

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
	:	
of	:	
	:	
HARI ARMIT CORPORATION	:	DETERMINATION
	:	DTA NO. 827506
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 June 1, 2012 through February 28, 2015.	:	

Petitioner, Hari Armit Corporation, 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 June 1, 2012 through February 28, 2015.

A hearing was held before Kevin R. Law, Administrative Law Judge, in Albany, New York, on November 28, 2017 at 10:30 a.m., with all briefs to be submitted by May 11, 2018, which date began the six-month period for the issuance of this determination. Petitioner appeared by Buxbaum Sales Tax Consulting, LLC (Michael Buxbaum, CPA). The Division of Taxation appeared by Amanda Hiller, Esq. (M. Greg Jones, Esq., of counsel).

ISSUES

I. Whether the audit methodology utilized by the Division of Taxation had a rational basis and was reasonably calculated to reflect the tax due.

II. Whether petitioner has shown reasonable cause for the abatement of penalties.

FINDINGS OF FACT

1. Petitioner, Hari Armit Corporation, is a convenience store in Wingdale, New York, that does business under the name of Wingdale Beer and Soda.

2. In April 2015, the Division commenced a sales tax audit of petitioner for the period June 1, 2012 through February 28, 2015 (the audit period).

3. The Division began the audit by conducting a survey of the business. The auditor observed that petitioner sold beer, soda, water, ice cream, miscellaneous baked goods, cigarettes and lottery tickets.

4. By appointment letter dated May 4, 2015, the Division informed petitioner that a field audit of its New York State sales and use tax records for the audit period was scheduled for May 28, 2015. The letter further explained that all books and records pertaining to sales and use tax liability for the audit period must be available for the appointment. Attached to the letter was an information document request (IDR) listing the items to be provided, including, petitioner's general ledger, sales invoices, exemption documents, cash register tapes, and bank statements for the audit period. The letter requested that petitioner call the Division's auditor prior the audit date to confirm the audit appointment.

5. On May 28, 2015, having received no response to the initial letter, the Division's auditor sent a second written request for petitioner's books and records and rescheduled the audit appointment.

6. The Division's auditor was eventually contacted by Bacham Singh to schedule an audit appointment. Mr. Singh is listed as petitioner's treasurer on petitioner's application to register for a sales tax certificate of authority.

7. On June 29, 2015, the auditor went to petitioner's business location to perform the audit and was met by Mr. Singh's son, who provided the auditor a box containing 70 days worth of cash register tapes and daily summary tapes. Based upon the auditor's review of what was provided, a detailed audit was not possible so an estimated audit methodology was employed.

Specifically, using the available cash register tapes, the auditor calculated a cash to credit ratio as well as a taxable ratio. Applying the cash to credit ratio to petitioner's credit card sales as reported to the Division by third party credit card vendors, the auditor estimated gross sales. With the gross sales amount, the auditor estimated taxable sales and tax due using the taxable ratio extrapolated from petitioner's cash register tapes.

8. On September 16, 2015, the Division issued a notice of determination, notice number L-043659883, to petitioner, asserting tax due in the amount of \$163,704.62, plus penalty and interest.

9. Following a conciliation conference in the Division's Bureau of Conciliation and Mediation Services, a conciliation order was issued reducing the tax to \$142,870.42 plus penalty and interest.

10. The petition in this matter alleges that the notice of determination lacks a rational basis and is arbitrary and capricious. The petition also alleges reasonable cause exists that would justify abatement of the penalties.

11. Petitioner did not present any witnesses or produce any documentary evidence at the hearing, and did not file a post-hearing brief.

CONCLUSIONS OF LAW

A. 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]). Tax Law § 1135 (a) (1) provides that "[e]very person required to collect tax shall keep records of every sale . . . and of all amounts paid,

charged or due thereon and of the tax payable thereon, in such form as the commissioner of taxation and finance may by regulation require.”

B. Tax Law § 1138 (a) (1) provides, in relevant part, that if a sales tax return was not filed, “or if a return when filed was incorrect or insufficient, the amount of tax due shall be determined [by the Division of Taxation] from such information as may be available. If necessary, the tax may be estimated on the basis of external indices” (Tax Law § 1138 [a] [1]). 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. The standard for reviewing a sales tax audit where external indices were employed was set forth in *Matter of Your Own Choice, Inc.*, as follows:

“To determine the adequacy of a taxpayer’s records, the Division must first request (*Matter of Christ Cella, Inc. v. State Tax Commn.*, [102 AD2d 352, 477 NYS2d 858] *supra*) and thoroughly examine (*Matter of King Crab Rest. v. Chu*, 134 AD2d 51, 522 NYS2d 978) the taxpayer’s books and records for the entire period of the proposed assessment (*Matter of Adamides v. Chu*, 134 AD2d 776, 521 NYS2d 826, *lv denied* 71 NY2d 806, 530 NYS2d 109). The purpose of the examination is to determine, through verification drawn independently from within these records (*Matter of Giordano v. State Tax Commn.*, 145 AD2d 726, 535 NYS2d 255; *Matter of Urban Liqs. v. State Tax Commn.*, 90 AD2d 576, 456 NYS2d 138; *Matter of Meyer v. State Tax Commn.*, 61 AD2d 223, 402 NYS2d 74, *lv denied* 44 NY2d 645, 406 NYS2d 1025; *see also, Matter of Hennekens v. State Tax Commn.*, 114 AD2d 599, 494 NYS2d 208), that they are, in fact, so insufficient that it is ‘virtually impossible [for the Division of Taxation] to verify taxable sales receipts and conduct a complete audit’ (*Matter of Chartair, Inc. v. State Tax Commn.*, 65 AD2d 44, 411 NYS2d 41, 43; *Matter of Christ Cella, Inc. v. State Tax Commn.*, *supra*), ‘from which the exact amount of tax due can be determined’ (*Matter of Mohawk Airlines v. Tully*, 75 AD2d 249, 429 NYS2d 759, 760).

Where the Division follows this procedure, thereby demonstrating that the records are incomplete or inaccurate, the Division may resort to external indices to

estimate tax (*Matter of Urban Liqs. v. State Tax Commn., supra*). The estimate methodology utilized must be reasonably calculated to reflect taxes due (*Matter of W.T. Grant Co. v. Joseph*, 2 NY2d 196, 159 NYS2d 150, *cert denied* 355 US 869, 2 L Ed 2d 75), but exactness in the outcome of the audit method is not required (*Matter of Markowitz v. State Tax Commn.*, 54 AD2d 1023, 388 NYS2d 176, *affd* 44 NY2d 684, 405 NYS2d 454; *Matter of Cinelli*, Tax Appeals Tribunal, September 14, 1989). The taxpayer bears the burden of proving with clear and convincing evidence that the assessment is erroneous (*Matter of Scarpulla v. State Tax Commn.*, 120 AD2d 842, 502 NYS2d 113) or that the audit methodology is unreasonable (*Matter of Surface Line Operators Fraternal Org. v. Tully*, 85 AD2d 858, 446 NYS2d 451; *Matter of Cousins Serv. Station*, Tax Appeals Tribunal, August 11, 1988). In addition, ‘[c]onsiderable latitude is given an auditor’s method of estimating sales under such circumstances as exist in [each] case’ (*Matter of Grecian Sq. v. New York State Tax Commn.*, 119 AD2d 948, 501 NYS2d 219, 221).”

D. In this case, the Division made a clear, unequivocal request for petitioner’s records and was supplied with only a portion of its cash register tapes. Thus, there can be no serious dispute that petitioner’s records were inadequate and that the auditor was well within his rights to use an indirect audit methodology. Here, the auditor’s use of those tapes coupled with the use of third party credit card information to obtain a cash to credit ratio and to estimate gross and taxable sales is a reasonable audit methodology. Petitioner produced no documentary evidence or witness testimony at hearing in order to shoulder its burden of proving that the assessment is erroneous.

E. In its petition, petitioner alleges that any omissions in tax were due to reasonable cause, and not willful neglect. In establishing reasonable cause for the abatement of penalty, the taxpayer faces an onerous task (*see Matter of Philip Morris, Inc.*, Tax Appeals Tribunal, April 29, 1993). As noted above, petitioner did not provide any documentary evidence or witness testimony at hearing much less an argument as to why reasonable cause is present. Here, there is simply no basis that would support abating the assessed penalty.

F. The petition of Hari Armit Corporation is denied and the notice of determination, dated September 16, 2015, as modified by the conciliation order, is sustained.

DATED: Albany, New York
November 08, 2018

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE