STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

BEIT NAJJAR, INC.
AND MOHAMMED NAJJAR AND MOHMUD H. ABDULLAH,
AS OFFICERS

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 December 1, 1979 through November 30, 1983.

DECISION

Petitioners Beit Najjar, Inc., 58-01 Junction Blvd., Rego Park, New York 11373, Mohammed Najjar, Officer, 83 Bay Ridge Parkway, Brooklyn, New York and Mohmud H. Abdullah, Officer,'5402 7th Avenue, Brooklyn, New York filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1979 through November 30, 1983 (File Nos. 50055, 58163, 58164).

A consolidated hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on July 17, 1986 at 9:15 A.M. with all briefs to be submitted by September 17, 1986. Petitioners appeared by Melvin L. Greenwald, Esq. The Audit Division appeared by John P. Dugan, Esq. (Michael Glannon, Esq., of counsel).

ISSUES

I. Whether the audit procedures and tests used by the Audit Division in an examination of the books and records of Beit Najjar, Inc. were proper and whether the additional taxable sales determined as a result thereof were correct.

II. Whether a consent extending the period of limitation for assessment of sales and use taxes executed on behalf of a corporation also extends the statute of limitations for issuing an assessment against an officer of the corporation.

III. Whether the Audit Division timely served its answer to the perfected petition.

IV. Whether the penalty assessed under section 1145(a)(1) of the Tax Law should be remitted.

FINDINGS OF FACT

1. Petitioner Beit Najjar, Inc. ("Beit") operated a Pioneer supermarket located at 58-01 Junction Boulevard, Rego Park, New York. The business was sold to 58-01 Junction Grocery Corp. on October 10, 1983.

2. On January 13, 1984, the Audit Division issued notices of determination and demands for payment of sales and use taxes due against Beit Najjar, Lnc. covering the periods December 1, 1979 through November 30, 1983 for taxes due of $339,137.14 plus penalty **of** $69,984.65 and interest of $89,369.99, for a total of $498,491.78. Said notices were issued prior to completion of a field audit of Beit's books and records. The taxes due were estimated based on the available books and records examined. The purpose for issuing the assessments at this time was to establish a liability against the purchaser pursuant to the bulk sale provisions under section 1141(c) of the Tax Law.

3. On November 2, 1984, the Audit Division issued notices of assessment review which revised the amount of taxes due on the above notices to

$236,646.80 plus adjusted penalty and interest. These notices were issued to reflect the actual tax found due upon completion of the audit.

4. On October 31, 1984, the Audit Division issued notices of determination and demands for payment of sales and use taxes due against petitioners Mohammed Najjar and Mohmud H. Abdullah, as officers of Beit covering the same periods and in the same amounts as the revised taxes due shown on the notices of assessment review.

5. The Audit Division obtained three consents from Beit extending the period of limitation for assessment of sales and use taxes for the period December 1, 1979 through November 30, 1980 to March 20, 1984. Petitioners Mohammed Najjar and Mohmud H. Abdullah were current corporate officers at the time of the execution of the consent. Messrs. Mohammed Najjar and Mohmud H. Abdullah took the position that the consents were valid only for the corporation and consequently, the notices issued October 31, 1984 were not timely with respect to the periods December 1, 1979 through August 31, 1981.

6. The books and records of Beit were originally scheduled for audit on February 3, 1983. The audit however was postponed for approximately six months at the request of Beit's accountant, Martin Liss. The auditor visited the business premises on February 24, 1983 and obtained the selling prices of various taxable items on the shelves. The sample included taxable items that were on sale that day. When the audit commenced on August 8, 1983, the Audit Division found Beit's books and records inadequate and incomplete for audit purposes. Beit did not maintain any cash register tapes to make an independent verification of receipts. In addition, purchase invoices were incomplete. Beit did provide a general ledger, cash receipts and cash disbursements journals and Federal income tax returns. In order to verify the accuracy of

taxable sales reported, the Audit Division reconstructed taxable sales by determining the ratio of taxable purchases to total purchases and applying applicable markup percentages to such purchases. The months of August 1982 and February 1983 were used as test months.[1]

7. The purchases of taxable items were categorized as follows: miscellaneous taxable - $98,719.00; soda - $24,399.00; beer - $11,771.00, and cigarettes - $3,561.00. Total purchases for the test months were $711,833.00. The following taxable percentages were computed for each category: miscellaneous - 13.87%; soda - 3.43%; beer - 1.65%; and cigarettes - .5%. These percentages were applied to total purchases for the audit period of $16,529,088.00 (allowing 2% shrinkage) to arrive at taxable purchases by category. A markup percentage was computed for each category based on the selling prices obtained on February 24, 1983 and the cost of such item in February 1983. The markup percentages were applied to the respective category of purchases to determine taxable sales of $4,307,214.00. Beit reported taxable sales of $1,025,815.00[2] for the same period, leaving additional taxable sales of $3,281,399.00 and tax due thereon of $269,290.50. The Audit Division allowed a credit of $2,591.60 for tax paid on electricity used in meat processing, for a net deficiency of $266,698.90.

8. Following a conference held with Beit's accountant, certain adjustments were made to the taxable ratio on purchases and the markup

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1 Because of incomplete purchase invoices, the auditor substituted purchases of some taxable items from January 1983 and August 1983 to complete the test periods.

2 Beit did not file a sales tax return for the period September 1, 1983 through November 30, 1983.

percentages in the categories of miscellaneous taxable and soda. The adjustments reduced the taxes due to $236,646.80.

9. The Audit Division reconciled gross sales from the general ledger with Federal income tax returns filed for the fiscal years ended November 30, 1981, November 30, 1982 and November 30, 1983. However, such sales exceeded gross sales reported on sales tax returns for corresponding periods by $2,333,633.00, $2,748,798.00 and $2,798,344.00, respectively.

10. During the course of the audit, the auditor examined composition notebooks covering the period under audit. The notebooks showed daily receipts by various sales categories and an entry for sales tax collected. The sales agreed with those shown in Beit's general ledger. However, the sales tax collected amounted to $272,156.59 as opposed to $84,179.59 in tax paid over with returns filed, leaving a difference of $187,977.00.

11. Mohammed Najjar and Mohmud H. Abdullah were also affiliated with the operation of two other supermarkets. Beit argued that there were intercompany sales to the affiliated companies. Beit's Federal income tax returns have an account entitled "Due from Affiliated Companies" however, it did not establish that the amounts shown thereon resulted from sales or, if there were in fact intercompany sales, to what extent the items sold were taxable.

12. Beit also claimed that it made wholesale sales to other supermarkets. Beit submitted invoices and a listing thereof showing sales to seven customers for the month of August 1983. Beit also submitted resale certificates to establish that the sales were nontaxable. Except for one certificate issued September 28, 1983, the resale certificates were issued after Beit sold the

business (October 10, 1983). Moreover, the invoices indicated a very limited number of taxable items.

13. On February 22, 1984, Beit filed a petition with respect to the notices issued January 13, 1984. On January 23, 1985, Mohammed Najjar and Mohmud H. Abdullah filed petitions for revision of the determinations issued October 24, 1984. By letter dated September 4, 1985, the Secretary to the State Tax Commission advised petitioners that the petitions filed had been accepted as perfected petitions under section 601.5 of the Rules of Practice and Procedure. The Law Bureau served its answers on October 17, 1985.

14. Petitioners argued that penalties should not be imposed since they were not properly represented by their former accountant.

15. Mohammed Najjar and Momhud H. Abdullah did not dispute their personal liability for any taxes determined due from Beit.

CONCLUSIONS OF LAW

A. That section 1135(a) of the Tax Law provides that every person required to collect tax shall keep records of every sale and of all amounts paid, charged or due thereon and of the tax payable thereon. Such records shall include a true copy of each sales slip, invoice, receipt or statement.

B. That Beit did not have cash register tapes or any other records that would serve as a verifiable record of taxable sales. Under such circumstances, the Audit Division's use of a test period and markup percentage audit was proper is accordance with section 1138(a) of the Tax Law (Matter of Licata v. Chu, 64 NY2d 873).

C. That the Audit Division reasonably calculated Beit's tax liability based on the books and records available for audit. When a taxpayer's recordkeeping is faulty, exactness is not required of the examiner's audit

(Matter of Meyer v. State Tax Commission, 61 AD2d 223). Beit failed in its burden of establishing that the amount of tax assessed was erroneous (Matter of Licata v. Chu, supra).

D. That Mohammed Najjar and Mohmud H. Abdullah were persons required to collect tax pursuant to section 1131(1) of the Tax Law and therefore bear personal liability for the tax determined due from Beit in accordance with section 1133(a) of the Tax Law.

E. That section 1147(c) of the Tax Law provides that prior to the expiration of the period for the assessment of additional tax, a taxpayer may consent in writing to an extension of the period within which additional tax due may be determined. Such consent by a corporation extends the liability of its current corporate officers required to collect tax under sections 1131(1) and 1133(a) of the Tax Law for the period consented to by the corporation. Therefore, since Beit signed a consent to an extension, the liability of Mohammed Najjar and Mohmud H. Abdullah was extended for the same period (Matter of Playmor Amusement Co., Inc., State Tax Conmission, November 5, 1982).

F. That 20 NYCRR 601.6(a)(1) provides, in part, that "The Law Bureau shall serve an answer on the petitioner or petitioner's representative, if any, within 60 days from the date the Secretary acknowledged receipt of an acceptable perfected petition." Based on the dates set forth in Finding of Fact "13", the petitioners were timely served answers by the Law Bureau.

G. That petitioners failed to establish that the underreporting of sales tax disclosed by the audit was due to reasonable cause and not due to willful neglect. Accordingly, penalties and interest were properly imposed under section 1145(a)(1) of the Tax Law.

H. That the petitions of Beit Najjar, Inc., Mohammed Najjar and Mohmud H. Abdullah, as officers, are denied and the notices of determination and demands for payment of sales and use taxes due issued January 13, 1984 and October 31, 1984 are sustained.

DATED: Albany, New York

FEB 24 1987

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER