

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RJB SLICK’S, INC.	:	DETERMINATION
N/K/A RKB VENTURES, INC.	:	DTA NO. 825079
	:	
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, 2004 through	:	
February 28, 2007.	:	

Petitioner, RJB Slick’s, Inc. n/k/a RKB Ventures, Inc. 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, 2004 through February 28, 2007.

A hearing commenced on September 18, 2014 and continued to conclusion on April 29, 2015 in Rochester, New York. Petitioner appeared by Hogan Willig (Steven Cohen, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Robert A. Maslyn, Esq., of counsel) with all briefs to be submitted by September 21, 2015. After reviewing the entire record in this matter, Donna M. Gardiner, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether petitioner has demonstrated that the Division of Taxation’s audit methodology was unreasonable.

II. Whether petitioner is entitled to a refund of sales and use taxes paid.

FINDINGS OF FACT

1. Petitioner, RJB Slick's, Inc. n/k/a RKB Ventures, Inc., operated a sports bar, known as Slick Willie's, in a medium-sized strip mall in Tonawanda, New York, during the period March 1, 2004 through February 28, 2007 (audit period). Slick Willie's featured two large serving bars for drinks.

2. Rudolph Bersani was the sole stockholder of Slick Willie's during the audit period. He was involved in all operations of the bar. He was responsible for completing the sales tax questionnaire and the bar fact forms sent to him by the Division of Taxation (Division). Slick Willie's was not his first business venture that required the collection and payment of New York State sales and use taxes.

3. The Division commenced a sales tax field audit of petitioner. On March 8, 2007, the Division sent an appointment letter to petitioner and requested its books and records for the audit period.

4. Petitioner provided z tape summaries, comp sheets, incomplete bank statements, handwritten day sheets and incomplete purchase invoices. After a review of the documents submitted, the auditor concluded that they were inadequate to conduct a detailed audit. Therefore, by correspondence dated May 9, 2009, an additional request for necessary books and records, including cash register tapes, was made.

5. The auditor determined that the z tapes were insufficient since they did not demonstrate individual sales, but rather, summarized daily activity. Since there was no record of individual sales, there was no way to determine the drink type sold, the quantity or the serving size, which made it impossible to verify. The auditor claimed that the day sheets provided to him

did not reconcile with the z tapes. He stated that he was unable to verify that every item sold had been entered into the register or whether every transaction made was displayed on the z tapes.

Without evidence of individual sales, the auditor was unable to determine the price or number of items sold. Sales could not be traced through to a general ledger or the day sheets.

6. On June 21, 2007, the auditor met with Mr. Bersani and his representative at the bar. The auditor reviewed the physical layout and overall area, and noted that the business operated from 11:30 a.m. to 4:00 a.m., seven days a week. The auditor also viewed photos of signs advertising specials, but noted that there were no dates or information from actual records concerning the specials advertised. At this meeting, the auditor was given the completed audit questionnaires and the bar fact forms.

7. The auditor concluded that the records produced were insufficient for the conduct of a detailed audit. Therefore, he reviewed purchases of beer and liquor for a test period of September 1, 2008 through November 30, 2008. This quarterly period was chosen based upon the availability of, and the ability to verify, the records produced. The auditor reviewed purchase information provided by Mr. Bersani as well as third-party purchase information obtained. The auditor computed a markup percentage for beer and liquor using Mr. Bersani's bar price list of December 4, 2006, because this price list was the closest in time to the test quarter. It listed prices and specials, and the auditor had all the purchases for that quarter. Although the comp sheets showed higher prices than that reflected on the bar price list and that none of the prices were able to be verified, the auditor used the bar price list in an attempt to be reasonable.

8. The auditor determined markup percentages of 2.92 on beer and 3.27 on liquor. Application of the markup percentages to purchases and projection over the entire audit period,

resulted in a determination of additional sales and use taxes due. Expense purchases and capital acquisitions were reviewed in detail, and the additional tax in the amounts of \$2,869.57 and \$164.02, respectively, were determined. Penalties were originally imposed based on petitioner's failure to maintain and provide proper records and upon the under reporting of tax due.

9. The initial audit findings were sent to petitioner's representative in February of 2008. In an effort to be reasonable, the auditor worked with petitioner and made many adjustments to his original audit findings. These adjustments included the following:

- removal of Bison purchases during the test period;
- adjustment for Red Bull and other mixers;
- happy hour and 3-for-2 Sunday specials;
- Crown Royal specials;
- 50-50 split per bottle for mixed drinks/shots with regular shot size granted at 1 ounce and shot size for mixed drink granted at 1 ½ ounces regardless of type;
- an overall 15% allowance (reduction) for comps, spillage and specials that could not be otherwise quantified;
- snacks were not assessed; and
- soda was not marked up or included in the computations.

10. Ultimately, by letter of October 31, 2008, the representative stated that petitioner was in agreement with the audit findings as long as the imposed penalties were abated. This agreement, including the waiver of penalties, was confirmed by discussion with the representative. By letter dated November 12, 2008, the Division mailed the Statement of Proposed Audit Changes to petitioner and his representative, along with audit schedules showing

additional tax and interest due by quarter periods. The auditor noted that, for settlement purposes only, no penalty was included and only minimum interest had been applied. The Statement of Proposed Audit Changes set forth the tax amount due of \$79,441.78, plus minimum interest. All penalties were abated.

11. Petitioner failed to return the executed Statement of Proposed Audit Changes or make payment by the agreed upon date. The auditor followed up with a telephone call to the representative. The representative directed the auditor to meet Mr. Bersani at the place of business in order to retrieve the executed Statement of Proposed Audit Changes. On November 17, 2008, petitioner executed the form and agreed to the tax amount of \$79,441.78 plus interest in the amount of \$24,375.10 for the audit period March 1, 2004 through February 28, 2007.

12. On November 19, 2008, petitioner's representative forwarded a check to the auditor for the amount agreed upon. The letter accompanying the check indicated that the representative was pleased that the parties were able to reach an agreement without the need of a formal hearing.

13. On December 9, 2008, a Notice and Demand L-031169376 was issued to petitioner that assessed sales and use tax in the amount of \$79,411.78 plus interest in the amount of \$24,375.10. The notice reflected payment of \$103,816.88 showing a zero balance due.

14. An application for refund, dated November 17, 2010, was filed on behalf of petitioner that alleged the audit method was unreasonable and requested a refund in the amount of \$103,816.88. The original auditor was assigned the refund claim for his review.

15. The auditor reviewed the letter and attachments that comprised the application for refund. The auditor determined that no additional records or information was submitted to

substantiate the claim. The auditor found that the calculations used to support the application for refund were unsupported by documents. In fact, the auditor recomputed the tax determined due by using the prices listed on the bartender comp sheets in place of the tax determined on audit and the tax determined from using the comp sheets exceeded the tax determined on audit.

16. By letter dated July 25, 2011, the Division denied the refund claim since petitioner presented no additional records or provided any reasonable basis that warranted any adjustment to the additional sales tax due on audit. The denial letter by the Division noted that an alternate analysis conducted by the auditor using petitioner's own records (i.e. the comp sheets) actually resulted in a higher tax liability than that determined on audit and set forth in the Statement of Proposed Audit Changes.

17. Thereafter, petitioner timely filed its petition with the Division of Tax Appeals contesting the denial of its refund claim. In its petition, petitioner alleges that the Statement of Proposed Audit Changes had been executed by Mr. Bersani under duress and he was misled by the Division. Petitioner also claims that the audit methodology was unreasonable and the result erroneous. A formal hearing ensued.

18. At the hearing, the Division presented the auditor as a witness. He testified concerning the performance of the audit, the determinations made and the basis for the determination. The auditor described the request for books and records and which documents were not provided from the requested list. The auditor testified to the inadequacies and unexplained discrepancies in the records that were produced including the lack of reliable and complete sales records and the inconsistencies between the comp sheets and the bar price lists. The auditor testified to the deficiencies in the z tapes that made reliance on them impossible.

19. The auditor reviewed affidavits that were provided by bartenders who were employed by Mr. Bersani during the audit period. The auditor noted that information contained within the affidavits were unsubstantiated and in contradiction to information provided by Mr. Bersani on audit. Furthermore, the auditor noted that the prices listed on the comp cards were not consistent with statement made within the affidavits. In addition, the auditor reasoned that the sales of specials could not be quantified based upon the information presented due to the fact that it was not possible to know what dates particular specials had been in effect. Nevertheless, the auditor testified that he did make allowances for specials listed on the bar price sheets.

20. The auditor described how he determined the amount of additional tax assessed. The Division submitted into evidence the audit log, audit report, and audit workpapers, which included the schedules for computation of additional tax. The auditor described in detail the negotiations and adjustments made to his calculations and the circumstances surrounding the execution of the Statement of Proposed Audit Changes.

21. Mr. Bersani also testified at the hearing. Mr. Bersani was questioned regarding his execution of the Statement of Proposed Audit Changes. He did confirm that his representatives had continuing discussions and negotiations with the auditor throughout the audit. It was clear from his testimony that the auditor did not exert any pressure on him and that at no point was he under any duress to execute the agreement.

22. Mr. Bersani explained the business operations as well as his recollection of the drink specials. He explained that the manager of the business was Mary Wagoner during the audit period. The other employees were bartenders. Petitioner did not prepare food or have wait staff.

23. Mr. Bersani testified that he would be involved with setting drink prices along with

his manager. However, Ms. Wagoner was solely responsible for entering and altering the drink prices in the cash register system. With respect to drink specials, Mr. Bersani claimed that Ms. Wagoner and other employees would apprise him of the types of specials being offered by similar establishments in the area. Mr. Bersani would discuss this with Ms. Wagoner and offer drink specials in order to remain competitive with the other businesses. In order to advertise the drink specials offered by petitioner, Mr. Bersani created drink cards which would entitle the holder of the card to obtain their first drink free. Mr. Bersani stated that using the cards was a cheaper alternative to print advertisements.

24. Mr. Bersani testified to extensive renovations to the business that were completed during the audit period. Petitioner introduced several pictures of the bar that showed the renovations completed. He detailed the types of renovations and was questioned regarding the impact of the renovations on his business. Although he mentioned that the clientele increased and, in turn, purchased more upscale drinks, his testimony was general in nature and was based upon his recollection and not on specific documentation reflecting an increase in sales or in more expensive drink purchases.

25. Mary Wagoner was present to testify as to her employment at petitioner as well as her job duties during the audit period. Despite being hired as a bartender, she was promoted to manager and held that position throughout the audit period. Included in her duties at the business were making daily deposits and the hiring and firing of employees, as well as taking any disciplinary actions that arose. Ms. Wagoner was the exclusive programmer for the cash registers used by the business. She would make decisions regarding which vendors to use in order to acquire the best pricing for Mr. Bersani.

26. During the audit of petitioner, Mr. Bersani and his representatives did not inform the auditor that Ms. Wagoner was the person who was in charge of programming the cash registers. Moreover, although Mr. Bersani testified that he never performed any bartending duties and that Ms. Wagoner was present during the auditor's visit to petitioner, Mr. Bersani and his representatives did not have Ms. Wagoner conduct the pour demonstration. During the hearing, Ms. Wagoner was asked repeatedly about her programming of the cash registers. She was questioned regarding her notes for programming and why the documents relating to the cash registers were not produced during audit. Her testimony was that she was never asked by Mr. Bersani or petitioner's representatives to produce the documents despite being the sole employee charged with programming the cash register with pricing details throughout the audit period.

27. The documents demonstrating the cash registers and the items programmed into the registers are exhibits 8 and 9. None of the documents are dated. Each page is a replica of a cash register grid. The represented grids have 16 columns and 10 rows. The seven pages that comprise exhibit 9 contain minimal pricing information. Exhibit 8 also has 16 columns and 10 rows. The column headings are different on both exhibits. Also, it is noted that the second column is entitled "DETL FEED." However, it was not utilized by petitioner throughout the audit period to provide a detail of sales on the register tapes.

28. Ms. Wagoner testified about specials offered by petitioner throughout the audit period. She discussed ladies night specials and game specials for both Buffalo Bills and Buffalo Sabres games. There was documentation submitted regarding a Spin the Wheel promotion at the bar that accompanied certain drink specials as well as information taken from petitioner's web site. Ms. Wagoner referenced posters that were hung at the establishment during the years in

issue that reflected certain drink specials. However, there were no specific dates for any of the specials promoted by petitioner during the years under audit. Furthermore, there was no evidence presented that could verify the quantity sold or cost per drink during the audit period.

29. Petitioner also presented the testimony of David Gross, who is a sales tax consultant. He was not involved with the audit of petitioner, but was retained by Mr. Bersani to review the auditor's workpapers in this matter after remittance of payment pursuant to the Statement of Proposed Audit Changes. Basically, Mr. Gross performed an analysis that utilized an alternative markup method to that utilized by the auditor to render his own estimate of petitioner's liability. At no point did Mr. Gross testify that he reviewed accurate books and records of petitioner for the audit period. In fact, Mr. Gross acknowledged that his estimation was performed by using estimates as a starting point.

CONCLUSIONS OF LAW

A. Tax Law § 1105(a) imposes a sales tax on the receipts from every retail sale. Tax Law § 1135(a) requires that a taxpayer maintain and make available for audit, upon request, such records as are sufficient to verify all transactions, and any failure to maintain such records or the maintenance of inadequate records will result in the Division estimating the tax due (Tax Law § 1138[a][1]; 20 NYCRR 533.2). When acting pursuant to Tax Law § 1138(a)(1), the Division is required to select a method of audit reasonably calculated to reflect the tax due. The burden of proof then shifts to the taxpayer to demonstrate that the method of audit or the amount of the assessment was erroneous (*see Matter of Your Own Choice*, Tax Appeals Tribunal, February 20, 2003).

B. Petitioner argues that the use of the test period lacked a rational basis. This argument

is without merit. Mr. Bersani, who was represented by counsel throughout the audit, executed a consent to the assessment contained on the Statement of Proposed Audit Changes and, thus, rendered the tax liability fixed and final. The tax liability was paid and a notice of demand was issued reflecting the payment, with a zero balance. This proceeding was brought in the form of a timely refund claim.

As set forth in *Matter of SICA Elec. & Maintenance Corp.* (Tax Appeals Tribunal, February 26, 1998), the execution of a Statement of Proposed Audit Changes provides, in part, as follows:

“for a taxpayer to agree and consent to the amount of a tax liability [citations omitted], thereby obviating the requirements of the issuance of a notice of determination and the 90-day protest waiting period thereafter, i.e., a taxpayer may consent to an assessment as was done in this matter. By agreeing to the amount of tax and consenting to an assessment, a taxpayer gives up its right to protest such assessment, except as provided by Tax Law former § 1139[c]; to wit, the taxpayer may protest by payment of the amount assessed and by filing a claim for refund of any such amount so paid within two years of the date of payment thereof.

* * *

We conclude that the signature on the consent to tax rendered the use tax fixed and final (*Matter of BAP Appliance Corp.*, Tax Appeals Tribunal, May 28, 1992; *Matter of Rosemellia*, Tax Appeals Tribunal, March 12, 1992) and established the rational basis for the assessment. Having signed the consent, the audit method and audit computation ceased being an issue. Further, the threshold issue of ‘rational basis’ that might otherwise be present in an audit case under Tax Law § 1138[a] was no longer present. The Division was relieved of the burden of showing a rational basis because petitioner’s signature on the consent established that there was a rational basis.”

Therefore, the audit was deemed to have a rational basis when Mr. Bersani executed the consent. The burden of going forward and of proving that the tax is erroneous and a refund due shifts to petitioner. Thus, the formal hearing was petitioner’s opportunity to establish that the

correct amount of tax is less than the amount set forth in the consent.

C. In order to estimate petitioner's tax liability, the Division was required to select an audit method that was reasonable (*Matter of W. T. Grant Co. v. Joseph*, 2 NY2d 196 [1957], *cert denied* 355 US 869 [1957]; *Matter of Grecian Sq. v. New York State Tax Commn.*, 119 AD2d 948 [1986]). Exactness is not required when it is petitioner's failure to maintain proper records which prevents it (*Matter of Meyer v. State Tax Commn.*, 61 AD2d 223 [1978], *lv denied* 44 NY2d 645 [1978]; *Matter of Markowitz v. State Tax Commn.*, 54 AD2d 1023 [1976], *affd* 44 NY2d 684 [1978]; *Matter of Lionel Leasing Indus. v. New York State Tax Commn.*, 105 AD2d 581 [1984]).

The burden of proof falls upon petitioner to demonstrate by clear and convincing evidence that the audit method employed was unreasonable or that the amount assessed was erroneous (*Matter of Meskouris Bros. v. Chu*, 139 AD2d 813 [1988]; *Matter of Surface Line Operators Fraternal Org. v. Tully*, 85 AD2d 858 [1981]).

In an effort to demonstrate that the Division's estimate was unreasonable, petitioner argued that the Division should have used a different method of estimation. Petitioner asserts that an observation test would have better reflected the tax liability than the utilization of a markup method. Moreover, petitioner presented the testimony of Mr. Gross who presented his estimate of sales tax due. However, petitioner cannot simply use its own estimates in order to overcome its burden to show that the Division's audit methodology was unreasonable. Petitioner was required to show errors made by the Division in its calculations. In reviewing the record, and as outlined above in Finding of Fact 9, the Division gave petitioner many concessions in an effort to be reasonable. In fact, the auditor gave a 15% allowance for comps, spillage and drink

specials that petitioner failed to quantify. Based upon the evidence submitted in this case, the Division's auditor was extremely generous in his concessions. In the absence of any proof that showed any error made by the Division, it is concluded that the audit methodology was reasonable. Accordingly, petitioner's claim for refund is denied.

D. The petition of RJB Slick's, Inc. n/k/a RKB Ventures, Inc. is denied.

Dated: Albany, New York
May 12, 2016

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE