STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SYED N. JAFFERY	:	DETERMINATION DTA NO. 821119
for Revision of a Determination or for Refund of of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 2001 through August 31, 2004.	:	

Petitioner, Syed N. Jaffery, 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, 2001 through August 31, 2004.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on March 21, 2007 at 10:30 A.M., with all briefs to be submitted by August 6, 2007, which date commenced the six-month period for issuance of this determination (Tax Law § 2010[3]). Petitioner appeared by William F. Friske, CPA. The Division of Taxation appeared by Daniel Smirlock, Esq. (Osborne K. Jack, Esq., of counsel).

ISSUES

I. Whether the audit methodology employed by the Division of Taxation in arriving at the determination that Syed N. Jaffery owed additional sales tax, plus interest and penalties, was proper and should be sustained.

II. Whether petitioner has established any basis warranting reduction or elimination of the penalty imposed.

FINDINGS OF FACT

1. During the period September 1, 2001 through August 31, 2004, petitioner, Syed N. Jaffery, together with his brother Syed Hussnain and one other employee, operated a gasoline station and convenience store located at 705 Broadway, Albany, New York. This business, operated under the name Syed Brothers' Grocery and Deli, was open seven days per week and sold gasoline and various convenience store items, including beer, soda, cigarettes, candy, lottery tickets, magazines, grocery items, and automotive supplies.

2. By a letter dated September 9, 2004, the Division of Taxation ("Division") advised petitioner that a sales tax field audit of his business operations for the period spanning September 1, 2000 through August 31, 2004, would commence on October 20, 2004. This audit appointment letter, and an attached list of books and records to be provided, advised petitioner that all of the business's books and records pertaining to the audit period, including cash receipts and disbursement journals, general ledgers, sales invoices, purchase invoices, cash register tapes, federal income tax returns, sales tax returns, bank statements, canceled checks and the like should be available for the auditor's review. The letter also advised that additional records and information might be required during the course of the audit.

3. The auditor met with petitioner's former representative as scheduled on October 20, 2004, at which time the only records made available were bank statements and some cancelled checks, some purchase invoices and some sales tax returns. The auditor was advised that petitioner's sales tax liability on gasoline sales was calculated based upon gasoline purchases plus a markup amount, and that his sales tax liability on convenience store sales ("inside sales"

or "store sales") was calculated based upon bank deposits. More specifically, petitioner's gasoline purchases plus a markup amount of 6 cents per gallon during the earlier part of the audit period and 10 cents per gallon during the latter part of the audit period formed the basis for calculating taxable gasoline sales, while 66 percent of petitioner's bank deposits (net of gasoline sales) were deemed to be taxable sales of convenience store items. The auditor also learned that petitioner, his brother Syed Hassnain, and the one other employee in the business were paid in cash from the store cash register, and that some inventory purchases were paid by check while others were paid by cash from the store cash register.

4. The auditor advised petitioner that the records provided were not sufficient for the conduct of a detailed audit, most specifically because such records were incomplete and because no sales records whatsoever were provided. By a follow-up letter dated October 21, 2004, the auditor advised petitioner that the Division would conduct an on-premises observation of sales during the month of November 2004, and also included a list of records to be provided by petitioner. No additional records were provided by petitioner in response to this follow-up letter and request.

5. With respect to inside sales, on November 18, 2004, the Division conducted a full-day observation of petitioner's premises, during which all sales of convenience store items were recorded. This observation resulted in total store sales of $1,173.51, with some 86.06 percent of such sales being taxable sales. Petitioner advised the auditor that sales were higher on days such as November 18, 2004 when there was a show or other event at the nearby Palace Theater ("event days"). In turn, a second observation of store sales was conducted on December 16, 2004, a date on which no event was taking place at the Palace Theater, which resulted in total sales of $1,032.94, with some 85.34 percent of such sales being taxable sales.

6. The auditor obtained a schedule of events from the Palace Theater, utilized the higher dollar amount of observed sales for event days (per such schedule) and the lower amount of observed sales for nonevent days, and by this method calculated audited taxable store sales for the audit period. The auditor compared audited taxable store sales to reported taxable store sales to arrive at additional taxable store sales and additional sales tax due thereon. Additional sales tax due on store sales was reduced by prepaid tax on cigarettes and by vendor credits to arrive at additional sales tax due on store sales in the amount of $33,349.97.

7. With respect to gasoline sales, petitioner did not provide any dollar amount or gallon volume sales records. Accordingly, the auditor obtained petitioner's gasoline purchase records from its supplier, Dutchess Terminals, and also obtained petitioner's actual selling price per gallon of regular grade gasoline from the Oil Pricing Information Service ("OPIS"), which maintains a database of the actual price of regular gasoline purchased with credit cards at many gasoline stations including petitioner's station. The auditor calculated the selling price per gallon of super grade gasoline by adding 20 cents per gallon to the per gallon price of regular grade gasoline, based on the results of four visits to petitioner's premises by Division investigators on each of which occasions this 20 cent per gallon price differential was observed. The auditor multiplied the number of gallons of each grade of gasoline purchased per quarterly period by the average price per gallon for each such grade and period to arrive at total gasoline sales. The auditor reduced the resulting total sales amount by the amount of excise tax included therein to arrive at taxable sales and sales tax due. After reducing the latter amount to reflect credit for prepaid sales tax on gasoline purchases, the auditor arrived at additional sales tax due in the amount of $1,512.30 on gasoline sales.

8. Additional sales tax due on gasoline sales ($1,512.30) plus store sales ($33,349.97) totaled $34,862.27, and on June 20, 2005 the Division issued a Notice of Determination to petitioner Syed Jaffery d/b/a Syed Brothers' Grocery and Deli assessing additional sales tax due for the period September 1, 2001 through August 31, 2004 in the amount of $34,862.27, plus interest and penalty. On July 15, 2005, the Division issued a second Notice of Determination to petitioner Syed Jaffery, identical in all respects to the foregoing notice except that the earlier notice was addressed to petitioner at the business premises (705 Broadway, Albany, New York) whereas the latter was addressed to petitioner at his home address. The Division clarified at hearing that it is not seeking to collect twice on the same assessment amount, but rather that two notices were issued simply to assure that notice of the assessment was afforded to petitioner.[1]

9. The auditor explained that penalty was imposed based upon the inadequacies in petitioner's record keeping methods, including specifically the absence of any sales records, and noted that this method of record keeping was a continuation of the same record keeping inadequacies found on a prior audit of petitioner's business.

SUMMARY OF PETITIONER'S POSITION

10. Petitioner alleged that the current whereabouts of his former representative, who handled all aspects of the audit, were unknown. In this regard, petitioner claimed that he gave all of his sales records, allegedly including all cash register tapes, to his former representative and has not been able to retrieve such records. Petitioner made a number of other assertions which may be summarized as follows:

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[1] Since petitioner has raised no issue concerning the manner or timeliness of the issuance of either of the notices, and since the Division has clarified that it does not seek to twice collect the amount assessed, it is concluded that the earlier issued notice, dated June 20, 2005, shall be treated as the notice at issue herein, and that the latter issued notice, dated July 15, 2005, shall be deemed withdrawn and cancelled by the Division.

a) that his business volume decreased by approximately 30 percent subsequent to the terrorist attacks of September 11, 2001;

b) that his business premises are located in an area of office buildings such that his business volume is approximately 35 percent less on weekends than on weekdays;

c) that his costs to purchase inventory, and hence his sales prices, increased by 15 to 25 percent in or about 2004 (i.e., during the audit);

d) that his business volume only increases by approximately eight to ten percent over normal volume on Palace Theater event days;

e) that he had 100 percent of his inventory purchase invoices available for the auditor, and that a merchandise purchase markup audit rather than an observation of sales audit would have been a more appropriate and allegedly more accurate audit method. In this regard, petitioner stated that although he was on vacation and not present during the prior sales tax audit of his business, the prior audit and resulting assessment was based upon a markup audit methodology; and

f) that penalties should be abated because petitioner relied entirely upon his former representative to prepare his sales tax returns and assumed that they were accurately and properly calculated. Petitioner also notes that his sales tax returns were timely filed, that the amount of additional tax found due on gasoline sales was small, and that the business utilized the same record keeping and return preparation methods during the prior audit period yet only tax and interest but no penalty was assessed as the result of the prior audit.

CONCLUSIONS OF LAW

A. The standard for reviewing a sales tax audit where an indirect audit methodology has been employed in the determination of sales tax liability is well established, and 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 request for books and records of petitioner's sales, as well as petitioner's failure to produce such books and records. The auditor reasonably concluded that petitioner did not maintain or have available books and records that were sufficient to verify gross and taxable sales for the audit period including, most tellingly, any records of sales. Having established the unavailability of required books and records, the Division was clearly entitled to resort to the use of indirect methods, including resort to an observation of sales, to determine petitioner's sales and sales tax liability. In fact, the Division's authority to do so has been consistently sustained (***see Matter of Del's Mini Deli, Inc. v. Commissioner of Taxation and Finance***, 205 AD2d 989, 613 NYS2d 967 [1994]; ***Matter of Vebole Edibles v. Tax Appeals Tribunal,*** 162 AD2d 765, 557 NYS2d 678 [1990]; ***Matter of Sarantopoulos v. Tax Appeals Tribunal***, 186 AD2d 878, 589 NYS2d 102 [1992]; ***Matter of Marte***, Tax Appeals Tribunal, August 5, 2004). In view of the foregoing, the only questions presented in this case are whether petitioner has established that the audit methods employed were unreasonable and whether the amount of tax assessed as the result of the application of the methods used in this case was erroneous (***Matter of Surface Line Operators***

Fraternal Organization v. Tully, supra.). On this score, conclusory allegations of error are insufficient to show that the selected method of audit was unreasonable or that the amount of tax determined thereby was erroneous (***Matter of Vebole Edibles v. Tax Appeals Tribunal, supra.***).

C. Petitioner has not established that the audit method was unreasonable or that the amount of tax determined by application of such method was erroneous. First, petitioner claimed via testimony that complete records of sales, including cash register tapes and records of purchases, including purchase invoices, existed. Allegedly, these sales records were provided to petitioner's former representative in the context of his involvement in this audit and in turn were provided to the auditor. In contrast, however, the auditor testified that he was never provided with any sales records, despite clear requests for them. Furthermore, neither petitioner's former representative nor any of the allegedly maintained sales receipts appeared or were provided at hearing. The reason for a taxpayer's failure to provide adequate books and records is irrelevant to the Division's right to turn to indirect audit methodologies and external indexes in determining the amount of tax due in the face of such failure (***Matter of Sole to Sole, Inc.***, Tax Appeals Tribunal, July 1, 1993). Moreover, given that the same absence of sales records was noted in connection with the earlier audit of petitioner's business, and that petitioner's own method of preparing sales tax returns was based upon bank deposits as opposed to sales records, the testimonial claim that such records were maintained and produced represents merely an unsupported and conclusory allegation which is suspect at best.[2]

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[2] In fact, petitioner's bank deposits method of calculating sales tax liability on store sales fails on a number of accounts. First, it is simply not based on records of sales. Furthermore, given that both payroll and many purchases were paid by cash from the register, it is clear that not all receipts were deposited intact into the bank account and hence the "sales base" against which tax was computed was understated. Finally, the observation tests revealed that approximately 85% of sales were taxable whereas petitioner's calculation method was based on treating some 66% of bank deposits as taxable sales (***see*** Finding of Fact "3").

D. With regard to purchase invoices, petitioner's claim seems to be that all purchase invoices were maintained and were given to the auditor and that the auditor should have conducted a purchase markup method of audit as opposed to an observation of sales method of audit. First, having established the inadequacies of a taxpayer's records, the Division is under no obligation to utilize one indirect method of audit as opposed to another, but rather must only select a method of audit reasonably calculated to determine the amount of tax due (***Matter of Grant Co. v. Joseph, supra.***). In this case, the auditor considered but rejected the use of a purchase markup audit with respect to store sales because he had no method to assure that he had records of all purchases from all of petitioner's suppliers. Specifically, the auditor was concerned with the limited number of suppliers shown from the limited number of supplier invoices provided in comparison to the variety of items offered for sale in the store. Even more significantly, the auditor was concerned by the fact that petitioner paid for many purchases in cash, leaving open the possibility that no invoices reflecting such purchases were ever created or maintained. Under these circumstances, the auditor's resort to an observation of sales audit method for store sales was entirely reasonable. Furthermore, the auditor's application of his chosen audit method was performed in a manner which took into account petitioner's claim that an observation on a Palace Theater event day would not provide a representative result since sales were higher on such days. The auditor responded to petitioner's concerns by conducting a second observation on a nonevent day and incorporating the difference in sales between the two observation days (amounting to some $140.57 or a 13.6% increase in sales) by only using the higher sales total in his calculations on days when there was an event at the Palace Theater.

E. Petitioner, in essence, appears to take issue with the Division's audit method and result for store sales because it is imprecise and because a different method might yield a better,

i.e., less imprecise, result. 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***).

F. As to fuel sales, the difference in sales tax due results from the auditor's applying the actual selling price per gallon to petitioner's gasoline purchases, on audit, rather than the six cents and, later, ten cents, per gallon amount petitioner applied to his gasoline purchases. In fact, the OPIS price per gallon for regular grade gasoline was the actual price per gallon charged by this station, and the differential between the OPIS per gallon price for regular grade gasoline and the 20 cent per gallon higher price for premium grade gasoline employed by the auditor was based on the actual pump price differential as observed at the premises on four different occasions. Petitioner has provided neither evidence nor argument to show any error in the method used or result obtained as to additional tax due on gasoline sales.

G. Petitioner has not provided evidence or argument which would support reduction or abatement of the penalty imposed, and it is, 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, petitioner's records of sales were nonexistent, and the balance of petitioner's records was incomplete. Further, this was the second audit of petitioner's business, and each audit uncovered essentially

the same failures with regard to record keeping. Hence, there is no basis for abatement of penalty properly imposed.

H. The petition of Syed Jaffery is hereby denied, and the Notice of Determination dated June 20, 2005 is sustained.

DATED: Troy, New York
November 8, 2007

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE