

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| AHMED ALAMARIE | : | SMALL CLAIMS DETERMINATION DTA NO. 820571 |
| 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 September 1, 2000 through May 31, 2003. | : | |

Petitioner, Ahmed Alamarie, 95-02 101st Avenue, Ozone Park, New York 11416, 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 September 1, 2000 through May 31, 2003.

A small claims hearing was held before Arthur S. Bray, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on November 28, 2006 at 1:15 P.M. Petitioner appeared by his son, Kaled Alamarie. The Division of Taxation appeared by Daniel Smirlock, Esq. (Lesley Cerrato). All briefs and documents were to be submitted by March 1, 2007, which date began the three-month period for the issuance of this determination.

ISSUES

I. Whether the audit methodology employed by the Division of Taxation was reasonably calculated to reflect the sales and use taxes due.

II. Whether penalties imposed pursuant to Tax Law § 1145(a)(1)(i) and (vi) should be sustained.

FINDINGS OF FACT

1. During the period in issue, petitioner, Ahmed Alamarie, operated a store known as Ace Newsstand & Grocery at 95-101 Avenue, Ozone Park, New York 11416. The store occupied about 400 square feet and sold various items such as lottery tickets, cigarettes, cigars, beer, soda, newspapers and candy.

2. The Division of Taxation ("Division") mailed a letter to petitioner, dated September 26, 2003, which stated that petitioner's sales and use tax records had been scheduled for a field audit for the period September 1, 2000 through May 31, 2003. The letter further explained that all books and records pertaining to the sales and use tax liability for the audit period must be available on the appointment date. Among the records specifically requested, in an attached Records Requested List, were the general ledger, cash receipts journal, Federal income tax returns, purchase invoices, sales invoices, guest checks, cash register tapes, bank statements, financial statements and exemption documents.

3. On October 8, 2003, the auditor went to the store and spoke to the owner's nephew. The auditor gave petitioner's nephew a copy of the appointment letter and asked him to give it to the owner. She also asked the nephew to have the owner confirm the appointment.

4. On October 20, 2003, the auditor met with petitioner at the Queens District Office. The auditor was provided with bank statements and a waiver of the statute of limitations. Petitioner explained that he had sporadic purchase invoices and asked if the auditor could go to the store to transcribe them. He further explained that he does not keep cash register tapes or daybooks.

5. On October 24, 2003, the auditor went to the grocery store and transcribed the available purchase invoices.

6. Following her review of the available documentation, the auditor concluded that the books and records were inadequate to conduct a complete audit because petitioner did not maintain original source documents such as a daybook or cash register tapes which would permit one to determine what was sold. Further, petitioner did not maintain purchase invoices or a complete set of bank statements for the entire audit period.

7. In order to determine audited taxable purchases, the Division utilized petitioner's purchase invoices or third-party verification letters, depending upon whether purchase invoices were available for the item being examined.

(a) With respect to the grocery's cigarette purchases, the Division applied a combination of petitioner's purchase invoices and information from petitioner's vendors to determine total cigarette purchases of \$195,762.00. This amount was increased by a seven percent markup to calculate that cigarette sales during the audit period were \$209,465.34.¹

(b) The Division utilized petitioner's purchases, which included cigars and other items, and multiplied by the percentage of the invoice constituting cigar purchases to calculate estimated cigar purchases. The estimated cigar purchases were then multiplied by an estimated markup of 50 percent² to determine estimated cigar sales of \$8,174.02.

(c) Petitioner's purchases of beer were determined through responses from suppliers and from an examination of petitioner's purchase invoices. Beer sales were derived by multiplying

¹ The markup of seven percent was derived from the Department of Taxation and Finance's Publication 509 titled Minimum Wholesale and Retail Cigarette Prices.

² The 50-percent markup was calculated by dividing the combined amounts of cost of goods sold reported on petitioner's Federal income tax returns for 2000 and 2001 by the combined amounts of gross sales reported on the same returns. As set forth above, the markup was applied to sales of cigars, beer, soda, and miscellaneous items.

beer purchases per the responses from the vendors or purchases per the invoices by the estimated markup of 50 percent to determine total beer sales of \$40,512.26.

(d) Soda purchases were largely calculated through an examination of responses of soda suppliers. Some of the purchases that were calculated during the audit were estimated from information derived from the grocery's invoices because the Division did not receive a response from each vendor. These invoices were also marked up by 50 percent to determine total soda sales of \$23,323.20.

(e) Through an examination of purchase invoices, the Division concluded that the grocery had miscellaneous taxable purchases of \$12,355.49. These were marked up by 50 percent to find miscellaneous taxable sales during the audit period of \$18,533.23.

8. In the course of the audit, petitioner completed a worksheet wherein he stated that his sales of coffee and hot chocolate were \$20.00 a day. This amount was projected over the audit period to determine total prepared food sales during the audit period of \$20,020.00.

9. During the period in issue, petitioner claimed a cigarette tax credit on his sales tax returns in the amount of \$21,354.00. Of this amount, the Division disallowed \$13,791.26. The Division's adjustment of the credit was premised upon petitioner's having had sales in the amount of \$123,958.00.³

10. The total of the additional sales tax found due on the audit plus the disallowed cigarette credit resulted in additional tax due in the amount of \$29,967.04. Accordingly, on June 22, 2004, the Division issued a Notice of Determination to petitioner which assessed sales and

³ It is unclear from the record how petitioner calculated the cigarette tax credit.

use taxes in the amount of \$29,967.04 plus interest in the amount of \$10,067.12 and penalty in the amount of \$11,699.71 for a balance due of \$51,733.87.

11. After the original assessment was issued, the auditor left her position on maternity leave and a new auditor was assigned. The new auditor and her team leader ascertained that petitioner had not been given the correct amount of cigarette tax credit for taxable sales. The problem arose because petitioner's son, who originally prepared the return, made a mistake in computing the cigarette tax credit. In order to calculate the correct amount of the credit, the Division used purchase invoices and documentation from suppliers to estimate petitioner's cigarette sales. As a result, petitioner was given credit for \$286,241.00 in taxable sales reported for the audit period. This resulted in a decrease in petitioner's liability from \$29,967.04, plus penalty and interest, to \$16,578.70, plus penalty and interest of \$12,732.61, for a balance due of \$29,311.31. The penalties were imposed pursuant to Tax Law § 1141(a)(1)(i) and (vi). On or about July 1, 2004, the Division issued a Statement of Proposed Audit Change for Sales and Use Tax to petitioner which reflected the reduction in the assessment.

12. Prior to 1998, petitioner's family received welfare. After petitioner's son, Kaled, graduated from college, petitioner decided to start a business so his family would not have to depend upon the State. Petitioner borrowed money and purchased a store. When petitioner started the store, he hired an accountant to prepare the sales tax returns. Petitioner found that the fee charged by the accountant was burdensome, and as a result, petitioner's son began preparing the returns. However, petitioner's son found the task challenging because he is not a lawyer or accountant. He is a geologist-engineer employed by the City of New York.

SUMMARY OF THE PARTIES' POSITIONS

13. Petitioner's son maintains that he provided the original auditor with everything that his father had in accordance with the auditor's request. However, he acknowledged that his father did not have complete records. Petitioner's son posits that petitioner attempted to keep all relevant records but found that he could not do so.

After observing that the amount sought by the Division had been significantly reduced from the initial proposed assessment, it is petitioner's belief that he does not have a tax liability. Petitioner contends that the Division never evaluated the business and just "threw" a number at him. Petitioner maintains that the Division should observe the business to see how much business is conducted. According to petitioner, the business could not afford an accountant or bookkeeper.

Petitioner further asserts that the consequences of imposing the penalty would have a devastating effect on his family since his wife and two of his children are diabetic and in need of medication and continuous health care. He also argues that if the business is forced to close, his family will be forced back onto welfare. It is petitioner's position that his family's hardship should be considered because they all rely on petitioner's income.

In a post-hearing letter petitioner asserts that the Division calculated the sales tax using the total gross sales that included nontaxable items such as lottery, magazines and newspapers. He also argued that the Division ignored health insurance expense which is paid from the store's income.

14. In its summation, the Division argued that the petition does not comply with 20 NYCRR 3003.3(b)(5) because it does not contain separately numbered paragraphs clearly and

concisely stating the facts upon which petitioner relies. The Division also argued that the business failed to maintain required records and as a result the books and records of the business were found to be inadequate. Using third-party verification and purchase invoices, the Division found that petitioner failed to pay the correct amount of tax due. The Division further asserts that petitioner is responsible for collecting the tax in issue and for penalties because he failed to remit more than 25 percent of the tax due. According to the Division, there has been no showing that the failure to pay was due to reasonable cause and not willful neglect.

In a post-hearing brief, the Division argues that petitioner failed to produce adequate books and records, that the Division was entitled to estimate the tax due, that petitioner presented no evidence to substantiate his claims and that petitioner failed to show reasonable cause for the abatement of penalties.

CONCLUSIONS OF LAW

A. Tax Law § 1105(a) imposes a sales tax on the receipts from every “retail sale” of tangible personal property except as otherwise provided in Article 28 of the Tax Law. A “retail sale” is “a sale of tangible personal property to any person for any purpose, other than . . . for resale as such . . .” (Tax Law § 1101[b][4][i]). Tax Law § 1138(a)(1) provides, in relevant part, that if a sales tax return is not filed, “or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined [by the Division of Taxation] from such information as may be available. If necessary, the tax may be estimated on the basis of external indices” When acting pursuant to section 1138(a)(1), the Division is required to select a method reasonably calculated to reflect the tax due. The burden then rests upon the taxpayer to

demonstrate that the method of the audit or the amount of the assessment was erroneous (*see, Matter of Your Own Choice, Inc.*, Tax Appeals Tribunal, February 20, 2003).

B. The standard for reviewing a sales tax audit where external indices were employed was set forth in *Matter of Your Own Choice, Inc.* (*supra*), as follows:

To determine the adequacy of a taxpayer's records, the Division must first request (*Matter of Christ Cella, Inc. v. State Tax Commn.*, [102 AD2d 352, 477 NYS2d 858] *supra*) and thoroughly examine (*Matter of King Crab Rest. v. Chu*, 134 AD2d 51, 522 NYS2d 978) the taxpayer's books and records for the entire period of the proposed assessment (*Matter of Adamides v. Chu*, 134 AD2d 776, 521 NYS2d 826, *lv denied* 71 NY2d 806, 530 NYS2d 109). The purpose of the examination is to determine, through verification drawn independently from within these records (*Matter of Giordano v. State Tax Commn.*, 145 AD2d 726, 535 NYS2d 255; *Matter of Urban Liqs. v. State Tax Commn.*, 90 AD2d 576, 456 NYS2d 138; *Matter of Meyer v. State Tax Commn.*, 61 AD2d 223, 402 NYS2d 74, *lv denied* 44 NY2d 645, 406 NYS2d 1025; *see also, Matter of Hennekens v. State Tax Commn.*, 114 AD2d 599, 494 NYS2d 208), that they are, in fact, so insufficient that it is "virtually impossible [for the Division of Taxation] 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; *Matter of Christ Cella, Inc. v. State Tax Commn.*, *supra*), "from which the exact amount of tax due can be determined" (*Matter of Mohawk Airlines v. Tully*, 75 AD2d 249, 429 NYS2d 759, 760).

Where the Division follows this procedure, thereby demonstrating that the records are incomplete or inaccurate, the Division may resort to external indices to estimate tax (*Matter of Urban Liqs. v. State Tax Commn.*, *supra*). The estimate methodology utilized must be reasonably calculated to reflect taxes due (*Matter of W.T. Grant Co. v. Joseph*, 2 NY2d 196, 159 NYS2d 150, *cert denied* 355 US 869, 2 L Ed 2d 75), but exactness in the outcome of the audit method is not required (*Matter of Markowitz v. State Tax Commn.*, 54 AD2d 1023, 388 NYS2d 176, *affd* 44 NY2d 684, 405 NYS2d 454; *Matter of Cinelli*, Tax Appeals Tribunal, September 14, 1989). The taxpayer bears the burden of proving with clear and convincing evidence that the assessment is erroneous (*Matter of Scarpulla v. State Tax Commn.*, 120 AD2d 842, 502 NYS2d 113) or that the audit methodology is unreasonable (*Matter of Surface Line Operators Fraternal Org. v. Tully*, 85 AD2d 858, 446 NYS2d 451; *Matter of Cousins Serv. Station*, Tax Appeals Tribunal, August 11, 1988). In addition, "[c]onsiderable latitude is given an auditor's method of estimating sales under such circumstances as exist in [each] case" (*Matter of Grecian Sq. v. Tax Commn.*, 119 AD2d 948, 501 NYS2d 219, 221).

C. In this matter, the Division made a proper request for the groceries books and records. In response, petitioner presented some documents. However, they were clearly inadequate to conduct a complete audit since there was no original record such as a daybook or cash register tape from which one could determine what was sold at the store and whether the proper tax had been charged in each instance (20 NYCRR 533.2[b][2]; *see, Matter of Licata v. Chu*, 64 NY2d 873, 487 NYS2d 552). The poor state of the records presented made it impossible to verify taxable sales through a complete audit from which the exact amount of tax due could have been determined. Accordingly, it was proper for the Division to resort to the use of third-party information to obtain petitioner's purchases and calculate the sales tax due (*see, Matter of Roebling Liquors v. Commissioner of Taxation & Finance*, 284 AD2d 669, 728 NYS2d 509 *appeal dismissed* 97 NY2d 637, 735 NYS2d 493, *cert denied* 537 US 816, 154 L Ed 2d 20).

D. Since the audit methodology was reasonable, petitioner bears the burden of proof of establishing that the assessment was erroneous or that the audit method was unreasonable (*Matter of Scarpulla v. State Tax Commn.*, 120 AD2d 842, 502 NYS2d 113; *Matter of Surface Line Operators Fraternal Org. v. Tully*, 85 AD2d 858, 446 NYS2d 451). Here, petitioner argues that the Division included nontaxable items when it calculated the tax due. However, petitioner has not presented any evidence to support this argument and therefore an adjustment to the assessment is unwarranted (*see, Matter of Cronos*, Tax Appeals Tribunal, January 26, 2006). Similarly, petitioner has not established how the payment of health insurance would have an impact upon the amount of tax due. Petitioner's arguments are not a substitute for evidence (*Matter of Lima*, Tax Appeals Tribunal, April 19, 2007; *Matter of Hero*, Tax Appeals Tribunal, September 11, 2003).

E. Tax Law § 1145(a)(1)(i) authorizes the imposition of a penalty for the failure to file a return or to pay or pay over the sales and use tax due within the time required. Tax Law § 1145(a)(1)(vi) authorizes the imposition of a penalty upon a taxpayer for his omission from the total amount of sales and use taxes required to be shown on a return an amount which is in excess of 25 percent of the amount of such taxes required to be shown on the return. Such penalties may be abated, pursuant to Tax Law § 1145(a)(1)(iii) and (vi), when the taxpayer establishes that such omission was due to reasonable cause and not due to willful neglect. Reasonable cause includes any cause for delinquency which would appear to a person of ordinary prudence and intelligence as reasonable cause for the delay in filing a sales tax return and paying the tax imposed under Articles 28 and 29 of the Tax Law (*see*, 20 NYCRR 2392.1[d][5]). Here, petitioner maintains that members of his family have been ill and that sustaining the assessment would have a devastating effect upon his family. However, there has been no showing that an illness prevented petitioner from collecting and remitting the proper tax due. Consequently, petitioner has not presented any evidence or argument warranting the waiver of penalties.

F. The Division's objection to the adequacy of the petition has been deemed waived because it waited until its summation to raise the issue for the first time.

G. The petition of Ahmed Alamarie is denied and the Notice of Determination dated June 22, 2004, as revised by the Statement of Audit Changes dated July 1, 2004, is sustained together with such penalties and interest as are lawfully due.

DATED: Troy, New York
May 24, 2007

/s/ Arthur S. Bray
PRESIDING OFFICER