

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
AMBOY QUICK SERVICE, INC.	:	DETERMINATION
AND HARMINDER SINGH	:	DTA NOS. 820063 AND 820064
.	:	
for Revision of Determinations or for Refund of	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period September 1, 1998	:	
through November 30, 2001.	:	

Petitioners, Amboy Quick Service, Inc. and Harminder Singh, c/o Bharat R. Madaglia, 110 West 40th Street, Suite 503, New York, New York 10018, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1998 through November 30, 2001.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on March 1, 2005 at 11:45 A.M., with all briefs to be submitted by June 24, 2005, which date commenced the six-month period for issuance of this determination (Tax Law § 2010[3]). Petitioners appeared by Bailey & Sherman, P.C. (Edward G. Bailey, Esq., of counsel). The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Robert Maslyn, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation's determination, upon audit, that petitioner Amboy Quick Service, Inc. owed additional sales tax, plus interest and penalties, was proper and should be sustained.

II. Whether petitioner Harminder Singh was a person under an obligation to collect and remit sales and use taxes on behalf of petitioner Amboy Quick Service, Inc. such that he was properly subjected to liability for the amounts determined to be due upon audit of Amboy Quick Service, Inc.

III. Whether petitioners have established any basis warranting reduction or elimination of penalties imposed.

FINDINGS OF FACT

1. Petitioner Amboy Quick Service, Inc. (“Amboy”) operated a gasoline station and convenience store located on Hylan Boulevard, Staten Island, New York, during the period at issue, to wit, September 1, 1998 through November 30, 2001. Amboy sold gasoline, cigarettes, soda, beer and other miscellaneous items.

2. By a letter dated September 28, 2000, the Division of Taxation (“Division”) advised Amboy that a sales tax field audit of its business operations for the period spanning October 1, 1998, when Amboy began operations, through May 31, 2000, would commence on November 7, 2000. This audit appointment letter advised Amboy that all of its books and records pertaining to the audit period, including financial statements, cash receipts and disbursement journals, general ledgers, sales invoices, purchase invoices, cash register tapes, Federal income tax returns, forms FT-943, daily pump readings, bank statements and canceled checks, should be available for review. The letter also advised Amboy that additional records and information might be required during the course of the audit, and that the audit period specified in the letter might be adjusted depending on the information gathered during the audit.

3. The initially scheduled audit appointment date of November 7, 2000 was changed, at petitioners’ request, to November 3, 2000. On November 3, 2000, petitioner Harminder Singh,

who identified himself as Amboy's owner, and petitioners' then-representative met with the Division's auditor. No books and records were presented by petitioners at this meeting. The Division's auditor, in turn, made additional written requests for books and records on November 3, 2000 and thereafter on December 14, 2001. This latter request for records advised that the period under audit had been extended to November 30, 2001.

4. The Division's auditor met with petitioners' representative on March 6, 2001, but was provided only with copies of some, but not all, of Amboy's fuel (gasoline) purchase invoices. None of the other records requested by the Division were provided by petitioners. Thereafter, the Division's auditor met with petitioners' representative in January 2002, at which time petitioners provided additional fuel purchase invoices and purchase histories obtained from Amboy's supplier. It appears that these records were sent by the supplier to petitioners in response to a Division request to the supplier for fuel purchase histories. No other books and records were provided by petitioners upon audit.¹

5. After reviewing the documents provided, the auditor determined the same to be insufficient and inadequate for the performance of a detailed audit, most specifically due to the lack of any records pertaining to sales. Accordingly, the auditor determined to resort to an indirect audit method to calculate the amount of Amboy's sales and its sales tax liability.

Fuel Sales

6. To determine Amboy's fuel sales, the auditor performed a quarter-by-quarter analysis based on fuel purchases. Amboy's fuel purchases were all made from Certified Heating Oils, Inc., and consistently ranged from 125,000 to 145,000 gallons for those quarterly periods for

¹ Amboy's sales tax returns for the four earliest sales tax quarterly periods in issue (September 1, 1998 through August 31, 1999) and the five latest sales tax quarterly periods (September 1, 2000 through November 30, 2001) were delinquent at the time the audit was commenced, and were submitted to the auditor at the January 2002 meeting.

which complete fuel purchase records were available. As to the quarterly periods for which there was no complete purchase history, the Division utilized the same number of gallons as had been determined for the closest prior quarterly period for which there were complete purchase records. In the case of the earliest quarterly period under audit, spanning September 1, 1998 through November 30, 1998, the Division accepted the documented purchase total of 40,000 gallons, given that Amboy had been in business for only a portion of such period.

7. Since Amboy presented no documentation of the prices at which it sold gasoline, the Division made two separate observations of actual pump selling prices, at a 200-day interval (August 22, 2000 and March 9, 2001). The Division compared the observed selling prices with the documented cost of gasoline for the same dates, and determined average markups for regular and premium grades of gasoline and for full-serve and self-serve. These average markups were applied to the purchase cost of each grade of gasoline for each quarterly period as determined earlier. As part of the observation, the auditor determined that 52.7 percent of Amboy's gasoline sales were made as higher priced full-serve sales, with 47.3 percent made as self-serve sales. The auditor actually used a 50 - 50 ratio between full-serve and self-serve to calculate Amboy's fuel sales.² Credits taken by Amboy for prepaid taxes on gasoline were allowed since the purchase records, though incomplete, did show the prepayment of sales tax.

Cigarette Sales

8. No records or other information were provided on audit concerning cigarette purchases or sales. The auditor determined the number of packs of cigarettes sold during the period in issue by dividing the tax credit for prepaid sales tax on cigarettes, as set forth on Amboy's sales tax returns, by the then 15 cents per pack amount of prepaid tax on cigarettes. In determining

² This ratio is, in fact, slightly beneficial to petitioners.

cigarette sales for quarterly periods for which no sales tax returns had been filed by Amboy, the auditor used the average number of packs of cigarettes sold in the quarterly periods for which returns had been filed. The auditor utilized an estimated average retail selling price of \$4.00 per pack of cigarettes, based on his audit experience of cigarette vendors in Amboy's geographical location. Notwithstanding Amboy's claim of credit for prepaid tax on cigarettes set forth on its sales tax returns, no credit for prepaid tax was allowed on audit because such purchases (unlike fuel purchases) were not documented by invoices showing that such tax had, in fact, been prepaid.

Miscellaneous Sales

9. No documentation of Amboy's purchases or sales of miscellaneous items such as soda, beer, candy, paper goods and various grocery items was provided on audit. The Division determined sales of miscellaneous items to be \$20,000.00 per sales tax quarterly period, based upon the auditor's supervisor's audit experience.

10. Total audited sales tax due on fuel sales, cigarette sales and miscellaneous sales, as calculated pursuant to the foregoing audit methodology, was reduced by sales tax paid by Amboy to arrive at additional sales tax due for the audit period in the aggregate amount of \$88,894.14.

11. As a result of its audit, the Division issued to petitioner Amboy a Notice of Determination, dated December 13, 2002, assessing additional tax due in the amount of \$88,894.14, plus interest and penalties, including omnibus penalty based on underreporting of more than 25 percent of the amount that should have been reported as due, for the period September 1, 1998 through November 30, 2001. A consent had been executed by Amboy, dated

November 16, 2001, pursuant to which the statute of limitations on assessment for the period September 1, 1998 through November 30, 1999 was extended to December 20, 2002.

12. The Division also issued to petitioner Harminder Singh a Notice of Determination, dated January 6, 2003, assessing additional tax, interest and penalties (including omnibus penalty) in the same amounts and for the same period as set forth on the assessment issued against Amboy. Petitioner Harminder Singh is listed as the owner of Amboy, held himself out as its owner and operator during the course of the audit, and provided no argument or evidence contrary to the Division's position that he was the owner and operator of Amboy.³

13. Petitioners challenged the assessment and, pursuant to conciliation orders dated March 26, 2004, the amount of tax due on each assessment was reduced to \$57,828.85, plus interest and penalties. The reduction was based on changes in each of the three areas for which additional sales tax had been found due, as follows:

a) Fuel Sales— sales of fuel were reduced based upon petitioners' submission of additional purchase invoices and purchase histories from Amboy's supplier which eliminated the need to estimate fuel purchase amounts for any of the quarterly periods covered by the audit, and allowed quantities of fuel sold to be based upon Amboy's documented purchases.

b) Cigarette Sales— credit was allowed for prepaid tax on cigarettes based upon petitioners' production of a printout of purchases from Amboy's cigarette supplier plus invoices showing actual prepaid tax and payments made.

c) Miscellaneous Sales— miscellaneous sales were redetermined based upon an observation of such sales, conducted on January 31, 2002, as opposed to

³ As noted, a consent was executed by Amboy, dated November 16, 2001, pursuant to which the statute of limitations on assessment for the period September 1, 1998 through November 30, 1999 had been extended to December 20, 2002. In contrast, Mr. Singh did not execute a consent to extend the period of limitations on assessment and the Division concedes that the portion of the assessment issued against Mr. Singh pertaining to the sales tax quarterly period ended November 30, 1999 should be cancelled as not timely issued. Further, since Amboy did not file returns for the quarterly periods ended November 30, 1998, February 28, 1999, May 31, 1999 and August 31, 1999 until January 2002, the period of limitations on assessment for such periods was not triggered and does not require cancellation for any of such quarterly periods.

the initial determination based upon audit experience. The amount of daily taxable sales determined upon such observation (\$31.19) was projected throughout the period in issue.

14. At hearing, petitioners provided an envelope dated February 20, 2001, which allegedly had been received by petitioners from Amboy's fuel supplier and contained Amboy's purchase history and purchase invoices.⁴ It undisputed that such fuel purchase information was provided to the Division during the course of the audit, and was utilized in arriving at the reduction in tax due on fuel sales as incorporated in the conciliation orders. Although not entirely clear, it appears that such envelope was provided at hearing to establish that when the supplier information was received by petitioners it was, in turn, given over to the Division and should, according to petitioners, serve as an indication of good faith in mitigation of the penalties imposed.

15. Petitioners' representative also submitted into evidence copies of eleven credit card receipts for gasoline sales. According to petitioners these receipts, dated May 26 through May 28, 2001, May 9, 2000, and November 7 and 8, 2000, were chosen out of some 50 such receipts provided by Mr. Singh to petitioners' representative, and reflect markup amounts of twelve cents, ten cents and seven cents per gallon. Petitioners' witness did not know whether the receipts represented sales of regular or premium gasoline or were made at full-serve or self-serve pumps, but claimed that such receipts support an average markup of ten cents per gallon which, in turn, would reduce the amount of tax determined to be due on audit by approximately \$10,000.00. In contrast, the Division's calculations determined a markup ranging from 16.9 to

⁴ It appears that the purchase information may have been initially furnished to the Division by Amboy's supplier, but was returned to the supplier by the Division as not being "original purchase records." In turn, the information was mailed by the supplier to petitioners' representative who, thereafter, provided copies of such information to the Division's auditor.

21.9 cents per gallon, and differentiated between regular and premium grades of gasoline and between full-serve and self-serve sales.

CONCLUSIONS OF LAW

A. 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).

B. In this case, the record establishes the Division's clear and unequivocal written requests for books and records of Amboy's sales, as well as Amboy's failure to produce such books and records for the Division's review. In turn, the auditor reasonably concluded that Amboy did not maintain books and records that were sufficient to verify his gross and taxable sales for the audit period. Having established the insufficiency of Amboy's books and records,

the Division resorted to the use of purchase records supplied by Amboy's fuel supplier, together with observed pump prices and quantities, to determine Amboy's fuel sales and, further, resorted to estimates based initially on audit experience to determine Amboy's sales of cigarettes and miscellaneous items. Petitioners, for their part, do not dispute the absence of complete sales records, or dispute the Division's authority to resort to indirect audit methodologies in this case. In fact, the Division's authority to do so has been consistently sustained, including specifically its authority to resort to observation tests and projections therefrom (*see, Matter of Del's Mini Deli, Inc. v. Commissioner of Taxation and Finance*, 205 AD2d 989, 613 NYS2d 967; *Matter of Sarantopoulos v. Tax Appeals Tribunal*, 186 AD2d 878, 589 NYS2d 102; *Matter of Marte*, Tax Appeals Tribunal, August 5, 2004), and to resort to the use of estimates based on experience gained from audits of similar businesses (*Matter of Oak Beach Inn Corp. v. Wexler*, 158 AD2d 785, 551 NYS2d 375). Hence, the only issue is whether petitioners have established that the amount of tax assessed as the result of the application of such methods was erroneous.

C. Petitioners, in essence, appear to take issue with the Division's audit result because it is imprecise. As a general proposition, any imprecision in the results of an audit arising by reason of a taxpayer's own failure to keep and maintain records of all of his sales as required by Tax Law § 1135(a)(1) must be borne by that taxpayer (*Matter of Markowitz v. State Tax Commission, supra.*; *Matter of Meyer, supra.*). In this instance, petitioners specifically complain that the markup amounts on gasoline, as used by the auditor, were too high, and that the estimated selling price per pack of cigarettes was too high and should be reduced by five cents per pack to account for the excise tax on cigarettes. As to fuel sales, the main difference between the parties' positions stems from petitioners' request for the use of a significantly lower per gallon markup amount, based on a tiny number of hand-selected credit card receipts

presented at hearing. It is undoubtedly true that fuel prices may have been, at times, either lower or higher than the prices observed by the auditor at the time of the audit and used by the Division in the calculation of the per gallon markup amount. It is equally likely that the composition of sales of full-serve versus self-serve, and of premium versus regular grades of gasoline, could have been different from those determined by the auditor based on the observations.

Nonetheless, petitioners' submission of a few credit card receipts out of a 27-month audit period together with the accompanying claim that ten cents per gallon is a more accurate markup amount, falls far short of the evidence necessary to support petitioners' claim and override the results of the audit as based on observed selling prices and fuel sales composition. Similarly, petitioners' assertion that the Division's estimated selling price of \$4.00 per pack of cigarettes was too high and should, at a minimum, be reduced to \$3.95 per pack because of a five cents per pack excise tax amount included therein, is rejected. Again, petitioners provided no records establishing the actual selling price per pack of cigarettes, nor any other basis for refuting the Division's estimated price.⁵ Ultimately, petitioners' failure to maintain or provide any records of sales leaves no basis for changing the Division's audit results.

D. Petitioners have not provided evidence which would support reduction or abatement of the penalties imposed, and the same are, therefore, sustained. In establishing reasonable cause for penalty abatement, the taxpayer faces an onerous task (*Matter of Philip Morris, Inc.*, Tax Appeals Tribunal, April 29, 1993). The Tribunal explained that “[b]y first requiring the imposition of penalties (rather than merely allowing them at the Commissioner’s discretion), the Legislature evidenced its intent that filing returns and paying tax according to a particular

⁵ In any event, the cigarette excise tax is a component part of the receipt (selling price per pack) subject to sales tax (*see*, 20 NYCRR 526.5[b]).

timetable be treated as a largely unavoidable obligation [citations omitted]” (*Matter of MCI Telecommunications Corp.*, Tax Appeals Tribunal, January 16, 1992). Here, Amboy neither maintained nor produced records as required, and was delinquent in the filing of its sales tax returns for a number of quarterly periods. Further, there was a substantial discrepancy between reported taxable sales (\$1,307,709.00) and audited taxable sales (\$12,295,473.00). Finally, it is also significant that even if petitioners’ own (best case) recalculation of liability were to be accepted, the same still results in a significant underreporting of sales and underpayment of sales tax (*see*, Finding of Fact “15”).

E. Petitioner Harminder Singh held himself out as the owner and operator of petitioner Amboy at all times, and neither challenged nor provided any evidence or argument to refute the Division’s position that he was a person under a duty to collect and remit sales and use taxes on behalf of Amboy. Accordingly, he was properly held responsible for the liability, including penalties and interest, assessed against Amboy (Tax Law §1131[1]; § 1133[a]; *Lorenz v. Division of Taxation of Department of Taxation and Finance of State of New York*, 212 AD2d 992, 623 NYS2d 455, *affd* 87 NY2d 1004, 642 NYS2d 621).

F. The petitions of Amboy Quick Service, Inc. and Harminder Singh are hereby granted to the extent of the reduction set forth in the conciliation orders dated March 26, 2004 (*see*, Finding of Fact “13”) and, with regard to petitioner Harminder Singh, to the extent that the tax, interest and penalties assessed for the sales tax quarterly period ended November 30, 1999 are canceled (*see* Footnote “3”), but are otherwise denied, and the notices of determination dated

December 13, 2002 (pertaining to Amboy) and January 6, 2003 (pertaining to Harminder Singh),
as reduced accordingly, are sustained.

DATED: Troy, New York
December 1, 2005

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE