

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
8th AVENUE GOURMET & GROCERY INC. : DETERMINATION
for Revision of Determinations or for Refund of Sales : DTA NOS. 825372
and Use Taxes under Articles 28 and 29 of the Tax Law : AND 825427
for the Periods June 1, 1991 through November 30, 1995, :
June 1, 1999 through February 29, 2000, September 1, :
2000 through August 31, 2001, March 1, 2002 through :
May 31, 2003 and September 1, 2004 through :
November 30, 2004. :

Petitioner, 8th Avenue Gourmet & Grocery Inc., filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods June 1, 1991 through November 30, 1995, June 1, 1999 through February 29, 2000, September 1, 2000 through August 31, 2001, March 1, 2002 through May 31, 2003 and September 1, 2004 through November 30, 2004.

On September 22, 2014, petitioner, appearing by KB Park CPA, LLC (KB Park, CPA), and the Division of Taxation, appearing by Amanda Hiller, Esq. (Michael Hall, of counsel), waived a hearing and submitted the matter for determination based on documents and briefs to be submitted by January 30, 2015, which date began the six-month period for issuance of this determination. After due consideration of the documents and arguments submitted, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUES

DTA NO. 825427

I. Whether petitioner has proven that assessment L-014551387-2, for which a consent was executed, has been paid in full.

DTA NO. 825372

II. Whether the Division of Taxation should cancel Assessments L-018115306-3, L-018250842-9, L-018345239-7, L-019374979-8 on the basis that they cover sales tax periods also covered by Assessment L-023232084-5, which was cancelled by the Division in 2013.

III. Whether assessments L-019920740-7, L-020313194-9 and L-020550108-1 should be cancelled because petitioner asserts it filed timely sales tax returns and made corresponding timely payments.

IV. If Issues II and/or III do not result in the cancellation of the assessments addressed therein, whether petitioner has shown that assessments L-018115306-3, L-018250842-9, L-018345239-7, L-019374979-8, L-019920740-7, L-020313194-9, and L-020550108-1 lack a rational basis and should therefore be modified or cancelled.

V. Whether petitioner has shown that a fire on November 11, 2001, in which petitioner alleged its business records were destroyed, provides the basis for reasonable cause to abate any portion of the assessments still due and owing.

FINDINGS OF FACT

1. The petition as originally filed challenged the following 15 notices: L-014551387-2, L-023403237-5, L-023426122-3, L-023426123-2, L-023403236-6, L-023426121-4, L-023232084-

5, L-025006450-5, L-018115306-3, L-018250842-9, L-018345239-7, L-019374979-8, L-019920740-7, L-020313194-9, and L-020550108-1.¹

DTA NO. 825427

2. Preceding this submission in lieu of a hearing, the Division of Taxation (Division) made a motion for dismissal, or in the alternative, for summary determination concerning six notices, L-014551387-2, L-023403237-5, L-023426122-3, L-023426123-2, L-023403236-6, and L-023426121-4, and an order was issued by the Division of Tax Appeals dated October 24, 2013, which reached the following conclusions concerning those notices:

a.) The Division's motion to dismiss for lack of subject matter jurisdiction with respect to assessment L-014551387-2, having been the subject of a signed consent, was granted;² and

b.) The Division's motion to dismiss for lack of subject matter jurisdiction and its alternative motion for summary determination with respect to assessments L-023403237-5, L-023426122-3, L-023426123-2, L-023403236-6, and L-023426121-4 were both denied, allowing for the merits of such assessments to be addressed herein. However, these assessments consisted of late filing penalties that the Division has since cancelled in their entirety for reasonable cause. Accordingly, these assessments will not be further discussed.

3. Regarding assessment L-014551387-2, petitioner signed a Statement of Proposed Audit Adjustment, also referred to as a "Consent to Fixing of Tax," on November 17, 1997. The Division issued a Notice and Demand for Payment of Tax Due dated December 30, 1997, in the

¹ The Division of Taxation originally addressed the 15 assessments in two separate motions. Each motion was determined separately, but the matters are consolidated for this determination.

² Although the merits of this assessment will not be addressed since a final determination on it has been made, petitioner continues to raise a question concerning the application of payments on this assessment, and this will be briefly addressed.

amount of \$33,949.90 plus penalties and interest. The Division's Case Resource Tracking System (CARTS) records show petitioner's payments totaling \$29,471.74 were applied to assessment L-014551387-2 in the following manner: \$12,135.61 against sales tax owed, \$3,836.93 against penalties owed and \$13,499.20 against interest owed. At the time of this submission, according to the Division's CARTS records, assessment L-014551387-2 still has a balance due. Petitioner has not submitted evidence of further payment concerning this notice.

DTA NO. 825372

4. Preceding this submission in lieu of a hearing, the Division made a motion for dismissal, or in the alternative, for summary determination concerning nine notices: L-023232084-5, L-025006450-5, L-018115306-3, L-018250842-9, L-018345239-7, L-019374979-8, L-019920740-7, L-020313194-9, and L-020550108-1, and an order issued by the Division of Tax Appeals dated January 16, 2014, reached the following conclusions concerning those notices:

a) The order noted that the Division had cancelled assessment L-023232084-5, and it was not further addressed;

b) As to assessment L-025006450-5, the Division's prior motion to dismiss for lack of subject matter jurisdiction was granted. However, upon the filing of the Division's documents for the instant submission, the Division cancelled the penalty-only assessment in its entirety, and this assessment will not be further discussed; and

c) The Division's motion to dismiss for lack of subject matter jurisdiction and its alternative motion for summary determination with respect to assessments L-018115306-3, L-018250842-9, L-018345239-7, L-019374979-8, L-019920740-7, L-020313194-9, and L-

020550108-1 were both denied, allowing for the merits of such assessments to be addressed herein.

5. The Division issued a Notice of Determination to petitioner dated November 17, 2003, for assessment L-023232084-5. This was an assessment of sales and use taxes estimated as due from petitioner, covering 12 consecutive sales tax quarters for the period December 1, 1997 through November 30, 2000, in the amount of \$145,553.65, plus penalties and interest, whereby each quarter was assessed, on average, sales tax due in the amount of \$12,129.47. On September 16, 2013, the Division cancelled assessment L-023232084-5,³ not due to any defect in the audit, but rather as a jurisdictional adjustment necessitated by the Division's misplacement of proper proof of service.

6. The following table sets forth the assessments that petitioner asserts should be cancelled as a duplication of assessment L-023232084-5 (*see* Finding of Fact 5), covering the same periods:

Date of Notice	Period	Assessment No.	Type of Notice	Reason for issuance of notice	Tax Assessed
10/24/00	6/1/99-8/31/99	L-018115306-3	Notice and Demand	Late filed return, partial payment	\$1,718.22
3/6/01	9/1/99-11/30/99	L-018250842-9	Notice and Demand	Late filed return, no remittance	\$1,824.51
3/6/01	12/1/99-2/29/00	L-018345239-7	Notice and Demand	Late filed return, no remittance	\$1,674.05

³ Although the merits of assessment L-023232084-5 itself will not be addressed, it is described herein as it relates to the assessments in Finding of Fact 6.

5/7/01	9/1/00-11/30/00	L-019374979-8	Notice of Estimated Determination	Failure to file return	\$1,824.50
--------	-----------------	---------------	---	---------------------------	------------

7. During the sales tax periods at issue, petitioner was a quarterly sales tax filer and was required to file sales tax returns with the Division during the month following the end of each quarter, showing the amount of tax payable for that quarter. It was also required to pay the tax due for each quarter at the same time, whether or not the return was filed. The Division, as part of the evidence it submitted, included the affidavit of Brittney Renaud, a tax compliance agent who was trained in CARTS and the e-Managed Processes for an Integrated Revenue Enterprise system (e-MPIRE), and responsible for reviewing billing notices, setting up payment arrangements and advising taxpayers of the collection procedures that the Division utilizes to collect delinquent tax debts. Ms. Renaud's review of petitioner's records during the periods in issue showed that petitioner frequently filed its sales tax returns late, and similarly, paid the sales tax due late. Ms. Renaud provided the detailed history of each of the notices in issue and the information comprising that history is set forth in the facts below.

8. Assessment L-018115306-3 represents petitioner's failure to both timely file its sales tax return and pay the tax due, for the period June 1, 1999 through August 31, 1999. On June 27, 2000, the Division issued a Notice of Determination (Estimated) assessing petitioner tax due in the amount of \$1,718.22 plus penalty and interest. On October 11, 2000, petitioner filed the return for this period and made a partial payment of the tax due in the amount of \$1,593.90. On October 24, 2000, the Division issued a Notice and Demand for Payment of Tax Due. Subsequent to the issuance of the Notice and Demand, petitioner's return was processed and assessment L-018115306-3 was adjusted, resulting in tax due in the amount of \$31.13. At the

time of this submission, according to the Division's CARTS records, assessment L-018115306-3 still has a balance due.

9. Assessment L-018250842-9 represents petitioner's failure to both timely file its sales tax return and pay the tax due, for the period September 1, 1999 through November 30, 1999. On July 11, 2000, the Division issued a Notice of Determination (Estimated) assessing petitioner tax due in the amount of \$1,718.22 plus penalty and interest. On November 1, 2000, petitioner filed the return for this period without payment of the tax reported due in the amount of \$1,789.72. The return was processed, and on March 6, 2001, the Division issued a Notice and Demand for Payment of Tax Due in the amount of \$1,824.51, disallowing the vendor credit in the amount of \$34.79 due to the untimely filed return. At the time of this submission, according to the Division's CARTS records, assessment L-018250842-9 still has a balance due.

10. Assessment L-018345239-7 represents petitioner's failure to both timely file its sales tax return and pay the tax due, for the period December 1, 1999 through February 29, 2000. On August 29, 2000, the Division issued a Notice of Determination (Estimated) assessing petitioner tax due in the amount of \$1,666.62 plus penalty and interest. On November 1, 2000, petitioner filed the return for this period without payment of the tax reported due in the amount of \$1,641.38. The return was processed, and on March 6, 2001, the Division issued a Notice and Demand for Payment of Tax Due in the amount of \$1,674.05, disallowing the vendor credit in the amount of \$32.67 due to the untimely filed return. At the time of this submission, according to the Division's CARTS records, assessment L-018345239-7 still has a balance due.

11. Assessment L-019374979-8 represents petitioner's failure to both timely file its sales tax return and pay the tax due, for the period September 1, 2000 through November 30, 2000. On May 7, 2001, the Division issued a Notice of Determination (Estimated) assessing petitioner

tax due in the amount of \$1,824.50 plus penalty and interest. On August 31, 2001, the Division issued a Notice and Demand for Payment of Tax Due in the amount of \$1,824.50. The Division has no record of petitioner having filed a return for this period, and at the time of this submission, according to the Division's CARTS records, assessment L-019374979-8 still has a balance due.

12. Assessment L-019920740-7 represents petitioner's failure to both timely file its sales tax return and pay the tax due, for the period December 1, 2000 through February 28, 2001. On August 6, 2001, the Division issued a Notice of Determination (Estimated) assessing petitioner tax due in the amount of \$1,674.04 plus penalty and interest. On November 29, 2001, the Division issued a Notice and Demand for Payment of Tax Due in the amount of \$1,674.04. The Division has no record of petitioner having filed a return for this period, and at the time of this submission, according to the Division's CARTS records, assessment L-019920740-7 still has a balance due.

13. Assessment L-020313194-9 represents petitioner's failure to both timely file its sales tax return and pay the tax due, for the period March 1, 2001 through May 31, 2001. On December 3, 2001, the Division issued a Notice of Determination (Estimated) assessing petitioner tax due in the amount of \$750.00 plus penalty and interest. On March 28, 2002, the Division issued a Notice and Demand for Payment of Tax Due in the amount of \$750.00. The Division has no record of petitioner having filed a return for this period, and at the time of this submission, according to the Division's CARTS records, assessment L-020313194-9 still has a balance due.

14. Assessment L-020550108-1 represents petitioner's failure to both timely file its sales tax return and pay the tax due, for the period June 1, 2001 through August 31, 2001. On January 29, 2002, the Division issued a Notice of Determination (Estimated) assessing petitioner tax due

in the amount of \$750.00 plus penalty and interest. On May 24, 2002, the Division issued a Notice and Demand for Payment of Tax Due in the amount of \$750.00 plus penalty and interest. The Division has no record of petitioner having filed a return for this period, and at the time of this submission, according to the Division's CARTS records, assessment L-020550108-1 still has a balance due.

15. Included with attachments to the petition was a Bureau of Fire Investigation, City of New York, report concerning a multiple alarm fire at petitioner's business location in Brooklyn on November 11, 2001. The fire was reported to have originated in the basement of the building and extended to the walls, ceiling and entire contents of the basement, the first floor grocery store and the exterior walls of the second floor, in addition to an adjacent building's basement area.

SUMMARY OF THE PARTIES' POSITIONS

DTA NO. 825427

16. Petitioner contends that concerning assessment L-014551387-2, covering sales tax quarters from June 1, 1991 through November 30, 1995, the tax due in the amount of \$33,949.90 plus penalties and interest have been paid, and there remains no balance due. Petitioner is unable to acquire proof of payment due to the fire that destroyed its records in 2001 and the failure of the banks to maintain payment history further back than seven years.

17. The Division asserts that petitioner's signature on the Statement of Proposed Audit Adjustment finalizes the liability and by consenting to assessment L-014551387-2, petitioner has surrendered its right to protest such assessment before the Division of Tax Appeals. Further, the Division relies upon its CARTS records to show the history of the assessment.

DTA NO. 825372

18. Petitioner does not take issue with the cancellation of assessment L-023232084-5, but argues that since assessment L-023232084-5, covering 12 consecutive sales tax quarters from December 1, 1998 through November 30, 2000, was canceled, and is the same time frame covered in part by four other notices, assessments L-018115306-3, L-018250842-9, L-018345239-7 and L-019374979-8, those should also be cancelled.

Petitioner argues that assessments L-019920740-7, L-020313194-9 and L-020550108-1 should be cancelled because petitioner filed timely sales tax returns and made corresponding timely payments.

Petitioner asserts that the November 2001 fire destroyed all of its business records and made it impossible for petitioner to answer the challenges presented by the assessments in issue.

19. The Division maintains that the cancellation of assessment L-023232084-5 due to a jurisdictional defect does not require the cancellation of assessments L-018115306-3, L-018250842-9, L-018345239-7 and L-019374979-8, since it has not been shown that the tax owed on assessments L-018115306-3, L-018250842-9, L-018345239-7 and L-019374979-8 was superceded by assessment L-023232084-5 or were derivative assessments of the same.

The Division asserts that assessments L-019920740-7, L-020313194-9 and L-020550108-1 should not be cancelled because petitioner has failed to prove timely filing of the sales tax returns or any timely payments.

The Division maintains that petitioner has not shown that assessments L-018115306-3, L-018250842-9, L-018345239-7, L-019374979-8, L-019920740-7, L-020313194-9 and L-020550108-1 lack a rational basis and should be cancelled.

The Division argues that the fire encountered by petitioner has no merit in the explanation of why petitioner did not remit timely returns and payments.

CONCLUSIONS OF LAW

A. Focusing first on assessment L-014551387-2, a signed consent on a statement of proposed audit adjustment prohibits the subsequent filing of a petition to challenge the same tax. Petitioner did not respond to the motion previously made by the Division with any evidence contrary to its signing the consent in November 1997, and has not since shown that it has paid this assessment in full as petitioner claims. Since petitioner specifically waived its right to a hearing in this matter by executing a consent to the assessment, the Division of Tax Appeals is without subject matter jurisdiction over this assessment. Petitioner's only remaining remedy is to pay the tax assessment as agreed and file for a refund of the tax as provided for in Tax Law § 1139(c) (*see Matter of Brewsky's Goodtimes Corp.*, Tax Appeals Tribunal, February 22, 2001).

B. Tax Law § 1105 (a) imposes a sales tax on the receipts from every "retail sale" of tangible personal property except as otherwise provided in Article 28 of the Tax Law. A "retail sale" is "[a] sale of tangible personal property to any person for any purpose, other than . . . for resale as such . . ." (Tax Law § 1101 [b] [4] [i] [A]). Tax Law § 1138 (a) (1) provides, in relevant part, that if a sales tax return was not filed, "or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the [Division of Taxation] from such information as may be available." When acting pursuant to section 1138 (a) (1), the Division is required to select a method reasonably calculated to reflect the tax due. The burden then rests upon the taxpayer to demonstrate that the method of audit or the amount of the assessment was erroneous (*see Matter of Your Own Choice, Inc.*, Tax Appeals Tribunal, February 20, 2003).

C. Petitioner argues that the cancellation of assessment L-023232084-5 should in turn lead to the cancellation of assessments L-018115306-3, L-018250842-9, L-018345239-7 and L-019374979-8, since the sales tax quarters covered by these four assessments are included in the tax assessed and already covered by the cancelled assessment (L-023232084-5). Three of the four individual assessments, issued in 2000 and 2001, were self-assessed amounts due to late filed returns and took the form of notices and demands. The fourth was a notice of estimated determination of tax due to the failure to file a return, and was issued in 2001. All four preceded assessment L-023232084-5, which was not issued until 2003 and later cancelled in 2013. The tax assessed by the four individual assessments in no way correlates to the tax assessed by the cancelled assessment, i.e., L-023232084-5, and there are no facts that support a finding that the estimated assessment, L-023232084-5, was a duplication of previous separate assessments, that it superceded them or that the individual assessments were derivative of assessment L-023232084-5. Accordingly, assessments L-018115306-3, L-018250842-9, L-018345239-7 and L-019374979-8 will not be cancelled on this basis.

D. Petitioner maintains that assessments L-019920740-7, L-020313194-9 and L-020550108-1 should be cancelled because petitioner filed timely sales tax returns and made corresponding timely payments. As part of the evidence submitted herein, petitioner included copies of three sales tax returns covering the periods with which these assessments are associated. Copies of the returns submitted, however, do not coincide with the Division's records. All three returns are undated, unsigned, and lacking any notations that indicate if or when they were filed with, or received by, the Division. The tax calculated as due on the three returns is not consistent with the amounts claimed due from petitioner according to the assessments. In addition, petitioner has not provided any proof of mailing of the returns to the

Division at any point in time, least of all in a timely manner. It is petitioner's burden of proof to show the returns were properly submitted, and petitioner has failed to carry this burden.

Accordingly, assessments L-019920740-7, L-020313194-9 and L-020550108-1 are not cancelled on this basis.

E. A notice of deficiency is presumed correct, and the burden of proof is upon petitioner to establish that those determinations are erroneous (*Matter of Leogrande v. Tax Appeals Tribunal*, 187 AD2d 768, 589 NYS2d 383[1992], *lv denied*, 81 NY2d 704, 595 NYS2d 398[1993]). The burden does not rest with the Division to demonstrate the propriety of the deficiency (*Matter of Scarpulla v. State Tax Commission*, 120 AD2d 842, 502 NYS2d 113[1986]), and if there are any facts or reasonable inferences from the facts to support the Division's determination, the assessment should be confirmed (*Matter of Levin v. Gallman*, 42 NY2d 32, 396 NYS2d 623[1977]).

Concerning the seven notices addressed by DTA No. 825372, assessments L-018115306-3, L-018250842-9, L-018345239-7, L-019374979-8, L-019920740-7, L-020313194-9 and L-020550108-1, the only arguments raised by petitioner have been addressed in Conclusions of Law C and D, and have been rejected. The Division set forth the details of each of the seven notices from its CARTS unit, including adjustments it made in petitioner's favor when returns were filed by petitioner. Petitioner has not carried its burden of proving that those determinations are erroneous (*Matter of Leogrande*).

F. 20 NYCRR § 2392.1 provides as follows:

“(a)(1) Where any person fails to timely file a return, fails to timely pay any taxes due or fails to meet or fulfill any other act or requirement of the Tax Law, thereby subjecting such person to the additions to tax, penalties, or interest penalty imposed pursuant to sections 182-a(10)(b), 289-b(1)(a), 289-b(2), 433(1)(a), 481(1)(a)(i), 512(1)(a), 527(b), 658(c)(4)(C)(i), 685(a), 685(f), 685(h), 685(o), 685(u), 685(v), 685(w), 1085(a), 1085(n), 1085(0), 1145(a)(1)(i), 1145(c),

1145(e), or 1416(b), of the Tax Law, or the interest amount imposed pursuant to section 1145(a)(1)(ii) of such law, the applicable additions to tax, penalties, interest penalty and/or the interest amount, as listed above, must be imposed unless its shown that such failure was due to reasonable cause and not due to willful neglect. In the event that these amounts have been imposed and it is later determined any such failure was due to reasonable cause and not due to willful neglect, all or part of these amounts will be canceled. The absence of willful neglect alone is not sufficient grounds for not imposing or for canceling these amounts.

* * *

(b) Except where reasonable cause exists or is presumed to exist pursuant to subdivision (c) of this section, all of the facts alleged as a basis for reasonable cause may be required to be affirmatively shown in a written statement made by the taxpayer. Where the taxpayer is unable to provide such a statement or does not have a personal knowledge of such facts, a showing of reasonable cause may be made on the taxpayer's behalf by an individual with a personal knowledge of such facts. *In determining whether reasonable cause exists, in addition to an evaluation of such facts, the taxpayer's previous compliance record with respect to all of the taxes imposed pursuant to the Tax Law may be taken into account.*

* * *

(d) 'Grounds for Reasonable Cause.' The following exemplify grounds for reasonable cause, where clearly established by or on behalf of the taxpayer:

* * *

(2) Destruction of place of business or business records. (i) The destruction of the taxpayer's place of business or business records by a fire or other documented casualty, *which precluded timely compliance*, may constitute reasonable cause, provided that:

'(a)' in the case of the failure to file any return, the applicable return is filed; or

'(b)' in the case of the failure to pay, pay over or deposit any tax, such amount is paid, paid over or deposited, within a justifiable period of time after the casualty has taken place. A justifiable period of time is that period which is substantiated by or on behalf of the taxpayer as a reasonable period of time for filing the return and/or for paying any tax, based on the facts and circumstances in each case (emphasis supplied)."

G. The seven assessments that remain in issue (L-018115306-3, L-018250842-9, L-018345239-7, L-019374979-8, L-019920740-7, L-020313194-9 and L-020550108-1) covered sales tax periods that preceded the fire. The sales tax returns and payments due on those

assessments were due before the date of the fire, and arose due to petitioner's habitually late or nonexistent filing of its sales tax returns, and the failure to timely pay the taxes due. It is likely that the penalties were for late filing, for failure to file and failure to timely pay, though each penalty component is not set forth. Even if tax returns were filed and tax remitted at a later time, it would have to be within a reasonable time frame after their due dates, not years later, for the fire to provide the basis of an abatement in this case. Petitioner was required to file the proper returns and make the proper payments within "a justifiable period of time after the casualty has taken place." Since petitioner has not shown that it took appropriate steps in years closer to the destruction of records to file the returns due and resolve these open assessments, petitioner simply has not met the criteria imposed by the regulation (20 NYCRR 2392.1) to excuse or abate any portion of such assessments on the basis of such destruction.

H. The petition of 8th Avenue Gourmet & Grocery Inc. is denied.

DATED: Albany, New York
June 11, 2015

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE