

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
HILARIO TAVERAS : DETERMINATION
DTA NO. 828051
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 September 1, 2010 through May 31, 2013. :

Petitioner, Hilario Taveras, 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 September 1, 2010 through May 31, 2013.

A hearing was held on April 10, 2018, at 1:30 p.m. in New York, New York. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Adam L. Roberts, Esq., of counsel) with all briefs to be submitted by August 31, 2018, which date commenced the six-month period for issuance of this determination. After reviewing the entire record in this matter, Donna M. Gardiner, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation's use of an indirect audit methodology to estimate sales and use tax due for the audit period was proper.

FINDINGS OF FACT

1. Petitioner, Hilario Taveras, was president of a corporation named Taveras Sisters, Inc., (the corporation) that operated a convenience store that sold, food, drink, cigarettes, and other items.

2. By letter dated June 28, 2013, the Division of Taxation (Division) advised petitioner that the corporation's New York State sales and use tax returns, forms ST-100, had been selected for a desk audit for the period September 1, 2010 through May 31, 2013. Petitioner's business was selected for audit as a result of third-party information the Division received from wholesalers. This information, when compared to the sales tax reported by petitioner on the ST-100s, resulted in a discrepancy.

The letter, which was sent by Ameer Layne, Tax Technician I, also noted that eight enclosures accompanied the letter including both audit work papers and a statement of proposed audit changes. The letter provided instructions for petitioner, depending on whether he agreed or disagreed with the statement of proposed audit changes. The referenced statement of proposed audit changes and audit work papers were not included with the cover letter as part of the audit file nor were any of the other stated enclosures. Furthermore, there was no information within the audit file as to any communication between petitioner and the Division in response to this June 28, 2013 letter.

3. By letter dated September 25, 2013, the Division issued a statement of proposed audit changes to petitioner for additional sales and use tax due in the amount of \$58,842.22, plus penalty and interest for the audit period.

4. At some point thereafter, this case was transferred to Mary Pantan, an auditor for the Division. The Tax Field Audit Record (log), submitted as part of the Division's audit file, had its first entry reflecting the date of November 7, 2013. This entry indicated that the taxpayer was telephoned to follow up on the proposed audit adjustment.

5. The Division did not submit a log reflecting the work performed by the initial auditor, Ms. Layne. Additionally, the log that began in November did not indicate that Ms. Pantan was

transferred the file from a previous auditor. The only evidence of any work completed by the initial auditor was the cover letter dated June 28, 2013 and the September 25, 2013 statement of proposed audit changes. Both of these letters were sent to the business, Taveras Sisters, Inc.

6. The log does not indicate that a request for books and records was made to petitioner. However, the audit file contains a one paragraph letter to petitioner by Ms. Panton on November 18, 2013, that referred petitioner to the original June 23, 2013 letter and advised petitioner to respond by November 27, 2013 “as to how the matter will be resolved.” Additionally, there lacked any notation regarding what documents were presented by petitioner and examined by the Division. At no point was a notation included to reflect that petitioner’s documentation was determined to be inadequate.

7. Although the Division issued to petitioner a notice of determination, assessment ID number L-041109881, dated April 29, 2014, assessing additional sales tax due in the amount of \$48,107.06, plus penalty and interest for the audit period, this was not mentioned in the log.¹ The only notation in the log addressed the issuance of a notice of determination to the business. Such notice is not at issue in this proceeding.

8. The log commences with a notation dated November 7, 2013 and there are four additional notations, culminating with the notation on December 5, 2013 that the auditor prepared the assessment notice for mailing to the business. As mentioned in finding of fact 7, the log lacks any notation that the auditor prepared an assessment notice for issuance to petitioner as a responsible officer.

¹ On July 20, 2017, an order was issued in this case that addressed the issue of whether petitioner filed a timely petition to protest this notice of determination. The order concluded that the petition was deemed timely in light of the Division’s failure to establish that it properly mailed the assessment to petitioner at his last known address.

9. The notice assessed additional tax due in the amount of \$48,107.06 which amount is roughly \$10,000.00 less than the additional sales and use tax set forth in the statement of proposed audit changes. There is nothing in the log to explain the adjustment.

10. There is a notation dated February 3, 2014 in the log that states a request for a conciliation conference was made by petitioner.² A conciliation order was issued by the Bureau of Conciliation and Mediation Services (BCMS), dated December 30, 2016, that sustained the notice of determination. Thereafter, on January 21, 2017, the Division of Tax Appeals received a petition from petitioner, Hilario Taveras, challenging notice of determination, assessment ID number L-041109881.³

11. There are seven detailed notations in the log after receipt of petitioner's request for conciliation conference. At the end of the log, it has an area to account for time spent on the audit for field, office and assist. The number 0.00 is indicated in each column. The log totals the number of hours worked on the file. The log indicates 0.00.

12. On page four of the audit file, there is a document referencing the BCMS case. The presentation of the documents in the exhibit referred to as the audit file is confusing. Since the log lacked any notations regarding receipt of or requests for information, it is hard to decipher which documents were presented to the auditor and which documents were submitted at BCMS. In fact, many of the documents submitted by facsimile occurred after the request for conciliation conference was filed.

² This notation is curious given that it indicates a request for conciliation conference was made over two months prior to the date of the notice of determination, i.e. April 29, 2014.

³ The petition also protested a separate notice of determination issued to the business that was the subject of a separate proceeding. Pursuant to the decision issued in *Matter of Taveras Sister[s], Inc.* (Tax Appeals Tribunal, March 20, 2018), the petition with respect to such notice was dismissed for lack of jurisdiction. Therefore, the only notice at issue is assessment number L-041109881.

13. At the formal hearing, the Division presented the testimony of Michael Breunig. Mr. Breunig is a Tax Technician II with the Division and appeared as a witness in this case due to the promotion of Ms. Panton. He testified that he was familiar with the facts since he spoke with Ms. Panton in preparation for the hearing.

14. Mr. Breunig testified that initially, no information was received from petitioner, but eventually, the Division received some material. As stated in findings of fact 6 and 7, there is no written notation in the log concerning any documents presented or examined. There is no written correspondence to petitioner that indicates an examination of the corporation's records was conducted to conclude that such records were not detailed enough to verify sales.

15. Mr. Breunig testified that, in his opinion, the Division did not have enough to do a detailed audit because the Division wanted to see documentation regarding sales and it did not receive that information. There is nothing in the log to support that assertion.

CONCLUSIONS OF LAW

A. Tax Law § 1138 (a) (1) provides that if “a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by (the Division) from such information as shall be available. If necessary, the tax may be estimated on the basis of external indices . . .” This language has been interpreted to provide that “[t]he honest and conscientious taxpayer who maintains comprehensive records as required has a right to expect that they will be used in any audit to determine his ultimate liability” (*Matter of Chartair, Inc. v State Tax Commn.*, 65 AD2d 44, 47 [3d Dept 1978]).

B. 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 [3d Dept 1984]) and

thoroughly examine (*Matter of King Crab Rest. v Chu*, 134 AD2d 51 [3d Dept 1987]) the taxpayer's books and records for the entire period of the proposed assessment (*see Matter of Adamides v Chu*, 134 AD2d 776 [3d Dept 1987], *lv denied* 71 NY2d 806 [1988]). The request for records must be explicit and not "weak and casual" (*Matter of Christ Cella, Inc.*, at 354).

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 [3d Dept 1988]; *Matter of Urban Liqs. v State Tax Commn.*, 90 AD2d 576 [3d Dept 1982]; *Matter of Meyer v State Tax Commn.*, 61 AD2d 223 [3d Dept 1978], *lv denied* 44 NY2d 645 [1978]; *Matter of Hennekens v State Tax Commn.*, 114 AD2d 599 [3d Dept 1985]), that they are, in fact, so insufficient that it is "virtually impossible [for the Division] to verify taxable sales receipts and conduct a complete audit" (*Matter of Chartair, Inc.*), "from which the exact amount of tax can be determined" (*see Matter of Mohawk Airlines v Tully*, 75 AD2d 249 [3d Dept 1980]). 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 (*see Matter of Urban Liqs.*).

C. The first requirement to determine the adequacy of a taxpayer's records is that an explicit request for books and records must be made by the Division. In reviewing the cover letter, dated June 28, 2013, it instructed the corporation to submit documents if it disagreed with the statement of proposed audit changes. The letter requested 10 items. It is determined that the letter constitutes an explicit request for documents.

D. The next requirement is for the Division to thoroughly examine the books and records for the entire audit period. As set forth in the findings of fact, the audit log does not reflect what

documents were received or examined. In fact, the audit log created by the initial auditor assigned to this matter was not introduced into the record. There is virtually nothing representative of the initial auditor's work on this case other than a two-page letter sent to the business and the two-page statement of proposed audit changes.

Once the case was undertaken by the second auditor, there were only six notations made in a thirty-day period prior to assessment. Surprisingly, the auditor failed to indicate by any notation that an assessment was issued to petitioner. The only notation reflected the assessment issued to the corporation. The audit log does not even reflect the amount of time spent on each of the activities reflected in the log. However, on page two of the log, it indicated that no time was spent on the case.

Since the Division has not established that it thoroughly examined the documentation submitted by petitioner, it is determined that the Division did not follow the steps required in order to estimate sales tax due using an indirect audit methodology. Thus, the assessment issued by the Division lacked a rational basis and is hereby canceled.

E. The petition of Hilario Taveras is granted and the notice of determination, assessment number L-041109881, dated April 29, 2014, is cancelled.

DATED: Albany, New York
February 7, 2019

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE