STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of	:	
PHYLLIS DININO	:	DETERMINATION DTA NO. 820014
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, 1979 through February 28, 1985.	:	

Petitioner, Phyllis Dinino, 16 North Lorna Lane, Monsey, New York 10952, 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, 1979 through February 28, 1985.

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 February 24, 2005 at 10:30 A.M., with all briefs to be submitted by June 17, 2005, which date began the six-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Michael P. McKinley, Esq., of counsel).

During the hearing the Division of Taxation filed a Motion for Partial Summary Determination, pursuant to 20 NYCRR 3000.5 and 3000.9(b), on the ground that there is no material issue of fact or justiciable matter at issue because the matter has already been tried and decided. The Division of Taxation submitted a Notice of Motion for an order of partial summary determination with attached exhibits. Petitioner's reply to the motion for partial summary determination was due on June 17, 2005.

ISSUES

I. Whether the Division of Taxation is entitled to an order of partial summary determination on the basis that there exists, in part, no material issue of fact or justiciable matter at issue because the matter has already been tried and decided.

II. Whether the sales and use tax audit method employed by the Division of Taxation was reasonable and, if so, whether petitioner has shown any errors in either the application of such method or the results derived therefrom.

FINDINGS OF FACT

1. On June 1, 2004, petitioner filed with the Division of Tax Appeals a petition protesting Conciliation Order CMS number 195757 issued by the Bureau of Conciliation and Mediation Services ("BCMS"). The order sustained statutory notices L009364121, L009364122 and L009364123.

2. A review of the records of the Department of Taxation and Finance's Case and Resource Tracking System ("CARTS") and a copy of a Consolidated Statement of Tax Liabilities issued to petitioner on February 22, 2005, establishes that the statutory notices sustained by BCMS Conciliation Order CMS number 195757 were converted from assessment numbers S850808001L, S850620004L and S820320016L, respectively.

3. Notice of Determination S820320016L was issued to petitioner as officer of P & D Auto Repairs, Inc. on March 28, 1982. The notice assessed sales and use taxes due for the period December 1, 1978 through November 30, 1981. P & D Auto Repairs, Inc. operated a gasoline service station in Ramapo, New York, and petitioner was the president of the

corporation during the period at issue. A hearing with respect to this notice of determination[1] was held on July 23, 1985, and the former State Tax Commission issued a decision on April 28, 1986.[2] The commission held that as petitioner did not apply to the then State Tax Commission for a hearing within 90 days of the date of the issuance of the notice of determination, the assessment was finally and irrevocably fixed.

4. On June 20, 1985 and August 8, 1985, the Division of Taxation ("Division") issued to petitioner, Phyllis Dinino, as officer of P & D Auto Repairs, Inc., two notices of determination, S850808001L (later converted to L-009364121) and S850620004L (later converted to L-009364122), assessing sales and use taxes due in the aggregate amount of $57,338.62, plus penalty and interest, for the period December 1, 1981 through February 28, 1985.

5. The foregoing notices were issued as the result of a field audit of P & D Auto Repair, Inc. On December 19, 1984, an auditor from the Division sent to P & D Auto Repair, Inc. an appointment letter advising the business that its sales tax returns for the period December 1, 1981 through November 30, 1984 were being subject to an audit. The letter advised the business to have available on the appointment date all books and records pertaining to its sales tax liability for the period at issue. The books and records to be made available were to include journals, ledgers, sales invoices, purchase invoices, cash register tapes, exemption certificates and other sales tax records. The appointment letter was returned to the Division with the handwritten notation that "P & D has been out of business since 1982 and had no more sales tax."

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[1] At the previous hearing the transcript indicates that the notice at issue was "S*A*20320016L." However, a review of a Consolidated Statement of Tax Liabilities, dated February 22, 2005, for petitioner, and a search of the Division's records indicates that there is a typographical error in the transcript, and the notice at issue in that hearing was S*8*20320016, later converted to L-009364123.

[2] ***Matter of P&D Auto Repair, Inc.*** (TSB-H-86[111]S).

6. Following the receipt of the appointment letter with the handwritten notation, the auditor telephoned the business on January 14, 1985 and was told that the company had been out of business since 1982 and no records were available. The Division requested that the company provide copies of its Federal income tax returns for the years 1981 and 1982. The auditor and her supervisor also made a visit to the business premises. At the premises, they observed a tow truck with the name of the company on its door. In addition, they spoke with John Dinino, husband of petitioner, and were informed that the requested Federal income tax returns would be forwarded to the Division.

7. In February and March 1985, the auditor made several attempts by telephone to contact petitioner's accountant, Sanford Katz, CPA, to again request copies of the business's Federal income tax returns. On April 4, 1985, the auditor telephoned Mr. Dinino and was told that the accountant would forward the Federal returns immediately following the income tax season. On May 16, 1985, Mr. Dinino informed the auditor that the company was out of business and he was unable to get in contact with the accountant. The company never provided any of the requested books and records for review.

As of August 16, 1985, the company was still listed in the then current telephone book and AAA directory. A previous audit of the business had been conducted during the end of 1981 and the beginning of 1982. The conference for the resulting notice of determination was held in April 1983. At no time during the previous audit or conference was it mentioned by anyone from the company that it had been out of business since 1982.

8. P & D Auto Repair, Inc. did not file sales and use tax returns for the quarters ended February 28, 1982 and August 31, 1982. The company reported zero taxable sales on its sales and use tax returns for the quarters ended May 31, 1983, August 31, 1983, November 30, 1983 and February 29, 1984.

9. Since no books and records were provided, the auditor decided to estimate taxable sales per quarter for the entire period at issue. For the quarters ended February 28, 1982, May 31, 1982 and August 31, 1982, the auditor estimated taxable sales to be $120,000.00 per quarter. This figure was derived from the results of the prior audit of the corporation for the period December 1, 1978 through November 30, 1981 in which the auditors had estimated the company's sales to be $40,000.00 per month. For the quarters ended November 31, 1982 and February 28, 1983, the auditor accepted the company's reported taxable sales of $117,994.00 and $86,014.00, respectively. For the remaining periods at issue, the auditor assumed that the company's reported taxable sales of $86,014.00 remained constant, and used this figure in calculating the additional tax due.

10. The auditor then subtracted reported taxable sales per quarter from the estimated taxable sales per quarter to arrive at additional taxable sales per quarter. For each quarter, the auditor applied the sales tax rate in effect to the additional taxable sales to determine the amount of sales tax due. The auditor's calculation resulted in additional sales tax due of $48,364.14 for the period December 1, 1981 through February 28, 1985.

On June 20, 1985, the Division issued to P & D Auto Repair, Inc. notice S850620003L asserting sales tax due of $48,364.14, plus penalty and interest for the period at issue. On the same date, the Division issued to petitioner notice S850620004L asserting the same amount of tax, penalty and interest due for the same period.

11. On its sales and use tax returns for the quarters ended November 30, 1982 and February 28, 1983, P & D Auto Repair, Inc. reported sales tax credits in the amounts of $5,266.05 and $3,708.43, respectively. As these credits more than offset the reported tax liability for each of these quarters, the company did not remit any tax for said periods. Although

requested by the auditor, the company did not provide any additional information or documentation to support these claimed credits. Therefore, the credits were disallowed by the auditor. As a result, on August 8, 1985, the Division issued to P & D Auto Repair, Inc. notice S850808000L asserting sales tax due of $8,974.48 for the two quarters, plus penalty and interest. On the same date, the Division issued to petitioner notice S850808001L asserting the same amount of tax, penalty and interest due for the same two quarters.

CONCLUSIONS OF LAW

A. In the instant matter, the Division has filed a motion for partial summary determination on the ground that, with regard to one of the notices at issue, there is no material issue of fact or justiciable matter at issue because the matter has already been tried and decided. The Division argues that the doctrine of *res judicata* precludes petitioner from challenging notice S820320016L (later converted to L-009364123), where this exact same notice was the basis of a decision by the former State Tax Commission. In order to invoke this doctrine there must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action and there must have been a full and fair opportunity to contest the prior decision (***see, Staatsburg Water Co. v. Staatsburg Fire Dist.***, 72 NY2d 147, 531 NYS2d 876,878; ***Schwartz v. Public Administrator of County of Bronx***, 24 NY2d 65, 298 NYS2d 955, 960).

B. To obtain summary determination, the moving party must submit documents showing that there is no material issue of fact and that the facts mandate a determination in the moving party's favor (20 NYCRR 3000.9[b][1]). Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable" (***Glick & Dolleck, Inc. v. Tri-Pac Export Corp.***, 22 NY2d 439, 293 NYS2d 93, 94; ***Museums at Stony Brook v. Village of Patchogue Fire Dept.***,

146 AD2d 572, 536 NYS2d 177, 179). If material facts are in dispute, or contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (***see, Gerard v. Inglese***, 11 AD2d 381, 206 NYS2d 879, 881).

C. Turning to notice of determination L-009364123, the Division has established that it was converted from notice S820320016L, which was the subject of a hearing before the State Tax Commission. In the decision issued in the ***Matter of P & D Auto Repair, Inc***. (State Tax Commn., April 28, 1986), the State Tax Commission held that as Ms. Dinino failed to apply for a hearing within the statute of limitations, the assessment was finally and irrevocably fixed. The doctrine of *res judicata* is applicable where, as here, a party has previously had the opportunity to fully litigate the issues raised by the notice.

> The doctrine of res judicata is designed to put an end to a matter once duly decided. It forbids relitigation of the matter as an unjustifiable duplication, an unwarranted burden on the courts as well as on opposing parties. Its main predicate is that the party *against* whom it is being invoked has already had a day in court, and, if it was not satisfactory, the proper course was to appeal the unsatisfactory result rather than ignore it and attempt its relitigation in a separate action.
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> The phrase "res judicata" has taken on several meanings. In its technical sense, res judicata is applicable only when a party is attempting to relitigate her whole cause of action; it intervenes in that instance to foreclose not only matters litigated, but also those which might have been litigated (Siegel, NY Prac § 442, at 714 [3d ed]) (emphasis added).

Thus, the Division's motion for partial summary determination is granted, the decision issued previously will prevail as to notice L-009364123 (formerly S82032001L) and the merits of the claim pertaining to this notice will not be addressed.

D. Where a taxpayer's records are not available, or are insufficient, unreliable and inadequate to verify, upon audit, the amount of the sales and use taxes due for the period under examination, the Division is authorized to estimate such 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). In this case, the Division made numerous requests by letter and telephone seeking to obtain access to the records of P & D Auto Repair, Inc. for the period December 1, 1981 through November 30, 1984 so as to conduct an audit, including a detailed listing of the records to be provided. In response to these oral and written requests, the auditor was initially faced with delay requests and was eventually advised that no records were available to be reviewed. Given these ongoing and repetitive efforts to access and review P & D Auto Repair, Inc.'s records, and the failure of petitioner to make such records available, it was clearly appropriate for the Division to resort to an indirect audit methodology for the period December 1, 1981 through November 30, 1984 (***Matter of Continental Arms Corp. v. State Tax Commission***, 72 NY2d 976, 54 NYS2d 362).

E. Where, as here, 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). However, 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)***.

F. In this case petitioner has shown no error in either the audit method utilized or the results derived from its application. Petitioner has not shown that the methodology was in any manner incorrect or unreasonable. Petitioner has not come forward with any documents, including source records of sales or purchases, or other evidence to refute the estimates and results based upon the Division's own prior period audit for the sales tax quarters ended February 28, 1982, May 31, 1982 and August 31, 1982 and the company's reported taxable sales for the sales tax quarter ended February 28, 1983, which was applied to the remaining quarters at issue.

For the quarters ended February 28, 1982, May 31, 1982 and August 31, 1982, the Division's estimate of sales and use taxes due on the basis of the results of its own sales and use tax audit for the sales tax quarterly periods preceding those at issue herein was reasonable. The Division is clearly entitled to rely on its own prior audit experience in its estimation process, particularly in light of a taxpayer's failure to supply any reliable records or information concerning its operations (***Matter of Convissar v. State Tax Commn.***, 69 AD2d 929, 415 NYS2d 305; ***Matter of Giordano v. State Tax Commn.***, 145 AD2d 726, 535 NYS2d 255).

For the quarter ended February 28, 1983, the corporation reported taxable sales of $86,014.00 and reported no taxable sales for the remainder of the audit period. As the corporation did not report any taxable sales in the period March 1, 1983 through November 30, 1984, the auditor assumed that the corporation's taxable sales for the seven quarters covered by this period were the same $86,014.00 reported for the quarter ended February 28, 1983. The Division's estimating taxable sales based upon on a reported amount from a prior period is reasonable where the taxpayer provides no books and records for the period under review (***Matter of Leogrande v. Tax Appeals Tribunal***, 187 AD2d 768, 589 NYS2d 383).

G. The corporation reported sales tax credits for the quarters ended November 30, 1982, February 28, 1983 and February 29, 1984. These credits were disallowed on audit because the corporation failed to provide any records to substantiate them. A determination of exact tax liability is a condition precedent to obtaining a refund (***Matter of Salzman v. State Tax Commission***, 101 AD2d 910, 475 NYS2d 610; ***Matter of Raemart Drugs***, Tax Appeals Tribunal, July 8, 1988). Since P & D Auto Repair, Inc. failed to provide any documentation to support the claimed tax credits, the credits were properly denied.

In sum, for the period December 1, 1981 through November 30, 1984, the audit methods employed had a rational basis, the results derived therefrom are presumed to be correct in the absence of any evidence bearing out error in such result and such result is, therefore, sustained (***Matter of Hammerman,*** Tax Appeals Tribunal, August 17, 1995; ***Matter of Fashana,*** Tax Appeals Tribunal, September 21, 1989).

H. Tax Law § 1138(a)(1) provides that if a return required to be filed under article 28 is not filed, or if a filed return is incorrect or insufficient, the Commissioner of Taxation shall determine the correct amount of tax due from such information as may be available and from external indices if necessary. Although there is statutory authority for the use of external indices, such as those employed here, resort to this method of computing tax liability "must be founded upon an insufficiency of record keeping which makes it virtually impossible to verify taxable sales receipts and conduct a complete audit" (***Matter of Chartair, Inc. v. State Tax Commn***., 65 AD2d 44, 411 NYS2d 41, 43). In order to determine whether a taxpayer's records are adequate for audit purposes, the Division must first request and then examine the taxpayer's records (***Matter of Christ Cella v. State Tax Commn***., 102 AD2d 352, 477 NYS2d 858; ***Matter of Adamides v. Chu***, 134 AD2d 776, 521 NYS2d 826, ***lv denied*** 71 NY2d 806, 530 NYS2d 109; ***Matter of Ahmed***, Tax Appeals Tribunal, November 10, 1988).

There is nothing in the record which establishes that the Division made a request for the books and records of P & D Auto Repair, Inc. for the period December 1, 1984 through February 28, 1985 before issuing assessments against the business and petitioner. The appointment letter originally sent to the corporation by the auditor listed the period at issue as December 1, 1981 through November 30, 1984. Accordingly, it must be found that the Division's failure to request books and records for the final quarter of the audit precluded it from resorting to external indices to determine the tax due, and the sales tax assessed for the quarter ended February 28, 1985 is canceled.

I. The documents and testimony supplied by petitioner were insufficient to establish the claim that the corporation was not selling fuel or not doing business as a service station during some of the years under audit. The documents are insufficient to establish such claims, and there are also apparent contradictions between the documents and testimony presented by petitioner and the sales and use tax returns filed and the information obtained by the auditor.

Petitioner's claim that the business had stopped selling fuel during the audit period and was only operating as an automobile body repair shop does not relieve the business of sales tax liability. The corporation would remain liable for sales tax on its receipts from automobile body repair work (***Matter of Pram Auto Collision, Inc. and Frame Auto Collision, Inc.***, State Tax Commission, May 14, 1982). However, there is no evidence in the record which establishes that any adjustment in the sales tax liability as a result of the corporation's ending its business of selling fuel and providing automobile repairs would not be more than offset by the increased sales tax liability from providing automobile body repair work (***see***, ***Matter of Clone Enterprises***, Tax Appeals Tribunal, March 19, 1992).

Petitioner's claim that the liabilities in question have been satisfied is not supported by the record. Initially it is noted that Mr. Dinino admitted under oath that he had added Mrs. Dinino's name to a document addressed to Janice Dinino from the Tax Compliance Division of the Department of Taxation and Finance. Additional evidence provided by petitioner is not relevant to the notices at issue herein. Finally, information provided by the Division establishes that the assessments issued to the corporation and petitioner remain outstanding. Based on the above, the corporation and petitioner have failed to establish that the notices at issue have been satisfied (***Matter of McKee v. Commissioner***, 2 AD3d 1077, 768 NYS2d 677).

J. The Division of Taxation's Motion for Partial Summary Determination is granted as to notice of determination L-009364123 (formerly S820320016). The petition of Phyllis Dinino, as officer of P & D Auto Repairs, Inc., is granted to the extent indicated in Conclusion of Law "H"; in all other respects the petition is denied. The notices of determination L-009364121 and L-009364122 (formerly S850808001L and S850620004L), originally dated June 20, 1985 and August 8, 1985, respectively, as modified, are sustained.

DATED: Troy, New York
July 7, 2005

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE