

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
GEDERA SERVICE CORPORATION : DETERMINATION
 : DTA NO. 820780
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, 2001 through May 31, 2004. :
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Petitioner, Gedera Service Corporation, 1149 Utica Avenue, Brooklyn, New York 11203, 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, 2001 through May 31, 2004.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on September 13, 2006 at 10:30 A.M., with all briefs to be submitted by October 13, 2006, which date began the six-month period for issuance of this determination. Petitioner appeared by Yona Carmazi. The Division of Taxation appeared by Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel).

ISSUE

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

FINDINGS OF FACT

1. Petitioner, Gedera Service Corporation ("Gedera"), operated a gasoline station and convenience store located at 1149 Utica Avenue, Brooklyn, New York, during the period at

issue, June 1, 2001 through May 31, 2004. Gedera was open 24 hours a day, 7 days a week, and sold gasoline, cigarettes, beer, soda and other miscellaneous items. Yona Carmazi was the president of petitioner during the audit period.

2. By a letter dated June 1, 2004, the Division of Taxation (“Division”) advised Gedera that a sales tax field audit of its business operations for the period spanning June 1, 2001 through May 31, 2004 would commence on August 31, 2004. The letter advised that all books and records pertaining to the audit period, including those on an attached list, should be made available. The letter also advised Gedera that additional records and information might be required during the course of the audit. The list requested that sales tax returns, FR schedules, forms FT-943, daily pump readings, pump prices, gasoline purchase invoices, other purchase invoices, bank statements, canceled checks, cash register tapes, cash receipts and disbursement journals, charge card slips and Federal income tax returns be made available.

3. During the course of the audit, petitioner provided the auditor with sales and use tax returns, Federal forms 1120 and gasoline purchase invoices. Petitioner did not provide any records which related to the sales tax returns filed, or how the amount of sales tax due on the returns was computed. There appeared to be no internal controls with respect to the sales portion of the business operation. After reviewing the records provided, the auditor determined that they were 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 resorted to an indirect audit method to calculate the amount of Gedera’s sales and its sales tax liability.

4. To determine Gedera’s fuel sales, the auditor accepted petitioner’s fuel purchases as indicated on the gasoline purchase invoices. Since Gedera presented no documentation of the prices at which it sold gasoline, the Division resorted to price information for the average

monthly motor gasoline prices for the downstate New York area, including Brooklyn, as compiled by the United States Department of Energy, for the period under audit. Applying the resulting audited average price per gallon to petitioner's purchases of gasoline for the audit period resulted in additional sales tax due of \$49,473.69 on petitioner's sales of gasoline.

5. No records or other information were provided on audit concerning cigarette purchases or sales, or how the claimed credit for prepaid sales tax on cigarette purchases was computed. The auditor disallowed petitioner's claimed prepaid sales tax, resulting in additional sales tax due of \$3,301.40 for the audit period.

6. On September 27, 2004, Yona Carmazi, as president, executed a Consent Extending Period of Limitation for Assessment of Sales and Use Taxes Under Articles 28 and 29 of the Tax Law for Gedera, which extended the period of limitation for assessing the period June 1, 2001 through November 30, 2001 to December 31, 2004. On December 15, 2004, petitioner's representative, Seth Wapnick, pursuant to a power of attorney, executed a second consent which extended the period of limitation for assessing the period June 1, 2001 through November 30, 2002 to December 31, 2005.

7. On February 18, 2005, the Division issued to petitioner a Statement of Proposed Audit Change for Sales and Use Tax for the period June 1, 2001 through May 31, 2004 indicating total tax due of \$52,775.09. For the period ending February 28, 2002, the statement indicates a credit to petitioner of \$1,583.18.

8. The Division issued to petitioner, on April 4, 2005, a Notice of Determination assessing sales tax due of \$54,358.27, plus penalty and interest, for the period June 1, 2001 through May 31, 2004. The difference in the tax assessed between the Statement of Proposed Audit Change and the Notice of Determination is the omission on the notice of the credit for the period ending

February 28, 2002. At the hearing, the Division conceded that this credit should be applied to the amount assessed on the notice, reducing the tax assessed on the Notice of Determination to \$52,775.09.

9. Following the hearing held in this matter, petitioner provided documentation to the Division establishing the amount of the prepaid cigarette sales tax claimed on petitioner's sales tax returns. The Division agrees that the Notice of Determination should be reduced by the amount of the prepaid sales tax claimed by petitioner, and originally disallowed by the Division, in the amount of \$3,301.40. This concession by the Division reduces the amount assessed in the Notice of Determination to sales tax due of \$49,473.69, plus penalty and interest.

CONCLUSIONS OF LAW

A. The standard for reviewing a sales tax audit where external indices are 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 Gedera's sales, as well as Gedera's failure to produce such books and records for the Division's review. In turn, the auditor reasonably concluded that Gedera did not maintain books and records that were sufficient to verify its gross and taxable sales for the audit period. Having established the insufficiency of petitioner's books and records, the Division resorted to the use of purchase invoices supplied by Gedera, together with price information for the average monthly motor gasoline prices for the downstate New York area, which includes Brooklyn, as compiled by the United States Department of Energy to determine petitioner's fuel sales. Petitioner, for its part, does not dispute the absence of complete sales records, or dispute the Division's authority to resort to indirect audit methodologies in this case. Hence, the only issue is whether petitioner has established that the amount of tax assessed as the result of the application of such methods was erroneous.

C. Petitioner, in essence, appears 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 its 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, petitioner specifically complains that the estimated selling price per gallon of gasoline was too high and should be reduced. It is undoubtedly true that fuel prices may have been, at times, either lower or higher than the prices used by the auditor in the calculation of the per gallon sales amount. Nonetheless, petitioner's claims that prices changed on an hourly and daily basis and that prices for gasoline sales to bulk purchasers were discounted fall far short of the evidence necessary to support petitioner's claims and override the results of the audit based on petitioner's purchases

and United States Department of Energy average sales prices per gallon of gasoline. Again, petitioner provided no records establishing the actual selling price per gallon of gasoline.

Ultimately, petitioner's failure to maintain or provide any records of sales leaves no basis for changing the Division's audit results.

D. Petitioner has not provided evidence which would support reduction or abatement of the penalties imposed, and they 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 timetable be treated as a largely unavoidable obligation [citations omitted]” (*Matter of MCI Telecommunications Corp.*, Tax Appeals Tribunal, January 16, 1992). Here, Gedera neither maintained nor produced records as required. Further, there was a substantial discrepancy between reported taxable sales and audited taxable sales.

E. The petition of Gedera Service Corporation is hereby granted to the extent indicated in Findings of Fact “8” and “9”, but is otherwise denied, and the Notice of Determination dated April 4, 2005, as reduced accordingly, is sustained.

DATED: Troy, New York
March 29, 2007

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE