STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PAUL SARACINO D/B/A PRESTIGE STONE, CO.[1]	:	DETERMINATION DTA NO. 822131
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 March 1, 2000 through May 31, 2005.	:	

Petitioner, Paul Saracino d/b/a Prestige Stone, Co., 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 March 1, 2000 through May 31, 2005.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, One Centre Street, New York, New York, on November 4, 2008 at 10:30 A.M., with all briefs to be submitted by April 1, 2009, which date commenced the six-month period for the issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Daniel Smirlock, Esq. (Lori P. Antolick, Esq., of counsel).

ISSUES

I. Whether the audit method employed by the Division of Taxation was reasonable or whether petitioner has shown error in either the audit method or result.

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[1] The Notice of Determination relevant to this matter was issued under the name "Prestige Stone Co." and the petition in this matter was filed under the name "Prestige Stone Co. Corp." During the period at issue, however, petitioner's business was actually a sole proprietorship operating under the name "Prestige Stone Co." (***see*** Finding of Fact 2). This error in the statutory notice is deemed harmless (***see Pepsico, Inc. v. Bouchard*** 102 AD2d 1000, 477 NYS2d 892 [3d Dept 1984]) and the caption in this matter has been changed to more clearly reflect the fact that petitioner's business was a sole proprietorship.

II. Whether petitioner has established any facts or circumstances warranting the abatement of penalties imposed pursuant to Tax Law § 1145(a)(1)(i).

FINDINGS OF FACT

1. On May 18, 2006, following an audit, the Division of Taxation (Division) issued to petitioner, Paul Saracino d/b/a Prestige Stone Co., a Notice of Determination which asserted $46,201.00 in additional sales and use tax due, plus penalty and interest, for the period March 1, 2000 through May 31, 2005.

2. Petitioner was in the business of fabricating and installing granite countertops. His place of business was located in the northeastern New Jersey borough of North Arlington.

3. Petitioner purchased granite slabs from suppliers to be used in his installations. Delivery of all such purchases was made in New Jersey.

4. The process by which petitioner sold and installed granite countertops during the period at issue was as follows: A customer signed a contract for the purchase and installation of a granite countertop and made a 25 percent payment at that time. Also at that time an appointment was made for petitioner's employee to visit the customer's premises in order to make a template of the area where the countertop was to be installed and to take any other necessary measurements for installation. An additional 25 percent payment was required at the time of such templating. After the templating and the fabrication of the countertop, an installation date was scheduled. The final 50 percent of the purchase price was due at installation.

5. All of petitioner's sales and installations of granite countertops during the period at issue were capital improvements.

6. Most of petitioner's sales during the period at issue were in New Jersey. Petitioner also regularly made sales in New York and Connecticut during that period.

7. Petitioner was not registered as a vendor for New York State sales tax purposes during the audit period and did not file any New York State sales and use tax returns during that period.[2]

8. During the period at issue, petitioner primarily purchased print advertising to be run in New Jersey. Petitioner did purchase some print advertising to be run in New York.

9. On March 8, 2004, the Division of Taxation sent a letter to petitioner scheduling an appointment to commence a sales and use tax field audit of his business for the period March 1, 1998 through February 28, 2004. The Division subsequently sent several similar audit appointment letters dated May 4, 2004, July 12, 2005 and December 21, 2005, which gradually expanded the audit period to November 30, 2005. Each of the Division's letters requested that all of the corporation's books and records pertaining to his sales and use tax liability for the audit period be available for review. Among the records specifically requested were the general ledger, cash receipts journal, federal income tax returns, purchase invoices and sales invoices.

10. In response to the Division's requests, petitioner produced his general ledger for the period January 1, 2000 through May 31, 2005. Petitioner also provided workpapers created by his accountant. During the audit, petitioner did not produce any source documentation of his purchases, such as invoices, or any source documentation of his sales, such as contracts with customers.

11. The Division concluded that the records produced by petitioner in response to its requests were inadequate for the purpose of verifying his tax liability and therefore proceeded to estimate such liability. Inasmuch as petitioner's sales were all capital improvements, the Division audited petitioner's purchases of materials incorporated into such capital improvements.

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[2] Effective December 2005, petitioner ceased operating as a sole proprietorship and began operating as Prestige Stone & NJ Monument, Inc., a New Jersey corporation. The corporation registered as a vendor for New York State sales and use tax purposes.

Specifically, the Division sought to ascertain petitioner's purchases of granite slabs which were ultimately installed at the job site. Accordingly, the Division totaled petitioner's materials costs and freight costs of receiving materials for the audit period as indicated by petitioner's general ledger. According to the general ledger, petitioner's materials costs totaled $2,368,588.43 and freight costs totaled $16,854.21. These totals include purchases for materials unrelated to the installation of granite slabs. During the audit, petitioner's accountant advised that such nongranite slab purchases were about 31 percent of petitioner's total materials purchases. The Division therefore subtracted 31 percent of the total materials and freights costs to reach total audited granite slab purchases of $1,645,955.42. Next, the Division sought to determine total costs of granite slab purchases installed in New York and therefore subject to New York use tax. To reach this result the Division first calculated petitioner's costs for granite slabs installed in New Jersey. New Jersey purchases were extrapolated from petitioner's New Jersey sales and use tax payments as indicated in the general ledger. Specifically, the New Jersey sales and use tax payments were divided by the prevailing rate to reach purchases subject to tax (all of which were assumed to be granite slab purchases installed as part of a capital improvement). Calculated in this manner, the Division determined petitioner's cost of granite slabs installed in New Jersey to be $1,060,484.33. Also during the audit, the Division accepted petitioner's accountant's claim of $16,843.50 in purchases of granite slabs installed in Connecticut. The Division then subtracted audited granite slab purchases installed in New Jersey and Connecticut from total audited granite slab purchases. The amount remaining, $568,627.59, was deemed purchases of granite slabs installed as part of capital improvement work in New York subject to New York use tax. The use tax liability as asserted in the subject Notice of Determination was computed accordingly.

12. At hearing petitioner submitted in evidence a set of records called template logs and installation (or install) logs. Both of these logs were maintained on looseleaf paper kept together in three-ring binders. Both were schedules of visits to customers and consisted of a listing of dates, customer names, locations (city or town), and phone numbers. The template log is a schedule of visits to customers for the purpose of taking the necessary measurements for the countertop. The installation log is a schedule of countertop installations.

13. Some of the install log sheets for 2004 and 2005 contained an additional column listing a dollar amount. Whether such amount represents the total amount for the job or the balance due is unclear from the record.

14. Both the template and installation logs introduced into the record are incomplete. There are no template logs for the periods March 1, 2000 through December 31, 2001 and July 16, 2004 through May 31, 2005. There are no install logs for the period March 1, 2000 through September 9, 2001. The 2002 logs include only the period April 29 through September 6.

15. Neither the installation logs nor the template logs were made available to the Division prior to the issuance of the statutory notice.

16. During the course of the audit, petitioner's accountant provided the Division with copies of amended federal and New Jersey income tax returns for 2004. The amended federal return reported an increase in petitioner's adjusted gross income of $282,138.00 and an increase in total tax due of $104,517.00. In explanation, the amended federal return states that petitioner "incorrectly calculated ending inventory for the period ending December 31, 2004." Petitioner did not file these amended returns.

17. At hearing petitioner testified that customer contracts for countertop installations were discarded after about 30 days.

18. Petitioner has had several serious health problems in recent years, including strokes.

CONCLUSIONS OF LAW

A. Preliminarily, it is observed that any sale of tangible personal property to a contractor for use in improving, repairing, maintaining, or otherwise adding to real property is a retail sale (Tax Law § 1101[b][4]). Hence petitioner's purchases of granite slabs at its place of business in New Jersey were retail sales which became subject to New York use tax pursuant to Tax Law § 1110(a) when the slabs were installed, i.e., used, at locations in New York.

B. Tax Law § 1138(a)(1) provides, in relevant part, that if a sales tax return was not filed, "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 . . . ." (Tax Law § 1138[a][1].)

C. Here, petitioner did not file any sales and use tax returns and did not pay any use tax during the audit period. Moreover, in response to the Division's requests for records, petitioner failed to make available for review any records of individual sales, such as contracts, to substantiate its claimed New York sales. Furthermore, during the audit, petitioner did not provide the template or installation logs or any purchase invoices. Under such circumstances, the Division used an estimated audit method relying largely on petitioner's own records and estimates to determine his New York sales and thus his New York use tax liability. Specifically, in its audit calculations, the Division accepted petitioner's total materials purchases as reported in his general ledger; accepted petitioner's accountant's estimate of his non-slab materials purchases and his statement of petitioner's slab purchases installed in Connecticut; and finally, the Division calculated slab purchases in respect of petitioner's New Jersey installations using his New Jersey sales and use tax payments as reported in the general ledger. Slab purchases not

attributable to Connecticut or New Jersey under this method were deemed installed in New York. Given the records made available to the Division, this audit method was reasonable (***see e.g. Matter of ADGN, Inc.,*** Tax Appeals Tribunal, February 6, 1997). It is well established that exactness in the audit result is not required, for any imprecision arises from the taxpayer's failure to maintain adequate books and records and thus is properly borne by the taxpayer (***see Matter of Cronos Enterprises***, Tax Appeals Tribunal, December 13, 2007).

D. Since the audit method was reasonable, petitioner had the burden of proof to show, by clear and convincing evidence, that the result of the audit was unreasonably inaccurate or that the amount of tax assessed was erroneous (***see Matter of Your Own Choice, Inc.,*** Tax Appeals Tribunal, February 20, 2003).

E. Petitioner has failed to meet this burden. Petitioner contended that his New York installations were far less than that determined by the Division in its audit. He asserted that the template and installation logs, together with his testimony and the testimony of three of his employees, established the number of his New York installations. This contention is rejected. The template and install logs submitted in evidence omit significant portions of the audit period and are thus of limited probative value. Specifically, the template logs omit approximately 32 of the 63 months that comprise the audit period and the install logs omit approximately 26 of 63 months of the audit period. The probative value of the logs is further limited by the fact that they do not indicate the cost of the slabs involved in any installations. Thus, even if complete, the logs would be insufficient to establish petitioner's New York use tax liability. Additionally, the testimony of petitioner and his employees regarding the general frequency of New York installations is self-serving and insufficiently credible to establish the number of New York installations.

Petitioner also failed to establish his contention that the average price of a slab of granite was $500.00. I have reviewed the invoices submitted by petitioner to establish this contention and I am unable to discern the price per slab as indicated by the invoices. Furthermore, even if the price per slab were established, without complete and accurate documentation of the number of New York installations during the audit period (which documentation is absent herein), information as to the price per slab cannot impact the audit result in this matter.

Finally, petitioner failed to prove his assertion that he built up his inventory of granite slabs, storing such slabs off site, and that this inventory buildup accounted for the difference between his New Jersey and Connecticut slab installations and his total slab purchases during the audit period. There is no documentation in the record to show that petitioner increased his inventory during the audit period. Significantly, although petitioner's accountant drafted an amended income tax return for 2004 reflecting an inventory buildup, such amended return was not filed. Accordingly, whether or not petitioner stored inventory off site as he contended, he did not establish an inventory buildup.

F. The Division asserted penalties herein pursuant to Tax Law § 1145(a)(1)(i), which provides that any person failing to timely file or pay any sales or use tax to the Commissioner of Taxation and Finance (the Commissioner) "shall" be subject to a penalty. This penalty may be canceled if the Commissioner determines that the failure was "due to reasonable cause and not due to willful neglect" (Tax Law § 1145[a][1][iii]). Consistent with this statute, the Commissioner's regulations provide that penalty imposed under Tax Law § 1145(a)(1)(i) "must be imposed unless it is shown that such failure was due to reasonable cause and not due to willful neglect" (20 NYCRR 2392.1[a][1]). "By 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 [***Matter of F&W Oldsmobile v. Tax Commn. of the State of New York***, 106 AD2d 792, 484 NYS2d 188]" (***Matter of MCI Telecommunications, Corp.***, Tax Appeals Tribunal, January 16, 1992). The taxpayer faces the "onerous task" of establishing reasonable cause as well as the absence of willful neglect (***Matter of Philip Morris, Inc.***, Tax Appeals Tribunal, April 29, 1993).

G. Petitioner has failed to establish reasonable cause or the absence of willful neglect in the present matter. While petitioner disputed the Division's audit results, he did concede that he had some New York sales, yet he did not pay any use tax during the audit period. Such a failure does not evince a good-faith effort to comply with his New York use tax obligations and thus weighs against the abatement of penalties imposed therein. Similarly, petitioner's failure to maintain his contracts of sale, the best evidence of his sales activity, also indicates something less than a good-faith effort to ascertain his New York use tax liability and thus also supports the imposition of penalties in this matter. Petitioner also noted numerous serious health problems over the past six years as a reason for his failure to pay New York use tax and to maintain records. The Division's regulations provide that the "serious illness of a taxpayer or the taxpayer's unavoidable absence from its usual place of business, which precluded timely compliance, may constitute reasonable cause," provided however, in the case of a failure to pay, the "amount is paid within a justifiable period of time" after the illness (***see***, 20 NYCRR 2392.1[d][1][i]). Here, the tax at issue has not been paid. Thus, while one is obviously sympathetic to petitioner's health problems, absent payment of the tax at issue, such problems may not constitute reasonable cause under the regulations.

H. The petition of Paul Saracino d/b/a Prestige Stone, Co. is in all respects denied and the Notice of Determination dated May 18, 2006 is sustained.

DATED: Troy, New York
August 13, 2009

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE