STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
HUNTER MARINE SALES, INC.	:	DETERMINATION DTA NO. 820178
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Periods December 1, 1998 through August 31, 2001 and March 1, 2004 through May 31, 2004.	:	

Petitioner, Hunter Marine Sales, Inc., 417 Woodcleft Avenue, Freeport, New York 11520, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods December 1, 1998 through August 31, 2001 and March 1, 2004 through May 31, 2004.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on August 11, 2005 at 10:30 A.M., with all briefs to be submitted by December 16, 2005, which date began the six-month period for the issuance of this determination. Petitioner appeared by its president, Francis Hunter. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Michael P. McKinley, Esq., of counsel).

ISSUES

I. Whether petitioner timely filed either a Request for a Conciliation Conference with the Division of Taxation's Bureau of Conciliation and Mediation Services or a petition with the Division of Tax Appeals following the issuance of a Notice of Determination for the period March 1, 2001 through August 31, 2001.

II. Whether the audit methodology employed by the Division of Taxation was reasonably calculated to reflect additional tax due from petitioner.

III. Whether petitioner has established that its purchases of motorcycles were purchases for resale.

IV. Whether petitioner has established any facts or circumstances to warrant the reduction or abatement of penalties imposed.

FINDINGS OF FACT

1. On February 10, 2003, the Division of Taxation ("Division") issued two notices of determination (Assessment Nos. L-022011068 and L-022011069)[1] to Hunter Marine Sales, Inc. ("petitioner") as follows:

Tax Period	Tax	Interest	Penalty	Total Due
12/01/98 through 02/28/01	$273,053.92	$112,507.59	$112,085.22	$497,646.73
03/01/01 through 08/31/01	$73,350.17	$11,987.67	$27,265.03	$112,602.87

2. On July 19, 2004, another Notice of Determination (Assessment No. L-024252392) was issued to petitioner which assessed tax in the amount of $77.90, plus penalty and interest, for a total amount due of $545.70 for the quarter ended May 31, 2004. This notice was issued as a result of the Division's disallowance of a vendor collection credit since petitioner had filed its sales tax return late for the period March 1, 2004 through May 31, 2004. The Notice of Determination provided, in relevant part, as follows:

[1] Two separate notices were issued by the Division because, at the time that the Division was closing the case, an amnesty program was in effect, and it was the Division's policy to issue separate notices for periods covered by the amnesty program and for periods not covered thereby. The notice issued for the period December 1, 1998 through February 28, 2001 (Assessment No. L-022011068) was for a period covered by the Division's amnesty program.

> The amount of vendor collection credit claimed was taken into consideration when determining the liability for this return. This credit is only allowed on a timely filed, full paid return. This liability may reflect an adjustment or denial of this credit.

Petitioner's sales and use tax return for the period March 1 through May 31, 2004 was signed on June 18, 2004 but was mailed to the Division in an envelope which bore a United States Postal Service postmark of June 24, 2004.

3. Previously, on or about October 25, 2001, petitioner, by its president, Francis Hunter, had executed a consent extending the period of limitation for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law whereby petitioner agreed that sales and use taxes due for the period December 1, 1998 through February 28, 2000 could be assessed at any time on or before March 20, 2003.

4. Petitioner sells new and used boats, repairs and stores boats and also sells boat trailers and accessories.

5. The audit of petitioner was triggered by an audit of one of petitioner's suppliers, Extreme Motorsports, Inc. While auditing Extreme Motorsports, Inc., the auditor, Martin Elfant, was presented with a resale certificate from petitioner which the auditor found to be unusual since a marine business did not normally purchase motorcycles which were exempt from sales tax. Accordingly, on October 16, 2001, the case was assigned to Martin Elfant who on that date mailed a letter to petitioner scheduling the audit for November 20, 2001. Attached to this letter was a checklist of records to be presented for audit which asked for the following records: general ledger; cash receipts journal; cash disbursements journal; Federal income tax returns; sales tax returns; purchase and sales invoices; expense purchase invoices; fixed asset purchase and sales invoices; bank statements, canceled checks and deposit slips; all exemption documents; guest checks and cash register tapes; and general journal and closing entries.

6. After petitioner made requests for additional time to furnish the records requested by the auditor, Mr. Elfant met with petitioner's representative, Steven Weinstein, at the representative's office on February 8, 2002. Records made available for audit were: general ledger, cash receipts and cash disbursements journals, Federal income tax returns, sales tax returns, incomplete bank statements and a general journal and closing entries.

At the meeting, the auditor completed the initial questionnaire and completed reconciliations of cash, deposits, sales and purchases. Taxable sales were tested for one sales tax quarter. Gross profit and markup percentages were also tested. The auditor prepared a summary analysis of fixed assets. The auditor reviewed petitioner's Federal income tax returns to determine whether recurring expenses were immaterial and concluded that no further testing of these expenses would be performed.

After a review of the records presented, the auditor determined that petitioner's sales records were inadequate since invoices were not maintained for nontaxable sales, a sales journal was not maintained and invoices were not sequentially numbered. The auditor found that general ledger sales were booked from monthly deposit statements without reference to sales invoices and that sales tax returns were prepared based upon a taxable worksheet which the representative received from petitioner. In addition, the auditor determined that petitioner's gross sales were estimated.

Asset records were deemed to be inadequate because all invoices were missing and no fixed asset records were presented. The absence of asset records did not permit the auditor to trace any transaction back to the original source or to calculate a final total. Therefore, the auditor utilized depreciation schedules attached to petitioner's Federal income tax returns.

Motorcycle purchases were reviewed utilizing a detailed method. Additional taxable motorcycle purchases of $27,807.64 were discovered, resulting in additional tax due of $2,363.66.

7. The auditor asked his supervisor to attend the next meeting with petitioner and its representative, which was held at petitioner's place of business on March 15, 2002. At that time, petitioner was informed that because there were no invoices, bank statements would be utilized to determine gross sales. Based upon his review, the auditor determined that there were three elements to the audit of petitioner's business, to wit, sales, fixed assets and motorcycles. Each will be addressed separately.

8. The auditor prepared a transcript of monthly bank deposits from the four accounts maintained by petitioner and reconciled the deposits to the sales tax returns. Pursuant to the auditor's calculations, petitioner's total deposits for the audit period were $5,743,783.23. From the total deposits, sales tax reported during the audit period ($35,398.00) was deducted. Also deducted were deposits or credits which were found not to be the result of sales. These amounts included returned checks, bank transfers from one account to another, amounts for lines of credit, officer loans and charge rebates. The balance after deduction of these amounts was $4,421,946.34 which the auditor determined to be petitioner's gross sales for the audit period. Since there was no documentation of nontaxable transactions, gross sales were held to be 100% taxable. After allowing for taxable sales already reported on petitioner's tax returns for the audit period ($422,260.00), additional taxable sales were determined to be $3,999,686.34, with tax due thereon in the amount of $339,973.34.

9. With respect to fixed assets, the auditor calculated total asset additions for the years 1999 and 2000 from the depreciation schedules of petitioner's Federal income tax returns. He

was then presented with a ledger for the period January 1 through August 31, 2001. Since the audit period includes just one month during 1998, no fixed assets from this period were included.

For 1999, petitioner's Federal income tax return for the year indicates that buildings and other depreciable assets increased by $1,000.00, from $9,300.00 at the beginning of the year to $10,300.00 at the end of the year. For 2000, petitioner's Federal income tax return indicates that buildings and other depreciable assets increased from $10,300.00 at the beginning of the year to $46,412.00 at the end of the year. For 2000, after examining the depreciation report attached to the 2000 Federal income tax return, the auditor requested invoices in order to determine whether tax had been paid on these fixed assets. Many of the invoices were missing. For 2001, petitioner purchased four items (pickup trucks and heating systems) totaling $10,700.00.

In summary, the auditor determined that for the audit period, petitioner acquired fixed assets in the total amount of $47,848.00 and that no tax had been paid thereon. Accordingly, additional tax was determined to be due in the amount of $4,067.09.

10. The auditor then determined that during the audit period, petitioner made ten purchases from Extreme Motorsports, Inc., the company to which petitioner had furnished a resale certificate (***see***, Finding of Fact "5") in the total amount of $27,807.64. Since invoices were not presented to show that these items were resold by petitioner, these items, generically referred to as motorcycles (even though the amounts of some of the purchases were indicative of motorcycle accessories), were deemed to be taxable. Since petitioner could not furnish invoices of its purchases from Extreme Motorsports, Inc., to show that it had paid tax on the purchases, tax in the amount of $2,363.66 was assessed on these transactions.

11. Total tax due in the amount of $346,404.09 was, therefore, assessed, consisting of $339,973.34 on petitioner's sales, $2,363.66 on its motorcycle purchases and $4,067.09 on its

fixed asset acquisitions. Penalties were asserted pursuant to Tax Law § 1145(a)(1)(vi) for omitting from the return in excess of 25% of the amount of taxes required to be shown on the return, and in addition, penalty pursuant to Tax Law § 1145(a)(5) was imposed for issuance of a false or fraudulent resale certificate with intent to evade tax.

12. At the hearing, the Division submitted a motion for partial summary determination with respect to Assessment No. L-022011069 for the period March 1 through August 31, 2001 on the basis that petitioner failed to file a Request for a Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS") or a petition for a hearing with the Division of Tax Appeals within 90 days of the issuance of the Notice of Determination.

13. Previously, on August 3, 2005, with permission granted pursuant to a letter from the Assistant Chief Administrative Law Judge dated August 1, 2005, the Division served upon petitioner an amended answer to its petition. The reason for the amended answer was to include information about an additional assessment (Assessment No. L-022011069) which was not specifically referenced on the petition[2] filed with the Division of Tax Appeals but which was deemed included by the Division of Tax Appeals on the basis that petitioner had attached to the petition a copy of a Consolidated Statement of Tax Liabilities dated July 23, 2004 which made reference to that assessment.

14. On June 4, 2004, a Conciliation Order (CMS No. 196900) was issued by BCMS which denied petitioner's request and sustained the statutory notice. However, the Conciliation Order indicates that it applies only to Assessment No. L-022011068. Nowhere on the order is

[2] On the first page of the petition, the assessment number for which the petition was seeking administrative review was listed as "L022011068."

there a reference to Assessment No. L-022011069, the subject of the motion for partial summary determination.

15. The petition was signed and dated September 2, 2004 and was received by the Division of Tax Appeals on September 7, 2004. A copy of United States Postal Service form EP-13F attached to the envelope in which the petition was mailed by express mail indicates that the petition was received at the post office on September 3, 2004 at 7:45 P.M.

16. To establish the date and method of mailing of the Notice of Determination (Assessment No. L-022011069) which is the subject of the Division's motion for partial summary determination, the Division attached to its motion papers: its certified mailing record ("CMR") for statutory notices mailed on February 10, 2003 which indicates that among the 180 certified mailings on that date, pieces of certified mail were sent to petitioner at 417 Woodcleft Avenue, Freeport, New York 11520-6341 as well as to its representative, Steven R. Weinstein at 4 Deerfield Lane, Katonah, New York 10536; a copy of the Notice of Determination issued to petitioner and to its representative under separate cover letters which are also attached; an affidavit of the Division's representative, Michael P. McKinley, an attorney employed in the Division's Office of Counsel (attached to the affidavit was a copy of the letter from the Division of Tax Appeals granting the Division permission to amend its answer as well as a copy of the amended answer of the Division); a copy of the petition dated September 2, 2004 and the Consolidated Statement of Tax Liabilities which was attached to the petition; a copy of petitioner's sales tax return for the period September 1 through November 30, 2002 which lists petitioner's address as 417 Woodcleft Avenue, Freeport, New York 11520-6341 and which was timely filed by December 20, 2002; a copy of the United States Postal Service Express Mail label which was affixed to the envelope containing the petition indicating that the documents

were delivered by petitioner for mailing on September 3, 2004; and affidavits of two Division employees, Geraldine Mahon and Bruce Peltier, familiar with the creation, processing and mailing of notices of determination.

Taken together, these documents are sufficient to establish that the notices were properly addressed and sent by certified mail to petitioner's last known address (as well as to its representative) on February 10, 2003.

Petitioner has failed to respond to the Division's motion despite being advised of the time limitations for replying to the motion by the administrative law judge at the hearing and, accordingly, has failed to present any evidence to show that the notice was not properly mailed or timely received or that it filed a timely protest within 90 days of the issuance of the statutory notice.

SUMMARY OF PETITIONER'S POSITION

17. Petitioner's president, Francis Hunter, claims that petitioner was licensed to sell motorcycles, trailers and all-terrain vehicles and claimed that the motorcycles were sold but he stated that he could produce no sales invoices. He stated that they were sold as used vehicles and that sales tax was paid when registered with the Department of Motor Vehicles.

Mr. Hunter admitted that he was "very poor at keeping records" and also asserted that most of his records were lost in a move from one place to another.

CONCLUSIONS OF LAW

A. The Division, in its motion for partial summary determination, claims that petitioner's protest of the Notice of Determination issued for the period March 1 through August 31, 2001 (Assessment No. 022011069) should be dismissed because petitioner failed to file a timely request for a conciliation conference or a timely petition for a hearing before the Division of Tax

Appeals. Tax Law § 1138(a)(1) authorizes the Division to estimate tax due and to issue a notice of determination to a taxpayer if a return required under Article 28 is not filed, or if a return, when filed, is incorrect or insufficient. Pursuant to this paragraph, after 90 days from the mailing of a notice of determination, such notice shall be an assessment of the amount of tax specified in the notice together with the interest and penalties stated in such notice, except only for any such tax or other amounts as to which the taxpayer has within such 90-day period applied to the Division of Tax Appeals for a hearing. As an alternative to filing a petition for a hearing with the Division of Tax Appeals, a taxpayer may file a request for a conciliation conference with BCMS which is what this petitioner elected to do. The time period for filing such request is also 90 days (Tax Law § 170[3-a][e]; 20 NYCRR 4000.3[c]). The filing of a petition or a request for a conciliation conference within the 90-day period is a prerequisite to the jurisdiction of the Division of Tax Appeals (***Matter of Roland***, Tax Appeals Tribunal, February 22, 1996). Where the timeliness of a request for a conciliation conference or a petition for a hearing is at issue, the Division has the burden to establish that it properly mailed the statutory notice at issue to the taxpayer at his or her last known address (***Matter of Perk***, Tax Appeals Tribunal, December 13, 2001).

B. Tax Law § 1147(a)(1) provides that a notice of determination shall be mailed by certified or registered mail to the person for whom it is intended "at the address given in the last return filed by him pursuant to [Article 28] or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable." This section further provides that the mailing of such a notice "shall be presumptive evidence of the receipt of the same by the person to whom addressed." However, the presumption of delivery does not arise unless or until sufficient evidence of mailing has been produced, and the burden of proving

proper mailing rests with the Division (***Matter of Novar TV & Air Conditioning Sales & Service, Inc.***, Tax Appeals Tribunal, May 23, 1991). When a notice is found to have been properly mailed by the Division, i.e., sent to the taxpayer at his or her last known address by certified or registered mail, the petitioner then bears the burden of proving that a timely protest was filed (***Matter of Malpica***, Tax Appeals Tribunal, July 19, 1990).

C. In the present matter, the Division has presented sufficient evidence to prove that the Notice of Determination was properly mailed to petitioner at its last known address as well as to its representative on February 10, 2003. Accordingly, in order to timely protest the notice, petitioner was required to file its petition within 90 days of February 10, 2003, i.e., on or before May 11, 2003. Since, in 2003, May 11th fell on a Sunday, petitioner had until the next business day, or Monday, May 12, 2003, to file its petition (***see***, General Construction Law § 25-a)

D. It is undisputed that petitioner's petition for administrative review with the Division of Tax Appeals was not mailed until September 3, 2004, and therefore, it is clear that the petition was filed nearly 16 months beyond the statutory 90-day period. Tax Law § 1147(a)(2) provides that when a document which is required to be filed on or before a prescribed date is "delivered by United States mail to the . . . bureau . . . with which or with whom such document is required to be filed . . . the date of the United States postmark stamped on the envelope shall be deemed to be the date of delivery." Since the envelope containing petitioner's petition contained a United States Postal Service express mail label which indicates that petitioner delivered the envelope for mailing to the post office on September 3, 2004, it is that date which is properly deemed to be the date on which petitioner filed its petition and such date is well beyond the statutory 90-day period. Accordingly, the Division of Tax Appeals is without jurisdiction to address the merits of petitioner's protest of the Notice of Determination for the period March 1 through August 31,

2001 (***Matter of Sak Smoke Shop***, Tax Appeals Tribunal, January 6, 1989) and that portion of its petition must be dismissed.

E. 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).

F. In this case, the record clearly indicates that the Division made a written request for books and records of petitioner's sales, fixed asset acquisitions and motor cycle purchases and sales. After reviewing the records produced, the auditor reasonably concluded that petitioner's records were insufficient to conduct a detailed audit to verify its gross and taxable sales for the audit period. Having established the insufficiency of petitioner's books and records, the auditor properly resorted to a bank deposit analysis to establish petitioner's gross sales, and since there

was no documentation of nontaxable transactions, he reasonably and properly concluded that 100% of gross sales were taxable. Since no invoices were presented which would have permitted the auditor to compute total fixed asset purchases for the audit period or to determine whether sales tax was properly paid by petitioner upon its acquisition of the fixed assets, his utilization of depreciation schedules from petitioner's Federal income tax returns for the years 1999 and 2000 and petitioner's own ledger for the period January 1 through August 31, 2001 was reasonable and proper.

As to the motorcycles and accessories purchased by petitioner from Extreme Motorsports, Inc., petitioner was unable to substantiate that it resold these items to its customers and its furnishing of a resale certificate to Extreme Motorsports, Inc. was, therefore, improper. No sales invoices were presented to the auditor, and inasmuch as petitioner could not prove that it had paid sales tax when it purchased the items, sales tax was properly assessed on the total amount of petitioner's purchases thereof.

As previously noted, petitioner bears the burden of proving, by clear and convincing evidence, that the audit method employed or the amount of tax assessed was unreasonable. Petitioner failed to sustain this burden of proof with respect to any element of the audit, i.e., sales, fixed assets or motorcycles, since no additional books and records were produced at the hearing or at any time subsequent to the audit which would warrant an adjustment of the audit results.

G. Tax Law § 1136(b) provides that quarterly sales tax returns shall be filed within 20 days after the end of the quarterly period covered by the return. Therefore, for the quarter ended May 31, 2004, the return was required to have been filed on or before June 20, 2004. Since it has been shown (***see***, Finding of Fact "2") that petitioner's sales tax return for the period March

1 through May 31, 2004 was not mailed until June 24, 2004, the Division's denial of the vendor collection credit and the assessment resulting therefrom in the Notice of Determination issued July 19, 2004 (Assessment No. L-024252392) was proper.

H. Petitioner has provided no basis upon which penalties, properly imposed, should be reduced or abated and the same are, therefore, sustained.

I. As previously indicated in Conclusion of Law "D", pursuant to the granting of the Division's motion for partial summary determination, that portion of the petition relating to the Notice of Determination (Assessment No. L-022011069) issued on February 10, 2003 for the period March 1 through August 31, 2001 is hereby dismissed.

J. The petition of Hunter Marine Sales, Inc. is denied and the notices of determination issued on February 10, 2003 and on July 19, 2004 are hereby sustained.

DATED: Troy, New York
June 1, 2006

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE