STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ZOHIR LAHAM	:	
for Revision of Determinations or 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.	:	DETERMINATION DTA NO. 825802

Petitioner, Zohir Laham,[1] 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 period March 1, 2004 through February 28, 2007.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, in New York, New York, on February 19, 2015 at 10:30 A.M., with all briefs due by June 23, 2015, which date began the six-month period for the issuance of this determination. Petitioner appeared by Alvin Silverman, CPA. The Division of Taxation appeared by Amanda Hiller, Esq. (Robert A. Maslyn, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly denied petitioner's application for refund or credit of sales and use taxes.

[1]Although the Bureau of Conciliation Mediation Services issued its order in this matter under the case name "V & Z Deli, Inc.," the application for refund was made in the name of Zohir Laham, individually, and as a responsible person of V & Z Deli, Inc., and the only payment for which a refund was requested was made by Zohir Laham. Therefore, the matter should have been captioned under Mr. Laham's name alone.

FINDINGS OF FACT

1. V & Z, Deli Inc. (V & Z), was a New York corporation whose principal place of business from June 1, 2004 through February 28, 2007 (audit period) was located at 859 Lexington Avenue, New York, New York, where V & Z operated as a vendor of food and drink. On its federal income tax returns, V & Z described its business as "food store" and "groc/deli," a description in which the auditor concurred. Pictures of the business indicated a typical grocery store with racks of dry goods, coolers for refrigerated drinks and other products and a deli counter.

2. At all times relevant herein, petitioner, Zohir Laham, was a person responsible for the collection and payment of sales and use taxes on behalf of V & Z. [2]

3. The audit began in April 2007 when the Audit Division (Division), Queens District Office, sent V & Z the first of four appointment letters, seeking to set an appointment at which the Division could review all books and records pertaining to V & Z's sales and use tax liability. Among the documents requested for review were sales tax returns, federal income tax returns, a general ledger, sales invoices, fixed asset and expense purchases, bank statements, canceled checks, deposit slips, a cash receipts journal, a cash disbursements journal and any exemption documents.

4. The Division received no response to this request and made three subsequent requests for books and records to be made available on June 29, 2007, August 3, 2007 and October 3, 2007. In addition, the Division requested a consent to extend the period of limitations on assessment because the period of limitations for asserting additional sales and use taxes for the

[2] Since officer liability was not challenged, further references to petitioner and V & Z may be interchanged vis-a-vis the audit.

first quarter in the audit period was expiring. Petitioner did not make any records available in response to any of the requests or execute and return the consents.

5. When petitioner failed to return an executed consent to extend the period of limitations on assessment, the Division was forced to estimate the sales and use taxes due for the first quarter of the audit period in order to issue a timely notice of determination.

6. For the first quarter of the audit period, June 1, 2004 through August 31, 2004, the Division employed an estimated audit methodology in the absence of any records provided by petitioner. The Division utilized the 2006 edition of the Almanac of Business and Financial Ratios to estimate gross sales using a rent factor. Petitioner's rent of $116,400.00 was determined from information obtained from petitioner's federal income tax return for the year 2004. The rent factor applicable to food and beverage stores, a category the Division believed was consistent with business activity code 455115 (not the code used by petitioner on its federal returns, which described its business as a food store selling deli and grocery items) was based on the auditor's observation of the business on April 13, 2007. The auditor also made a visit to the business on June 27, 2007 to hand deliver the second request for an audit appointment and production of sales tax books and records.

7. The Division selected a rent factor from the 2006 Almanac of Business and Financial Ratios of 19.6%, representing rent as a percentage of gross sales. The Division used the "zero assets" column to arrive at a gross sales figure it believed was fair to petitioner. When the rent factor was applied to the rent claimed in 2004, it yielded gross sales of $593,878.00. This amount was divided by 4 to determine gross sales for a quarter of $148,469.00.

8. The Division had no records to determine how many of these sales were taxable and based its estimate of a taxable sales ratio of 65% on the auditor's survey of the business on April

13, 2007 and "auditor's experience." The latter basis was said to be the product of "the taxable ratio found on audits of similar type businesses." In the audit report, authored by Ms. Haydee Velez and dated February 2, 2008, she noted the following about her survey: "Based on a survey done the deli is a very busy store selling prepared food, beer, soda, cigarettes, candy, other taxable items, and non taxable food and grocery items." There was no other entry by her concerning the survey in the record, other than a notation in the audit report that a survey had been conducted. Ms. Velez did not testify at the hearing, and her supervisor, Daniel O'Sullivan, who did testify, relied on conversations with Ms. Velez and her statement in the audit report concerning the survey. He never visited the business location but believed that because it sold nontaxable and taxable items it would not be fair to find all sales taxable. Therefore, they chose to rely on office experience with similar businesses to arrive at a taxable ratio of 65%.

9. When the taxable ratio was applied to the audited quarterly sales (65% x $148,469.00), taxable sales per quarter were determined to be $96,505.00.

10. Since the period of limitation on assessment was expiring for the quarter ended August 31, 2004 and no waiver was forthcoming from petitioner, the Division utilized its estimated audit methodology set forth above to determine taxable sales of $96,505.00. It then subtracted taxable sales reported of $26,622.00 to arrive at additional taxable sales of $69,883.00, which yielded additional sales and use tax due of $6,027.42 for the quarter. Notices of determination were issued to petitioner and V & Z, dated September 4, 2007, which asserted additional tax due of $6,027.42 plus penalty and interest for the quarter ended August 31, 2004.

11. When no further books and records were received, the same estimated audit methodology was utilized for the remainder of the audit period, September 1, 2004 through February 28, 2007. It yielded total audited gross sales of $1,504,630.00. The only figure that

changed in the formula was the actual rent paid, which was increased to $119,330.00 per the 2005 federal income tax return filed for V & Z. After applying the 65% taxable ratio, the Division determined audited taxable sales to be $978,009.00. After crediting petitioner $254,049.00 in reported taxable sales, additional taxable sales were calculated to be $723,960.00 yielding $62,441.59 in additional sales and use taxes due.

12. The Division issued to petitioner and V & Z notices of determination, dated December 6, 2007 and November 30, 2007, respectively, which asserted additional sales and use tax of $62,441.59 plus penalty and interest.

13. Following the issuance of the notices, petitioner and V & Z failed to timely protest the notices and they became fixed and final assessments. The matters were petitioned, but the Tax Appeals Tribunal denied the petitions and found that neither petitioner had filed timely protests. (***See Matter of V & Z Deli, Inc.***, Tax Appeals Tribunal, March 18, 2010; ***Matter of Zohir Laham***, Tax Appeals Tribunal, July 1, 2010.)

14. On or about March 20, 2008, petitioner requested a courtesy conference with the Division to discuss the audit results. The request was granted and a conference was held on April 2, 2008. Mr. Laham met with the auditor and Daniel O'Sullivan, and produced two boxes of loose purchase invoices, cash register tapes, checks, bank statements and daybooks. Mr. Laham told the auditors that the business kept no formal books and records. The register tapes did not itemize sales, making it impossible to discern a taxable ratio or tie the amounts into the daybooks. In sum, the records were not in auditable condition and were deemed inadequate and unreliable. Mr. Laham could not explain to the auditors how tax had been reported on the sales tax returns filed for V & Z during the audit period. As a result, the audit results were not adjusted following the courtesy conference.

15. Warrants were filed in New York and Kings Counties for the current amounts due on both assessments in March and July 2008. The warrants were satisfied in full in March 2012.

16. On May 9, 2012, petitioner filed a claim for refund, claiming $77,000.00 due as a refund of sales and use taxes for the period March 1, 2004 through February 28, 2007. The stated basis of the claim was "excessive sales tax assessment, unjust penalty, interest. Respectfully request abatement of penalty and other assessments levied from bank account, not included in the warrant levied for $175,000." Petitioner provided no additional information or documentation to substantiate the claim at that time or thereafter.

17. The Division sent petitioner an appointment letter with a request for documentation on May 24, 2012. The appointment took place at petitioner's representative's office on July 5, 2012. Petitioner explained that his refund claim was based on reasonable cause for the abatement of penalty due to his ill health and problems running the business. Following the conference, the Division denied the refund claim by letter, dated August 6, 2012.

18. The lease in effect for the business at 859 Lexington Avenue indicated a yearly rent of $161,448.00 for the year 2004-2005, $130,008 for the year 2005-2006, and $140,412.00 for the year 2006-2008. These rent figures were much higher than the amounts claimed on V & Z's federal income tax returns and the amounts used by the Division in its estimated audit methodology. In addition, in the addenda to the lease, there was a clause prohibiting petitioner from creating noxious odors from cooking and noting the provision of ventilation equipment in place for the removal of such odors, thus contemplating cooking by petitioner.

19. V & Z did not have sophisticated cash registers and was only able to record taxable and nontaxable sales, with no ability to differentiate between items sold. Further, items such as coffee and water were sold with tax included and would never be traceable on the summary tapes

(Z tapes) generated by the registered. Some Z tapes were produced at the courtesy conference to show a very rough and incomplete estimate of the taxable ratio, but were not considered reliable by the Division's auditors.

SUMMARY OF THE PARTIES' POSITIONS

20. Petitioner contends that the Division's characterization of V & Z as a deli was in error and that it was a grocery store. Petitioner submitted photographs of the store to substantiate its claim. Thus, petitioner believes the Division's assertion of a 65% taxable ratio was overstated.

21. Petitioner also argues that his inability to fully understand the English language hampered his ability to deal with the Division on audit and at the courtesy conference. At the conference held after the refund application, petitioner now maintains that ill health and his poor business acumen justify abatement of penalties.

22. The Division notes the complete lack of books and records produced on audit of V & Z, Inc., and the propriety of its utilization of an estimated audit methodology in that circumstance. The Division argues that the audit methodology it chose was reasonable and that petitioner has raised no grounds for finding otherwise.

23. The Division also contends that the refund claim was properly denied because it was not supported by any proof that the underlying audit was incorrect. The Division notes that the daybook entries and Z tapes produced at hearing were not supported by source documentation and had little, if any, probative value. The Division argues that since all receipts are deemed taxable until the contrary is demonstrated, petitioner did not meet its burden of proving what sales were not subject to tax and the Division's use of a survey and office experience was justified.

24. The Division believes that there was no reasonable cause for the abatement of penalties herein because petitioner has not established that its failure to report and pay the tax was due to reasonable cause and not willful neglect.

CONCLUSIONS OF LAW

A. The standard for reviewing a sales tax audit where an indirect audit methodology has been employed is well established, and was set forth in ***Matter of AGDN, Inc.*** (Tax Appeals Tribunal, February 6, 1997), as follows:

> "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)."

B. The Division may estimate tax liability pursuant to Tax Law § 1138(a)(1) only where a taxpayer's records are inadequate. Tax Law § 1135(a)(1) requires persons required to collect

sales tax to keep records of every sale. These records must be kept in a manner suitable to determine the correct amount of tax due and must be available for the Division's inspection upon request (Tax Law § 1135[g]; 20 NYCRR 533.2[a][2]). The regulations provide that among the sales records required to be maintained are "sales slip, invoice, receipt, contract, statement or other memorandum of sale; . . . guest check, . . . cash register tape and any other original sales document" (20 NYCRR 533.2[b][1]). To determine the adequacy of a taxpayer's records, the Division must first request and thoroughly examine the taxpayer's books and records for the entire period of the proposed assessment (***Matter of Adamides v. Chu***, 134 AD2d 776 [1987], ***lv denied*** 71 NY2d 806 [1988]). If the Division's examination establishes that the taxpayer's records are adequate and complete, the taxpayer is entitled to have its assessment calculated based upon a detailed audit of those records (***Matter of James G. Kennedy & Co. v. Chu***, 125 AD2d 773 [1986]). In contrast, when a taxpayer's records are incomplete and unreliable for determining sales, the Division may resort to external indices to estimate the tax (***Matter of Skiadas v. State Tax Commn.***, 95 AD2d 971 [1983]).

C. The record establishes the Division's four clear and unequivocal written requests for books and records of petitioner's sales on audit and once again after the application for refund was filed, as well as petitioner's failure to produce such books and records. Specifically, there is no dispute that petitioner did not maintain daily register tapes of itemized sales transactions. While petitioner argues that the Z tapes, spotty invoices and daybooks are sufficient to determine the amount of tax due, the evidence shows that the Z tapes were the product of concededly unsophisticated cash registers that broke sales down into two categories and did not distinguish between taxable and nontaxable sales of specific items. Further, the Z tapes are not tied into the daybooks and thus there is no audit trail to trace transactions to any source. In these

circumstances, the Division reasonably concluded that petitioner did not maintain or have available books and records that were sufficient to verify gross and taxable sales for the audit period and was entitled to resort to and indirect audit methodology (***see Matter of W. T. Grant Co. v. Joseph***, 2 NY2d 196, 204 [1957], ***cert denied*** 355 US 869 [1957]; ***Matter of Del's Mini Deli, Inc. v. Commissioner of Taxation and Finance***, 205 AD2d 989, 613 NYS2d 967 [1994]).

The use of rent as a basis for projecting sales is specifically provided for in the second sentence of Tax Law § 1138(a)(1), and its application by the Division has been upheld as valid in numerous instances (***Matter of A & J Gifts Shop v. Chu***, 145 AD2d 877 [1988], ***lv denied***, 74 NY2d 603 [1989]). (***Matter of Abbasi***, Tax Appeals Tribunal, June 12, 2008.) Likewise, use of petitioner's rent to project sales has been upheld as an external index when used in conjunction with statistical information found in a standard reference for business in ***Matter of Constantini*** (Tax Appeals Tribunal, January 10, 2008) and ***Matter of Your Own Choice*** (Tax Appeals Tribunal, February 20, 2003). The Tax Appeals Tribunal has based its approval of the rent factor on the sufficiency of the Division's identification of the statistical report on which its calculations were based (***Abbasi***). The Tribunal's rationale was that the report was available to the public and a taxpayer could produce evidence to challenge its soundness or applicability.

D. In this matter, petitioner has not challenged the report per se. Petitioner's dispute with the Almanac of Business and Industrial Financial Ratios was that the Division reclassified the business activity code to one assigned to food and beverage stores, which it believed best described the premises the auditor surveyed on April 13, 2007 and described in her audit report. Petitioner's own description of its business on its federal returns filed during the audit period, noted a food store selling deli and grocery items. The photos of the business, placed in evidence by petitioner, support such a finding and nothing in the record conflicts with this conclusion.

Therefore, it is held that petitioner's contention is without merit and the Division's assignment of a classification code consistent with the evidence in the record is sustained.

E. Having found that the report was valid and choice of business activity code was proper, it concluded that the ratio was valid also. When applied to the rent reported by V & Z on its federal tax returns, it yielded a gross sales figure that has not been challenged seriously or successfully by petitioner. V & Z's failure to maintain accurate books and records compromised its ability to demonstrate that it had paid its actual sales tax liability.

With a gross sales figure established by the financial ratio applied to its rent, the Division then established a taxable ratio. Petitioner's contention that the taxable ratio used by the Division was overstated is without any factual foundation. V & Z maintained no records to show what the taxable ratio should have been and the 65% taxable ratio used by the Division was grounded in the auditor's experience in the Queens District Office and the survey performed by the auditor on April 13, 2007.

All sales are considered taxable until the contrary is established (Tax Law § 1132[c][1]). However, since the auditor observed both taxable and nontaxable items on the shelves and in the coolers of the store, she knew all sales were not taxable. She relied on her experience with like establishments and her survey to assign a taxable ratio to the sales projected by the ratio generated by the Almanac, for which there is ample precedent. (***See Matter of Hanratty's/732 Amsterdam Tavern v. State Tax Commn.,*** 88 AD2d 1028 [1982], ***appeal dismissed*** 57 NY2d 954 [1982]; [where court upheld markups for beer, wine, liquor and food and percentages for spillage and spoilage that were based on auditor's experience]; ***Matter of Your Own Choice*** [where office experience demonstrated a ratio of taxable sales as high as 70 or 80 percent].)

While petitioner may dispute the accuracy of such an estimate, it did not provide any specific information concerning sales of taxable and nontaxable items. Any imprecision in the results of an audit arising by reason of a taxpayer's own failure to keep and maintain records of all of its sales, as required by Tax Law § 1135(a)(1), must be borne by that taxpayer (***Matter of Ahmed,*** Tax Appeals Tribunal, April 14, 2011[where an auditor's survey was used to establish a percentage of shelf space for soda and her office experience was used to establish reasonable markup percentages for various items sold by the business]; ***Matter of Markowitz v. State Tax Commn.***; ***Matter of Meyer v. State Tax Commn.***).

F. Petitioner has raised an issue with respect to his participation at the courtesy conference afforded him after the notices of determination had become fixed and final assessments. Petitioner appeared at the conference alone and met with the auditor and her supervisor. Petitioner asserts that he did not understand the proceedings and requested an interpreter. Mr. O'Sullivan credibly testified that an interpreter had not been requested in advance and that had Mr. Laham requested one at the conference or made it known that he did not understand the proceedings due to his lack of command of the English language, he would have assisted him.

It is concluded herein, from the credible testimony of Mr. O'Sullivan, that there was no specific request for an interpreter. Petitioner clearly understood why he requested a courtesy conference and went prepared with records to prove he should not be held liable. In addition, petitioner chose to attend the courtesy conference alone. He could have retained a new representative and had that person accompany him to the conference as he did for the hearing in this matter.

From petitioner's testimony, it does not appear he was meaningfully disadvantaged by his lack of English language proficiency. He brought records with him to the conference that were

examined by the auditors and found inadequate and unpersuasive and he conceded that the business did not maintain accurate sales records. The result of the courtesy conference was a refusal by the Division to modify the notices. Given the lack of records produced at the conference, a failure which persisted from the beginning of the audit, it cannot now be argued by petitioner that his language proficiency forms a basis for modifying sound audit results that resulted in fixed and final assessments following his failure to protest.

G. Tax Law § 1145(a)(1)(i) authorizes the imposition of a penalty for the failure to timely file a sales tax return or to pay any tax imposed under Articles 28 and 29 of the Tax Law. Omnibus penalties are imposed under Tax Law § 1145(a)(1)(vi) for failure to report and pay sales tax in an amount in excess of 25% of the amount required to be shown on the return. Petitioner, as a responsible officer of V & Z, was personally liable for the penalties imposed upon the corporation. (***Lorenz v. Division of Taxation***, 212 AD2d 992 [4th Dept 1995], ***affd*** 87 NY2d 1004 [1996]).

Penalties may be abated upon the showing of reasonable cause and a lack of willful neglect. (Tax Law § 1145[a][1][iii], [iv]; 20 NYCRR 2392.1.) Petitioner bears the burden of proving that penalties were improperly assessed. (***Matter of LT&B Realty Corp. v. New York State Tax Commn.***, 141 AD2d 185 [1988].)

Taxpayers face an onerous task in establishing reasonable cause (***Matter of Philip Morris, Inc.***, Tax Appeals Tribunal, April 29, 1993). Here, petitioner has not demonstrated reasonable cause for the abatement of either of the penalties imposed. Although given numerous opportunities to produce books and records, including after its refund application, to establish V & Z's sales tax liability for the audit period, it has never done so. In fact, the record reveals that V & Z never maintained the books and records required by law. Petitioner's only arguments

contesting the audit results revolve around the products it sold and the ratio of taxable to nontaxable sales.

Its Z tapes had no probative value in establishing a taxable ratio since such tapes do not itemize and could not be tied in with daybooks. Likewise, its registers were antiquated and could not produce a breakdown of items sold. Its claims that it did not prepare food is belied by the lease for the property, which clearly contemplated cooking, noting exhaust fans and the removal of smoke and odors.

Petitioner's contention that his ill health and poor business acumen justify an abatement of the penalties and a refund is without merit as well. Petitioner raised these contentions for the first time at hearing and, without more, they simply do not constitute a basis for abatement of the penalties that were properly imposed.

H. Given the conclusions reached herein with respect to the audit performed for the audit period coupled with petitioner's failure to submit any evidence with its refund application, the Division's denial of said application was proper.

I. The petition of Zohir Laham is denied and the Division's denial of petitioner's application for refund, dated August 6, 2012, is sustained.

DATED: Albany, New York
December 3, 2015

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE