STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
NEW INTRIGUE JEWELERS, INC	:	DECISION DTA NO. 823770
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, 2005 through August 1, 2008.	:	

Petitioner, New Intrigue Jewelers, Inc., filed an exception to the determination of the Administrative Law Judge issued on October 25, 2012. Petitioner appeared by Lawrence R. Cole, CPA. The Division of Taxation appeared by Amanda Hiller, Esq., (Osborne K. Jack, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a letter brief in lieu of a formal brief in opposition. Petitioner did not file a reply brief. Oral argument, was heard on September 18, 2013, in New York, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether the audit methodology utilized by the Division of Taxation in its audit of New Intrigue Jewelers, Inc., had a rational basis and was reasonably calculated to reflect the taxes due.

II. Whether the Division of Taxation may issue a notice of determination where it has previously issued and canceled a notice of determination for the same periods.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except for finding of fact "3," which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

Petitioner, New Intrigue Jewelers, Inc., operated a kiosk in the Roosevelt Field Mall located in Garden City, New York, selling jewelry. Mr. Muhammad Abbasi was the president of petitioner.

On July 3, 2007, July 25, 2007, September 28, 2007 and October 16, 2007, the Division of Taxation (Division) sent letters to petitioner stating that the business's sales and use tax records had been scheduled for a field audit for the period September 1, 2004 through May 31, 2007. On May 8, 2008, the Division issued to petitioner a Notice of Determination indicating sales and use tax due of $285,088.82, plus penalty and interest for the period September 1, 2004 through May 31, 2007. The notice was based on an audit methodology that had been employed by the Division in an audit of petitioner for an earlier period.

We have modified finding of fact "3" of the Administrative Law Judge's determination to read as follows:

> In ***Matter of Abbasi*** (Tax Appeals Tribunal, June 12, 2008) the Tribunal held that the audit methodology used in the earlier audit of petitioner was without rational basis and was unreasonable. As a result of the Tribunal's decision, and because the Division had used this same methodology in the audit for the period September 1, 2004 through May 31, 2007, the Division sent a letter to Mr. Abbasi, as president of petitioner, stating that the amount claimed to be due in the Notices of Determination had been canceled. The letter was dated October 17, 2008. Additionally, on October 23, 2008, the Bureau of Conciliation and Mediation Services (BCMS), sent a letter to petitioner's president advising him that due to the cancellation of the Notices of Determination, BCMS had closed its

file with respect to his protest of the Notices.[1]

On October 21, 2008, the Division sent a letter to petitioner stating that the business's sales and use tax records had been scheduled for a field audit for the period December 1, 2005 through August 31, 2008. The letter stated that "[a]ll books and records pertaining to the sales and use tax liability, for the audit period, must be available on the appointment date." The appointment date indicated on the letter was November 7, 2008. A schedule of books and records to be produced was attached to the letter. The letter specifically requested, among other records, the general ledger, sales invoices, cash register tapes and bank statements for the entire audit period. No records were provided by petitioner.

On November 3, 2008, the Division sent a second letter to petitioner stating that the business's sales and use tax records had been scheduled for a field audit for the period December 1, 2005 through August 31, 2008. The letter stated that "[a]ll books and records pertaining to the sales and use tax liability, for the audit period, must be available on the appointment date." The appointment date indicated on the letter was November 24, 2008. A schedule of books and records to be produced was attached to the letter. The letter specifically requested, among other records, the general ledger, sales invoices, cash register tapes and bank statements for the entire audit period. No records were provided by petitioner.

On November 24, 2008, another request letter was issued by the Division to petitioner for the business's books and records. The letter noted that Tax Law § 1135 provided that a taxpayer's records "shall be available for inspection and examination at any time upon demand by the tax commission or its duly authorized agent or employee . . . ." Again, no records were

[1] We modify this fact to more accurately reflect the record.

provided by petitioner.

On December 29, 2008, the Division issued to Mr. Abbasi, as president of petitioner, a subpoena and subpoena duces tecum demanding the books and records of the business. Again, no records were provided by petitioner.

The Division concluded that in the absence of any records being produced in response to its requests, petitioner's records were inadequate for the purpose of verifying its tax liability with respect to sales. The Division determined that the lack of original source documents detailing petitioner's sales precluded the Division from tracing any transaction back to the initial sale or forward to the amount of sales reported. In the face of a total lack of records, the auditor decided to employ an indirect audit method to calculate the amount of taxable sales. The indirect audit method chosen was a rent factor.

The auditor employed an industry index entitled Almanac of Business and Industrial Financial Ratios, 2005 edition, to compute the gross sales of petitioner. The publication contains North American Industry Classification System (NAICS) data covering North America and Mexico based on Internal Revenue Service tax return information from five million U.S. and international corporations. The index is based on financial and operating data for the accounting period July 2001 through June 2002. The Almanac categorizes performance results on the basis of 192 industries, with each industry further divided by 13 asset size groups, beginning with zero assets. In addition, the publication provides 50 items of data and ratios on corporate performance, including an analysis of operating costs, such as rent, to operating income. In its introduction, the Almanac states, in part, as follows:

> "The Almanac of Business and Industrial Financial Ratios provides a precise benchmark for evaluating an individual company's financial performance. The performance data is derived from the latest available IRS figures on U.S. and international companies, and tracks 50 operating and financial factors in 192 industries. The Almanac provides competitive norms in actual dollar amounts for revenue and capital factors, as well as important average operating costs in percent of net sales. It also provides other critical financial factors in percentage, including debt ratio, return on assets, return on equity, profit margin, and more."

The auditor began by most closely matching the business activity code number (453990) appearing on petitioner's U.S. Income Tax Return for an S Corporation, form 1120S, for the years 2005, 2006 and 2007 with the NAICS codes contained in the Almanac. The auditor chose the code "453000" (industry classification of miscellaneous store retailer) and the asset column of zero. The auditor surmised that as petitioner's assets were $66,033.00 in 2005, $73,791.00 in 2006 and $58,812.00 in 2007, the zero asset column was closer to petitioner's asset valuation than the next asset column of $500,000.00. The auditor used the information in the Almanac to compute a rent factor of 7.24 percent.

The auditor next determined a monthly rent by using the annual rent claimed on petitioner's form 1120S income tax returns for the years 2006 and 2007. The 2006 yearly rent of $123,148.00 yielded a monthly rent of $10,262.34 and the 2007 yearly rent yielded a monthly rent of $10,232.67. The 2006 figure was used in the months of December 2005 through December 2006 and the 2007 figure was used in the months of January 2007 through August 2008. Total rent paid for the audit period was multiplied by the rent factor of 7.24 percent to arrive at audited taxable sales for the audit period of $2,447,582.00. Taxable sales reported of $800,081.00 were subtracted from audited taxable sales to determine additional taxable sales of $1,647,501.00, and additional tax due of $142,509.53 for the audit period. Penalties and

statutory interest were imposed.

On the basis of the audit performed, the Division issued three notices of determination (Assessment #s L-031578246, L-031942506 and L-032412720), dated February 23, 2009, May 15, 2009 and August 17, 2009, respectively, to petitioner, which together assessed sales and use tax for the period December 1, 2005 through August 31, 2008 in the amount of $142,509.53, plus penalty and interest. The penalty was imposed pursuant to Tax Law § 1145(a)(1) because of the inadequacy of the business's records and the amount of the underreporting of tax.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge analyzed the statute and case law regarding sales tax audits. The Administrative Law Judge found that the Division made proper records requests and that petitioner failed to produce books and records sufficient to conduct a complete audit. Therefore, the Division was entitled to utilize indirect audit methods, such as calculating receipts by utilizing a rent factor, as was done in the instant case. The Administrative Law Judge noted that when utilizing a publically identifiable statistical report to calculate a rent factor, the Division need only identify the report, as that provides the taxpayer with the ability to challenge it. In this case, the Division not only identified and introduced into the record the statistical report on which its calculations were based, but also described and responded to petitioner's inquiries at the hearing as to how the Almanac was used in the audit. After reviewing the record, the Administrative Law Judge concluded that petitioner failed to establish that the audit methodology was unreasonable.

The Administrative Law Judge rejected petitioner's claim that the Division may not issue a notice of determination following the cancellation of a previously issued notice of

determination covering the same period. The Administrative Law judge concluded that as the Notices were issued within the statute of limitations provided by Tax Law § 1147 (b), they were properly issued pursuant to Tax Law § 1138 (a) (1).

The Administrative Law Judge also observed petitioner's failure to make adequate books and records available for the audit and substantial underreporting and underpayment of tax and concluded that the waiver of penalties was not justified. Accordingly, the Administrative Law Judge sustained the subject Notices of Determination together with penalty and interest.

ARGUMENTS ON EXCEPTION

On exception, petitioner continues to argue that the Division did not select a method that was reasonably calculated to determine the amount of tax due. Petitioner also argues that the Division was precluded from reissuing the Notices of Determination assessing tax for periods for which earlier Notices had been cancelled.

Petitioner did not take exception on the issue of penalties.

The Division argues that petitioner failed to produce on audit, sufficient books and records for the Division to perform a detailed audit. Therefore, the Division contends that it was entitled to estimate the tax due and that the method used was reasonable. The Division maintains that it was permitted to reissue the Notices of Determination for periods still open under the applicable statute of limitations.

OPINION

This Tribunal has well-established standards for reviewing sales tax audits. As summarized in ***Matter of AGDN, Inc.*** (Tax Appeals Tribunal, February 6, 1997):

"[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)."

Here, petitioner did not provide the requested books and records for the audit period. As such, we find that the Division properly determined that petitioner failed to meet its statutory obligations under the Tax Law. We conclude, therefore, that the Administrative Law Judge properly determined that the Division was entitled to estimate petitioner's tax liability using an indirect audit methodology.

We have previously determined that the use of a rent factor to estimate taxable sales may be reasonable under certain circumstances (***see Matter of Constantini***, Tax Appeals Tribunal, January 10, 2008; ***Matter of Your Own Choice***, Tax Appeals Tribunal, February 20, 2003; ***Matter of Bitable on Broadway***, Tax Appeals Tribunal, January 23, 1992, ***confirmed sub nom. Matter of Bitable on Broadway v Wetzler***, 199 AD2d 633 [1993]; ***cf. Matter of Abbasi***, Tax

Appeals Tribunal, June 12, 2008). As we noted in ***Matter of Bitable on Broadway***, the key to the approval of a rent factor audit is the identification in the record of the statistical report from which the rent factor is derived. This allows the taxpayer both the opportunity to review the report and the ability to introduce evidence to challenge the soundness or applicability of the report.

As noted by the Administrative Law Judge, the Division identified and introduced into the record the statistical report on which its calculations were based and also described and responded to petitioner's inquiries at the hearing as to how the report was used in the audit of petitioner. As to the specifics of the rent factor methodology, the Division chose the NAICS business activity code that most closely matched the business activity code number appearing on petitioner's federal income tax returns. Within the chosen NAICS business activity code, the Division selected the rent factor for a business with zero assets, the category closest to petitioner's asset valuation as indicated by its federal income tax returns. Finally, the Division used rental expenses as reported on petitioner's federal income tax returns for the years 2006 and 2007. We find that this audit method was reasonable under the circumstances.

We also agree with the Administrative Law Judge that petitioner failed to meet its burden to show error in the audit method or result. Petitioner offered no evidence to show that the use of a rent factor lacked a rational basis (***cf. Matter of Fokos Lounge***, Tax Appeals Tribunal, March 7, 1991 [where petitioner proved through an expert witness that a utilities factor was irrational]) or that the specific rent factor used herein was unreasonable or inaccurate. Under the circumstances presented here, it is not enough for petitioner to simply assert that the Division should have utilized sales from petitioner's federal income tax returns, in that the Division

accepted the rent expenses from those same returns. As noted by the Administrative Law Judge, petitioner offered no invoices, cash register tapes or other source documentation from which its sales tax liability could be established. Petitioner's suggested alternative audit method overlooks this fact and also fails to acknowledge the well-established rule that any imprecision or assessment resulting from a taxpayer's failure to make books and records available as required by Tax Law § 1135 must be borne by the taxpayer (***see Matter of Markowitz v State Tax Commn.***, 54 AD2d 1023 [1976], ***affd*** 44 NY2d 684 [1978]). Accordingly, we sustain the Division's audit determination of additional tax due.

We find that petitioner's argument that the Division may not issue a notice of determination following the cancellation of a previously issued notice covering the same taxable period must fail. Though the argument may appear meritorious, it lacks statutory support. As noted herein, the earlier notices were cancelled by the Division upon learning that the underlying audit method was found to be improper by the Tribunal in a case dealing with even earlier periods. Article 28 (Sales and Compensating Use Taxes) of the Tax Law contains no provision precluding the Division from issuing a subsequent notice of determination for the same periods in this case. In contrast, Articles 22 (Personal Income Tax) and 27 (Corporate Tax Procedure) do restrict further notices of deficiency where a petition has been filed (***see*** Tax Law § § 689 [d] [4], 1089 [d] [4]). We find that the absence of such a provision in Article 28 evinces a legislative intent to refrain from placing a similar restriction on the issuance of further notices of determination. Accordingly, as the subject Notices were issued within the period of limitations, considering the reason for the cancellation and later issuance of new notices, and the absence of any claim of estoppel against the Division as a consequence of the cancellation (***cf. Matter of***

Harry's Exxon Serv. Sta., Tax Appeals Tribunal, December 6, 1988), we find that such Notices were properly issued.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of New Intrigue Jewelers, Inc. is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of New Intrigue Jewelers, Inc. is denied; and

4. The notices of determination dated February 23, 2009, May 15, 2009 and August 17, 2009 are sustained.

DATED: Albany, New York
March 6, 2014

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner

/s/ James H. Tully, Jr.
James H. Tully, Jr.
Commissioner