartair, Inc. v. State Tax Commn.*, 65 AD2d 44, 411 NYS2d 41, 43). When estimating sales tax due, the Division need only adopt an audit method reasonably calculated to determine the amount of tax due (*Matter of Grant Co. v. Joseph*, 2 NY2d 196, 159 NYS2d 150, *cert denied* 355 US 869); exactness is not required (*Matter of Meyer v. State Tax Commn.*, 61 AD2d 223, 402 NYS2d 74, *lv denied* 44 NY2d 645, 406 NYS2d 1025; *Matter of Markowitz v. State Tax Commn.*, 54 AD2d 1023, 388 NYS2d 176, *affd* 44 NY2d 684, 405 NYS2d 454). The burden is then on the taxpayer to demonstrate, by clear and convincing evidence, that the audit method employed or the tax assessed was unreasonable (*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).

C. As set forth above, it was incumbent upon petitioner to demonstrate that the amount of tax assessed was incorrect or unreasonable. Petitioner did establish, via his submission of travel records, that he was out of the State for certain periods of time. In turn, the Division reduced its assessment to reflect this fact, and such reduction is set forth in the Conciliation Order issued to petitioner (*see* Finding of Fact "4"). However, petitioner has provided no additional evidence, either by testimony or documents, which would allow for further reduction of the amount of tax determined and remaining at issue, or would otherwise support petitioner's claims, including the claim that he did not work five days per week. In fact, petitioner's representative's assertion that petitioner's total sales per day averaged at most \$100.00 to \$120.00 is entirely consistent with a calculation resulting in the amount of tax remaining at issue. That is, the Division's initial assessment was based on estimated average daily taxable sales of \$160.00, generating tax of some \$9,438.00 for the audit period. This amount was reduced by one-third at conference, to reflect that petitioner was out of the State for about one-third of the audit period. Mathematically, reducing the initial estimated average daily taxable sales of \$160.00 by one-third, results in average daily taxable sales of approximately \$107.00. This

amount is within petitioner's representative's estimation of petitioner's daily sales (\$100.00 to \$120.00), and results in a tax liability comparable to that which the Division asserts is due. Accordingly, petitioner's own position supports the accuracy of the Division's assessment.

D. Petitioner has presented no argument or evidence which would support or warrant reduction or abatement of the penalties properly imposed in this case and the same are, therefore, sustained.

E. The petition of Mohamed M. Mahmoud is hereby denied and the Notice of Deficiency dated May 29, 2001, as reduced pursuant to the Conciliation Order dated April 19, 2002, together with penalties and interest thereon, is sustained.

DATED: Troy, New York
June 17, 2004

/s/ Dennis M. Galliher
PRESIDING OFFICER