

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RAJNI T. MOHNANI	:	DETERMINATION
	:	DTA NO. 828964
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, 2013 through	:	
February 28, 2017.	:	

Petitioner, Rajni T. Mohnani, 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, 2013 through February 28, 2017.

A hearing was held in Albany, New York, on July 2, 2021, with all briefs to be submitted by October 21, 2021, which date began the six-month period for issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Elizabeth Lyons, Esq., of counsel). After reviewing the entire record in this matter, Nicholas A. Behuniak, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the audit methodology utilized by the Division of Taxation in its audit of 101 Auto Mall, Inc., had a rational basis and was reasonably calculated to reflect the taxes due.

II. Whether petitioner Rajni T. Mohnani was personally liable for the sales and use taxes due on behalf of 101 Auto Mall, Inc., as a person required to collect and pay such taxes under the Tax Law.

FINDINGS OF FACT

1. The Division of Taxation conducted a sales and use tax audit of 101 Auto Mall, Inc. (the business), a used car dealership and auto repair shop, for the period September 1, 2013 through November 30, 2016.

2. The Division assigned auditor Joon Kim to perform the audit. On February 17, 2017, the auditor sent an initial appointment letter to commence the audit, as well as an information document request (IDR), to the business.

3. The February 17, 2017 IDR requested the business' books and records for the period September 1, 2013 to November 30, 2016, including: sales tax returns, worksheets, and canceled checks showing taxes paid; federal income tax returns; New York State corporate tax returns; general ledger; general journal and closing entries; sales invoices; all exemption documentation supporting non-taxable sales; chart of accounts; fixed asset purchase and sales invoices; expense purchase invoices; merchandise purchase invoices; bank statements, canceled checks and deposit slips for all accounts; cash receipts journal including sales journal; cash disbursement journal including purchase journal; the corporate book, including minutes, board of directors and articles of incorporation; depreciation schedules; lease/rental agreements; waste tire management fee returns; NYS motor vehicle MV-50 forms; books of registry; dealer financial statements; car jackets (a/k/a deal jackets or customer files); dealer floor plan; service vehicle replacement report; demo/loaner/rental vehicle log; wage reporting tax returns; and manufacturer parts statements.

4. On February 28, 2017, the auditor went to the business location and met with petitioner to discuss the audit. On April 14, 2017, the auditor again went to the business location and met with petitioner to discuss the audit. At this meeting, petitioner provided bank statements, federal

income tax returns for 2013 through 2015 for the business, and purchase bills from an auto auction.

5. On April 20, 2017, the auditor went to the business location and received the following additional information requested in the February 17, 2017 IDR: vehicle purchase list from the automobile seller Manheim for 2013-2017, vehicle purchase list from the automobile seller Dealer Block for 2016, and New York State MV-50 forms for 2013 through 2016. At this meeting, the auditor inquired about bills of sale, purchaser information, and payment methods for the business. Petitioner informed the auditor that for the business' used vehicle sales, the business only maintained the MV-50 forms.

6. The business filed New York State sales tax returns for the periods ending November 30, 2014 and November 30, 2016. However, the business failed to file sales tax returns for the remaining quarters of the audit period. The auditor determined that the books and records provided were inadequate since there were no source documents to support the reported gross sales reflected on the sales tax returns filed.

7. On May 9, 2017, the auditor informed petitioner that the audit period was being extended to February 28, 2017. On May 9, 2017, the auditor sent an IDR for the updated audit period. The May 9, 2017 IDR requested: sales tax returns, worksheets, and canceled checks showing taxes paid; federal income tax returns; New York State corporate tax returns; general ledgers; general journal and closing entries; sales invoices; all exemption documentation supporting non-taxable sales; chart of accounts; fixed asset purchase sales invoices; expense purchase invoices; merchandise purchase invoices; bank statements; canceled checks and deposit slips for all accounts; cash receipts journal including sales journal; cash disbursement journal

including purchase journal; the corporate books, including minutes of the board of directors' meetings and articles of incorporation; depreciation schedules and lease/rental agreements.

8. In May of 2017, petitioner provided the auditor MV-50 forms for the updated audit period and certain repair invoices for the business' repair shop.

9. The Division issued notice of determination L-048700629 (notice), dated August 16, 2018, to petitioner as a responsible person of the business assessing tax due of \$150,718.36, plus interest and penalties.

10. Petitioner filed a petition with the Division of Tax Appeals protesting the notice. Petitioner asserts in the petition that she was not a responsible person of the business.

11. After the July 2, 2021 hearing in this matter, the record was kept open until July 16, 2021 to enable petitioner to submit additional documentation in support of her position. On July 15, 2021, petitioner submitted an equipment invoice dated September 4, 2013 for automobile repair equipment purchased by the business.

12. At the hearing, the Division presented the testimony of its auditor, Joon Kim. The auditor testified as to the conduct of the audit and the assessment of petitioner as a responsible person of the business.

13. The business did not maintain a general ledger or all the invoices for the repair shop sales. The business failed to provide the contracts of sale or finance documents for the used car sales which the auditor requested in order to verify sales. The only records maintained by the business for its used car sales were New York State MV-50 forms.

14. To calculate the business' used car sales for the audit period, the auditor used the MV-50 forms provided by petitioner since they were the most accurate and complete document the

auditor received from the business.¹ The auditor took the business' MV-50 forms for the audit period and transcribed the information onto a worksheet. For the business' wholesale, out of state sales, or loaner car transactions the auditor testified that these sales were not included in the final calculation of the business' retail sales subject to sales tax.² The auditor added up all of the applicable retail sales reflected on the business' MV-50 forms provided and calculated estimated gross sales of \$1,584,852.10 for the period at issue. The gross sales were reduced to \$1,580,131.10 to reflect when the auditor determined that a MV-50 form sale price included sales tax in the overall sales price.

15. The auditor reviewed the repair invoices provided by petitioner to estimate the business' auto repair sales. The auditor asserts that petitioner only provided auto repair invoices for the 18 months of October 2014 to July 2015; November 2015 to January 2016 and April 2016 to August 2016.³ Total sales in the amount of \$94,315.59 were calculated from all of the auto repair invoices provided and \$2,015.52 in sales tax paid was subtracted from the total sales, resulting in total auto repair sales of \$92,300.07. The auditor calculated average repair sales of \$5,115.00 per month by dividing what the auditor represented as total repair sales of \$92,070.07⁴ by 18 months, which is the total number of months the auditor represented he had received repair

¹ The auditor testified that certain information for automobile sales (e.g., trade-in vehicle allowances) would not be reflected on the MV-50 form.

² A review of the relevant audit workpapers by the undersigned supports this assertion. The audit workpapers show several "sales" memorialized from the MV-50 forms but there is no correlating sales dollar amount for the transaction included in the sales column of the auditor's worksheets. This indicates that the auditor received several MV-50 forms from petitioner but did not include the transactions as sales subject to State sales tax.

³ In a review of the audit workpapers, the undersigned noted that the auditor transcribed repair invoice information for the month of February 2016. Contrary to the Division's assertions, it appears petitioner provided the auditor invoices for 19 months.

⁴ $\$94,315.59 - \$2,015.52 = \$92,300.07$; the Division fails to explain why the number calculated as total sales by the auditor differs from the calculation that the Division and auditor represented was completed which was the total repair sales less the taxes included therein. The difference is in petitioner's favor and deemed immaterial.

invoices from the business for. The auditor estimated that the business' repairs started in September of 2013. The auditor applied the \$5,115.00 per month average of auto repair sales to any month from the beginning of the audit period, September 2013, through end of the audit period, February 2017, in which the auditor determined invoices had not been provided by petitioner. Otherwise, the auditor utilized the actual invoice repair sales numbers, except for the February 2016 repair invoice, provided by petitioner for a given month. Total repair sales were determined to be \$209,715.07 for the audit period.

16. The auditor added taxable car sales of \$1,580,131.13 and repair shop sales of \$209,715.07 for total taxable sales of \$1,789,846.20. This amount was further reduced by the additional sales taxes included in that number, \$21,950.00, and resulted in \$1,767,896.20 of taxable sales for the audit period.

17. Total taxable sales of \$1,767,896.20 was multiplied by the applicable sales tax rate of 8.875% to determine total sales tax due of \$156,900.79. The auditor deducted \$6,182.43 in sales tax previously assessed for total sales tax due of \$150,718.36, which was the amount of additional tax assessed on the notice.

18. The auditor assessed penalty because he determined that the business was collecting sales tax on some sales but not remitting such to the State.

19. Petitioner was assessed as a responsible person of the business. During the audit, the auditor met with petitioner several times to discuss the audit, and at all times the auditor testified that petitioner appeared to have had access to the books and records of the business and was able to explain the business' operations. The auditor completed a survey report on February 28, 2017 which noted that petitioner had indicated to the auditor that she was the owner of the business and oversaw the records of the business. The auditor also performed a business entity search

with the New York State Department of State which showed petitioner as the registered agent for the business. Petitioner was listed as the responsible person and president on the business' Application to Register for a Sales Tax Certificate of Authority, form DTF-17.

20. On October 19, 2017, on behalf of the business, petitioner executed a consent extending the statute of limitations for the audit. An additional consent was executed by petitioner, on behalf of the business, on April 25, 2018. Petitioner executed both consents as the president of the business.

21. Petitioner signed a form entitled Communication with the Tax Department during your Audit on which she identified herself as president for the business.

22. Petitioner signed, as the business' president, the State general business corporation franchise tax returns, form CT-3, for 2014, 2015, 2017, 2018.

23. The audit report includes business checks signed by petitioner.

24. Petitioner's name appears in the "submitted by" line of the two sales tax returns filed by the business during the audit period.

25. Petitioner testified at the hearing that she did not know the business was required to collect and remit sales tax to the State.

26. Petitioner testified that she submitted New York State corporate tax and sales tax returns for the business. She testified that she had access to the books and records of the business. She testified that the business was not maintaining adequate business records and was only maintaining the MV-50 forms for used car sales.

27. Petitioner testified that the business was collecting sales tax on transactions but was not remitting the sales tax to the State but rather was using it to pay other business expenses because such was needed to keep the business operating.

28. Petitioner testified that she was at the business daily,⁵ and that she signed checks on behalf of the business.

29. Petitioner testified that she consulted with her brother about running the business, made business decisions on her own and had the independent ability to give input into the operations of business even though her decisions were not always taken into consideration.

30. Petitioner testified that auto repair sales began in late-2014 because it took time to fully set up and utilize the repair equipment purchased and prior to that time period any repairs were on cars owned by the business and were done at no charge in order to prepare the cars for sale.

31. At the hearing, petitioner presented the testimony of her brother, Roger Mohnani.⁶ Mr. Mohnani testified that petitioner was involved in the business. Mr. Mohnani also testified that the business collected sales tax on transactions but used the money to pay business expenses.

32. Mr. Mohnani testified that the business did not maintain adequate records. He testified that the business did not have a general ledger, invoice of sales or other accounting records.

33. In its letter brief filed after the hearing, petitioner asserts the Division's assumptions are incorrect and most of the business' sales were non-taxable wholesale sales. Petitioner also argues that many of the invoices the Division used in its calculations were invoices for a

⁵ In petitioner's brief filed after the hearing, she asserts that she did not understand what was being asked of her when she testified that she came to the business "daily." It is noted that at the beginning of the hearing the undersigned offered petitioner free access to a translator for the hearing and petitioner rejected such. Moreover, even if the undersigned discounted petitioner's testimony on this issue, it would not impact the ultimate conclusions found herein.

⁶ The audit file indicates that the auditor concluded that Mr. Mohnani should have been assessed personally as an additional responsible person of the business; however, the audit file indicates the auditor reached this conclusion too late to charge him as such.

different auto dealership, one owned by her brother, Roger Mohnani, which was operating next door to petitioner's business. Finally, petitioner argues the business was closed in 2018 and neither the business nor petitioner have money to pay the assessment and therefore it should be reduced or cancelled.

CONCLUSIONS OF LAW

A. 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. Such records shall include a true copy of each sales slip, invoice, receipt, statement or memorandum upon which subdivision (a) of section eleven hundred thirty-two requires that the tax be stated separately.”

The sales records required to be maintained include, among other things, sales slips, invoices, receipts, statements or other memoranda of sale, guest checks, cash register tapes and any other original sales documents (20 NYCRR 533.2 [b] [1]).

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 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 estimate methodology utilized by the Division must be reasonably calculated to reflect taxes due (*Matter of W. T. Grant Co. v Joseph*, 2 NY2d 196 [1957], *cert denied* 355 US 869), but exactness in the outcome of the audit method is not required (*Matter of Markowitz v State Tax Commn.*, 54 AD2d 1023 [3d Dept 1976], *affd* 44 NY2d 684 [1978]; *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 [3d Dept 1986]) or that the audit methodology is

unreasonable (*Matter of Surface Line Operators Fraternal Org. v Tully*, 85 AD2d 858 [3d Dept 1981]; *Matter of Cousins Serv. Station*, Tax Appeals Tribunal, August 11, 1988).

C. The standard for reviewing a sales tax audit where external indices or estimates are employed was set forth in *Matter of Your Own Choice, Inc.*, (Tax Appeals Tribunal, February 20, 2003) 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) 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).”

D. In the case at hand, the record shows that the Division made several written requests for the business' books and records. Petitioner maintained almost no business records and very little was provided in response to the Division's requests. As a result, the Division used the business' own MV-50 forms and auto repair invoices to determine the tax due. MV-50 forms are records provided by the State Department of Motor Vehicles to car dealers to record car sales. Each time a car dealer sells a car, the dealer is required to complete a MV-50 form. The MV-50 forms include the following relevant information to be completed by the dealer for each transaction: type of sale (wholesale or retail, and new, used, demo or salvage); the vehicle year, make, model, body type, and color; the vehicle identification number (VIN); the vehicle's

inspection certificate number, date and place of inspection; the vehicle's license plate or permit number; the selling price; the dealer's information (name and address); the purchaser's information (name and address); the date of sale; prior owner information including name, address, and date of purchase; odometer reading; a dealer certification that the sale occurred and that “[a]ll New York State and local taxes due as a result of this sale have been collected from the purchaser;” the dealer's and purchaser's signatures and date; and the dealer's facility number and sales tax number (*see Matter of Silverstein*, Tax Appeals Tribunal, December 7, 2017). The Tax Appeals Tribunal has accepted the utilization of MV-50 forms to calculate a taxpayer's sales tax liability (*Id.*). In this case, the auditor took the MV-50 forms supplied directly by petitioner to determine the total taxable used car sales for the audit period. At the hearing, petitioner admitted that the MV-50 forms were the best records available that petitioner still had. In its brief, for the first time, petitioner asserts that the invoices the Division utilized to calculate the sales tax due were not for petitioner's business but rather for a separate and different business operated next door by petitioner's brother. Also, for the first time in its brief petitioner asserts that many of the automobile sales the Division counted were wholesale transactions not subject to sales tax. As noted above it is petitioner's burden to establish the Division's approach was unreasonable. Petitioner offers no documentation to support its assertions. Petitioner provided the auditor the very MV-50 forms he used in his calculations. If petitioner wished to address the MV-50 forms it provided the auditor and establish that transactions actually belonged to a different taxpayer or were somehow not taxable, she could have done such at the hearing. Moreover, the Division's auditor appears to have already properly accounted for petitioner's non-taxable transactions (*see* finding of fact 14). Petitioner's newfound and unsupported

assertions do not rise anywhere close to the level necessary to meet its burden of proof establishing errors by the Division.

E. For the business' auto repair sales, the Division estimated the total taxable sales for the audit period by utilizing the invoices petitioner supplied for such charges. The Division took all of the business' invoices that were supplied by petitioner, except for the invoice for February 2016, and calculated an average monthly auto repair sales amount to be applied to all of the remaining months of the audit period for which the Division did not receive any invoices. The Division's approach utilized the business' own records and petitioner fails to provide any substantive evidence to show the approach is unreasonable. Notwithstanding that fact, the Division's repair shop sales calculations require two modifications. First, as noted, petitioner provided the Division a repair shop invoice for February 2016; the Division fails to address its handling of this invoice at the hearing or in its brief. Given the Division's lack of any explanation, it is deemed appropriate that it should recalculate the relevant repair shop sales numbers with the inclusion of the February 2016 invoice.⁷ In addition, at the hearing, petitioner credibly testified that the repair shop did not begin operations until late-2014. The first invoice that the Division received was for October 2014; accordingly, the Division is to recalculate the repair shop sales with a starting operations date of October 2014 rather than the September 2013 date utilized initially (*see* finding of fact 15). It is noted that upon the determination of non-fatal errors, adjustments to the assessment are the appropriate remedy (*see Matter of the Petition of J & L Donut Shop, Inc.*, Tax Appeals Tribunal, September 13, 2012)

⁷ This would necessitate that the Division also use 19 months, instead 18 months, as a denominator to its average monthly repair shop sales calculation.

F. Petitioner bears the burden of proof to show, by clear and convincing evidence, that she is not a person required to collect tax of the business §§ 1131 (1) and 1133 (a) (*see Matter of Goodfriend*, Tax Appeals Tribunal, January 15, 1998). Whether a person is responsible for collecting and remitting sales tax for a corporation so that the person would have personal liability for the taxes not collected or paid depends on the facts of each case (*see Matter of Cohen v State Tax Commn.*, 128 AD2d 1022 [3d Dept 1987]). Various factors are considered in making this factual determination. The holding of corporate office is one such factor, but personal liability under Tax Law § 1131 (1) is not limited to individuals holding official titles (*see Matter of Ianniello*, Tax Appeals Tribunal, November 25, 1992, *confirmed* 209 AD2d 740 [3d Dept 1994]). Other relevant factors include the individual's authority to sign corporate checks, the individual's economic interest in the corporation, and the individual's knowledge of and control over the financial affairs of the corporation (*see Matter of Constantino*, Tax Appeals Tribunal, September 27, 1990). The relevant consideration is "petitioner's authority and responsibility to exercise control over the corporation, not [her] actual assertion of such authority (citations omitted)" (*Matter of Coppola v Tax Appeals Trib.*, 37 AD3d 901 [3d Dept 2007]).

In this case, petitioner was assessed as a responsible person of the business. During the audit, the auditor met with petitioner several times to discuss the audit, and at all times she appeared to have had access to the books and records of the business and was able to explain the business' operations. Petitioner executed two separate consents extending the statute of limitations for the audit; petitioner executed both consents as the president of the business. Petitioner signed several forms for the Division indicating she was the president of the business. She signed, as the business' president, the business' general business corporation franchise tax returns, form CT-3, for 2014, 2015, 2017 and 2018, and signed checks on behalf of the business.

Petitioner testified that she had access to the books and records of the business. Petitioner does not provide any argument or proof to rebut the assertion that she was a person required to collect sales tax on behalf of the business. Petitioner has failed to rebut the assertion that she was a responsible person under the Tax Law and consequently, she is deemed a responsible person for the periods at issue.

G. Petitioner asserts that the business is closed, and she does not have the resources to pay an assessment and therefore it should be reduced or cancelled. Petitioner's argument fails in that it is a well-settled principle that economic hardship does not relieve a taxpayer of her duty to pay over taxes collected on behalf of the State (*see Matter of the Petition of Cal Snyder*, Tax Appeals Tribunal, May 5, 2011).

H. The petition of Rajni T. Mohnani is granted to the extent indicated in conclusion of law E, but is otherwise denied and the notice of determination L-048700629, dated August 16, 2018, as modified, is sustained.

DATED: Albany, New York
April 21, 2022

/s/ Nicholas A. Behuniak
ADMINISTRATIVE LAW JUDGE