

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
MD. ABID HOSSAIN : SMALL CLAIMS
 : DETERMINATION
 : DTA NO. 820570
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 June 1, 2002 through :
August 31, 2003. :
_____ :

Petitioner, MD. Abid Hossain, 37-57 80th Street, Apartment #D-27, Jackson Heights, New York 11372, 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 June 1, 2002 through August 31, 2003.

A small claims hearing was held before Thomas C. Sacca, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on March 14, 2006 at 1:15 P.M., which date began the three-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Jeff Jennings).

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, MD. Abid Hossain, 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 August 26, 2003, an investigator for the Division of Taxation (“Division”) conducted an observation of petitioner’s business activities. From this observation and discussion with petitioner, the investigator concluded that petitioner worked five days per week, eight hours per day and four weeks per month. During the time 2:35 P.M. to 2:50 P.M., the investigator observed 15 customers with an average transaction of \$2.00, with a taxable ratio of approximately 95%.

2. The Division issued a letter, dated January 22, 2004, advising petitioner that he had been selected for audit. This letter requested that petitioner either complete a Self Audit Schedule and return it to the auditor with supporting documentation or make an appointment at a local district office of the Division. A second request was sent to petitioner on February 18, 2004. Petitioner did not respond to either letter.

3. Petitioner, who had filed sales tax returns but reported no taxable sales, did not submit any books and records to the Division. Accordingly, on April 8, 2004, the Division issued to petitioner a Statement of Proposed Audit Changes indicating that he would be billed \$7,368.56 in sales tax due, plus penalty and interest. Subsequently, on May 28, 2004, the Division issued to petitioner a Notice of Determination assessing sales tax due for the period June 1, 2002 through November 30, 2003 in the amount of \$7,368.56, plus penalties (pursuant to Tax Law § 1145[a][1][i], [vi]) and interest. The Division’s auditor calculated this liability on the basis of the Division’s experience with other push cart vendors as well as the information obtained from the observation of petitioner’s business operation on August 26, 2003. Specifically, for each

quarter of the audit period, the auditor multiplied estimated daily gross sales by the days petitioner worked in each quarter (petitioner stated that he worked 160 days per year) to arrive at gross sales per quarter. Gross sales per quarter were multiplied by an estimated taxable ratio of 95% to arrive at total quarterly taxable sales. In turn, total quarterly taxable sales were multiplied by the applicable sales tax rate to arrive at tax per quarter. The auditor's computation of sales tax due is as follows:

Sales Tax Period	Daily Sales	Days Worked	Gross Sales	Taxable Sales	Tax Rate	Sales Tax Due
8/31/02	\$500.00	40	\$20,000.00	\$19,000.00	8.25%	\$1,567.50
11/30/02	\$450.00	40	\$18,000.00	\$17,100.00	8.25%	\$1,410.75
2/28/03	\$300.00	20	\$6,000.00	\$5,700.00	8.25%	\$470.25
5/31/03	\$425.00	50	\$21,250.00	\$20,188.00	8.25%	\$1,665.47
8/31/03	\$550.00	50	\$27,500.00	\$26,125.00	8.25%	\$2,254.59
TOTAL						\$7,368.56

SUMMARY OF PETITIONER'S POSITION

4. Petitioner challenged the assessment by filing a petition for a hearing with the Division of Tax Appeals, alleging that he only worked during the warmer months, that he was out of the country for periods of time, that he did not always work five days per week due to weather conditions, that he was an employee of the cart's owner and that he was employed elsewhere.

CONCLUSIONS OF LAW

A. During the period in issue, petitioner conducted business 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 initially conducted an observation of petitioner's business

activities, and determined that petitioner had made taxable sales of \$30.00 during a 15-minute period. After noting that petitioner had reported no taxable sales during the audit period, the Division sent two letters to petitioner requesting that he either conduct a self audit of his business records or make an appointment with the local district office of the Division. Petitioner did not respond to either letter. Under these circumstances the Division would be entitled to estimate petitioner's sales tax liability 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), if it establishes that it made a proper request and evaluation of petitioner's books and records to determine their insufficiency to verify taxable sales receipts.

B. 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).

C. There is nothing in the record which establishes that the Division made a request for the books and records of petitioner for the period June 1, 2002 through August 31, 2003 before issuing the assessment against petitioner. The letters of January 22, 2004 and February 18, 2004 are not in the record, and therefore it cannot be determined whether a specific request was made for petitioner's books and records and the period for which they were being requested. A summary of those letters in the records of the Division presented at hearing indicate only that petitioner was to perform a self audit or make an appointment at the local district office. Even the summary does not state for what period petitioner was being audited. Accordingly, it must be found that the Division's failure to establish that it requested books and records for the audit period precluded it from resorting to external indices to determine the tax due, and the sales tax assessed for the entire audit period is canceled.

D. The petition of MD. Abid Hossain is granted, and the Notice of Determination dated June 18, 2004 is canceled.

DATED: Troy, New York
June 1, 2006

/s/ Thomas C. Sacca
PRESIDING OFFICER