

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**PERAR DISCOUNT CENTER, LTD.** : DECISION  
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 December 1, 1979 :  
through November 30, 1982. :  
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The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on July 12, 1990 with respect to the petition of Perar Discount Center, Ltd., c/o Jack M. Portney, 2050 Center Avenue, P.O. Box 346, Fort Lee, New Jersey 07024 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 December 1, 1979 through November 30, 1982 (File No. 801113). Petitioner appeared by Jack M. Portney, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Irwin A. Levy, Esq., of counsel).

The Division submitted a letter in lieu of a brief. Petitioner submitted two briefs. Oral argument, at the request of the Division, was heard on January 30, 1991.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

***ISSUES***

I. Whether the Division of Taxation properly determined petitioner's additional sales and use taxes due on its gasoline service station operations by the use of third-party verifications.

II. Whether the Division of Taxation properly determined that petitioner is liable for fraud penalties.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge except for the third paragraph of finding of fact "4" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

On February 24, 1984, the Division of Taxation issued a Notice of Determination and Demand for Payment of Sales and use Taxes Due against petitioner, Perar Discount Center, Ltd., for the period December 1, 1979 through November 30, 1982 containing the following explanation:

"The following taxes have been determined to be due in accordance with Section 1138 of the Tax Law and is based on an audit of your records. The tax assessed herein has been estimated and/or determined to be due in accordance with the provisions of Section 1138 of the Tax Law and may be challenged through the hearing process by the filing of a petition within 90 days."

The notice asserted additional tax due of \$278,396.35, plus penalty and interest totalling \$162,211.33, for a total amount due of \$440,607.68. The taxes due for the various periods were broken down as follows:

<u>"Period Ended</u>	<u>Tax Due</u>	<u>Penalty Due</u>	<u>Interest Due</u>
2/28/80 - 380	\$13,644.47	\$3,411.11	\$ 7,080.66
5/31/80 - 480	16,945.04	4,236.26	8,250.20
8/31/80 - 181	16,537.54	4,134.38	7,640.50
11/30/80 - 281	15,847.44	3,961.86	6,819.15
2/28/81 - 381	27,791.05	6,947.76	11,086.96
5/31/81 - 481	33,679.03	8,419.75	12,356.16
8/31/81 - 182	33,538.47	8,384.61	11,153.50
11/30/81 - 282	33,933.12	8,483.28	10,029.61
2/28/82 - 382	28,426.53	7,106.63	7,369.86
5/31/82 - 482	27,941.07	6,985.26	6,236.44
8/31/82 - 183	27,941.07	6,147.03	5,228.89
11/30/82 - 283	2,172.52	412.58	328.89"

A consent extending the period of limitation for assessment of sales and use taxes was executed by Kanat Arbay, president of Perar Discount Center, Ltd., dated February 28, 1983 indicating that sales tax due from Perar Discount Center, Ltd. for the period June 1, 1980 through May 31, 1982 could be determined at any time on or before April 20, 1984.

Petitioner, Perar Discount Center, Ltd., operated a Gulf gasoline station at 2 West Montauk Highway in Lindenhurst, New York from about June 23, 1980 to March 1, 1982. The station had six gas pumps and it was determined that two bay areas existed for repair work. Kanat Arbay was president and owner of Perar Discount Center, Ltd.

Initially this case was assigned to Andrew Coughlin of the Special Investigations Bureau late in 1982. Mr. Coughlin visited the office of Jack Portney, C.P.A., on or about October 24, 1982 for the purpose of discussing and reviewing the books and records of various service stations owned by Mr. Arbay. At the same time Mr. Coughlin was investigating Perar Discount Center, Ltd., he was also responsible for the review of the books and records of various other stations owned by Mr. Arbay.

Mr. Coughlin visited the subject premises on or about November 1, 1982 at which time the station was being operated by another party. While at the station he viewed an ST-105 certificate of authority in the name of Cemal Discount bearing an identification number different from the prior owner, Kanat Arbay.

We modify the third paragraph of finding of fact "4" to read as follows:

With respect to the request for books and records, Mr. Coughlin testified that he did not believe that he specified which books and records he wanted Mr. Portney to retrieve from the business. The testimony indicates that he thought he might have mentioned the cash receipts and disbursements. His further testimony indicated that he made Mr. Portney aware that this corporation did exist, that this case would probably be opened up, and that he wanted to see what records were available. It wasn't until almost two months later that the Perar Discount case was, in fact, actually opened up. Furthermore, there is no written evidence of a request at any time for records from Perar Discount Center, Ltd.<sup>1</sup>

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<sup>1</sup>The third paragraph of the Administrative Law Judge's finding of fact "4" read as follows:

"With respect to the request for books and records, Mr. Coughlin testified that he did not believe that he specified which books and records for Mr. Portney to retrieve from the business. The testimony indicates that his recollection was a request for cash receipts and disbursements. However, it was established that Mr. Coughlin was working closely with Mr. Portney with respect to the books and records of various stations owned by Mr. Arbay at this time, and a broad request may have covered more than one station."

The third paragraph of finding of fact "4" has been modified to more accurately reflect the record.

At the end of October 1982, Mr. Coughlin sent to Albany for the sales tax returns filed by Perar Discount Center, Ltd. Tax returns were filed by Mr. Arbay, as president of Perar Discount Center, Ltd., for the consecutive periods beginning June 1, 1980 through and including the period ended August 31, 1982. The period covered by the sales tax return encompassing March 1, 1982 through May 31, 1982 indicates no taxable sales made during this period and further, for the subsequent period of June 1, 1982 through August 31, 1982, the sales tax return reflects the company as "inactive".

Mr. Coughlin also testified that at one time an investigation was considered with respect to Cemal Discount, the successor to Perar, and he indicated that some of the tax returns filed by Cemal Discount were also obtained from Albany. The submission of sales tax returns into evidence included a few of the tax returns initially filed by Cemal Discount covering the period September 1, 1981 through August 31, 1982. The first two returns filed by Cemal Discount covering the period September 1, 1981 through February 28, 1982 indicate that it was an inactive company. The first payment of sales tax indicated taxable sales and services beginning with the quarter March 1, 1982, the date which petitioner asserts it ceased operation.

On or about January 10, 1983, Mr. Coughlin issued a subpoena to Gulf Oil Corporation requesting verification of purchases made by Mr. Arbay for the gasoline service station in question. The Special Investigations Bureau was terminated at this point, still having received no records from Mr. Portney or Gulf Oil. Mr. Coughlin testified that he never reviewed the third-party verification that ultimately became part of the file. Shortly before the Special Investigations Bureau ceased operations, Mr. Coughlin also issued a subpoena to the Long Island Trust Company requesting bank statements that corresponded to deposits made by Mr. Arbay with respect to Perar Discount Center, Ltd. During mid-February he was able to summarize the deposits and the disbursements as indicated by those statements. He testified that the signature card had one signatory power, that of Kanat Arbay. His analysis of the bank deposits indicated that monthly deposits ranged from \$55,000.00 to \$165,000.00, with an average of approximately

\$80,000.00 a month. The sales tax returns filed during those periods indicated that Mr. Arbay was reporting approximately 10% or less of the amount of the bank deposits.

The bank statements were being sent to Mr. Allan Stuart, Mr. Arbay's prior accountant. Mr. Coughlin testified that he did not contact Mr. Stuart for books and records and that, although he was working with Mr. Gulotta, another representative of the company, he believed that he did not request books and records from him either.

The testimony indicates clearly that Mr. Coughlin obtained information from various sources but did not retain the file long enough to review any books and records or receive any explanation of the differences between the sales tax returns and the deposits, since the Special Investigations Bureau was terminated while he was in the middle of obtaining information to complete his review.

The next action taken on this case was during mid-January 1984. Once the Special Investigations Bureau had ceased its operations, the files being handled by Mr. Coughlin were transferred to various local district offices. Petitioner's case herein was transferred to the Mineola District Office at which point an assessment had not been issued nor had the investigation been completed. The file was assigned for one day to Allan Korenstein who was asked to expedite it with the information that was available at that time. Mr. Korenstein testified that he worked with the sales tax returns, the third-party verification from Gulf and other documents contained in the field audit folder. Mr. Korenstein did not contact petitioner nor any of petitioner's representatives hereinbefore mentioned for an explanation as to any of the records contained in the file or with respect to differences found between the sales tax returns and the deposits or the sales tax returns and the Gulf statements.

Mr. Korenstein prepared a field audit report on January 18, 1984 which indicated that the bank statements from Long Island Trust Company for the period July 1, 1980 through February 28, 1982 showed deposits of \$1,978,178.00. It further indicated that sales tax returns filed for the period December 1, 1979 to November 30, 1982 indicated taxable sales reported of \$137,414.00, while the third-party verification of gasoline purchases from Gulf for the same

period (December 1, 1979 through November 30, 1982) indicated taxable gasoline purchases of \$3,273,932.00.

Although the field audit report indicates that there was an "audit performed," in fact, Mr. Korenstein computed the additional sales tax due with the information contained in his file and not by any review of books and records or contact with the taxpayer. His computation utilized gasoline purchases per the third-party verification with a markup of 12% to arrive at audited taxable gasoline sales of \$3,695,765.00, resulting in sales tax due on those purchases of \$262,636.41. It is noted in the report that the 12% markup was based on external indices including similar audits performed, average statewide markup for the period and prices being charged at the station.

It is not clear from the record whether Mr. Korenstein or any other party determined that Mr. Arbay did not report taxable repair sales. However, as part of the computation of additional tax due, the field audit report indicates that sales tax due of \$25,534.08 on repair sales was computed by estimating that the 2 repair bays operated during an 8-hour day for 6 days a week for 144 weeks at an estimated \$26.00 per hour labor charge resulting in repair sales of \$359,424.00. Thus, the additional tax due as indicated by the notice of determination issued on February 24, 1984 was \$278,396.35, plus penalty and interest.

Jack Portney, a certified public accountant, appeared on behalf of petitioner to represent his position. Mr. Portney disclosed that Mr. Arbay was a United Nations official and, as a result, had the ability to acquire large allocations of gasoline. Mr. Portney indicated that Mr. Arbay obtained gasoline not only for his own retail sale purposes but also for resale. Mr. Portney indicated that he had invoices, resale certificates and other documentation which purportedly exonerated petitioner, but apparently had not been reviewed by either Mr. Coughlin or Mr. Korenstein during the steps taken by each of them before the notice of determination was issued. At the hearing, Mr. Portney presented such evidence on behalf of petitioner's resale contention as follows:

- (a) sales invoices covering the period January 1980 through September 1981 showing sales of various types of gasoline to Sevinc and Ahmet Batur at 2 Saratoga Boulevard,

Island Park, New York and Apokan Discount, 189 Sunrise Highway, Amityville, New York (which is owned and operated by Abdullah Nevruzhan) totalling \$2,464,149.00;

(b) two resale certificates showing Sevinc Batur and Apokan Discount as purchasers of tangible personal property for resale from Perar Discount Center, Ltd. principally engaged in the business of a gasoline service station dated February 27, 1980 and May 8, 1980, respectively;

(c) as an analysis of the sales information from petitioner's records, Mr. Portney presented a schedule of purchases of gasoline from June 1980 through February 1982 offset by sales for resale in gallons and dollars, as well as retail sales to customers;

(d) a statement in Turkish which Mr. Portney claims is notarized as well as an English translation of the same by Abdullah Nevruzhan which states as follows:

"I owned several gas stations from 1978 through 1983 and purchased the majority of my gasoline purchases from the gas stations on Long Island owned by Mr. Kanat Arbay, during the above periods. My gasoline trucks and drivers would pick up the gasoline at night after the stations had closed by pumping directly from the ground tanks into the truck with portable pumps.

I hope this will clarify [sic] the circumstances regarding my relations with Mr. Kanat Arbay and his gas stations.

Respectfully submitted,

Abdullah Nevruzhan"

It is noted that the statement in the English translation is not dated; however, it does appear that the Turkish copy bears a date stamp and date within the body of the notarization of "19/6/1984"; and

(e) a letter of verification from the Henrich Petroleum Equipment Company, Inc. dated July 10, 1985 stating that Kanat Arbay purchased a Blackmer explosion-proof pump from this corporation during the year 1978 and that since the business was unable to locate the invoice, this letter was being submitted as part of the proof of purchase.

***OPINION***

In the determination below, the Administrative Law Judge held that it was unclear whether an adequate request for books was made in the first instance and it appeared clear from the testimony that whatever records were requested were not thoroughly examined to determine their adequacy. The Administrative Law Judge held that the Division failed to determine that petitioner's books and records were inadequate, failed to conduct an audit and failed to prove that the assessment was based on an audit of petitioner's records. Although the Administrative Law Judge concluded that the Division's resort to an estimate methodology was not justified, the Administrative Law Judge also determined petitioner met its burden of proving that the results of the investigation and that portion of the "audit" so performed resulted in an erroneous assessment and, further, that the Division also deliberately overlooked records supporting the resale of gasoline by petitioner.

On exception, the Division alleges that petitioner had sales of \$3,695,765.00 (inclusive of a 12% mark-up) during the audit period of December 1, 1979 through November 30, 1982 and argues that although petitioner has shown sales for resale in the amount of \$2,464,149.00, there still remains unsubstantiated sales of \$1,097,202.00 and taxes due on such amount since only \$137,414.00 was reported as taxable sales during the tax period. The Division also seeks an assessment against Kanat Arbay based on the unsubstantiated sales of \$1,097,202.00.

Petitioner argues that the State of New York never conducted an audit of petitioner's books and records as the State's auditors were directed by their supervisors to make assessments based on third party verifications already contained in the file. Further, the original assessments were against the corporation and not Mr. Arbay as officer and the hearing addressed the corporation assessment only. Lastly, petitioner respectfully requests that the determination of the Administrative Law Judge be affirmed as being consistent with the evidence submitted.

We affirm the determination of the Administrative Law Judge for the reasons stated below.

The Division has the authority to determine "from such information as may be available" the amount of tax actually due from a taxpayer for a given period when any one of its sales tax returns is either not filed or states an incorrect or insufficient amount of tax due (Tax Law

§ 1138[a][1]). However, when the vendor maintains a comprehensive set of books and records, "such information as may be available" (Tax Law § 1138[a][1]) is restricted to his books and records, and not external indicia, because "the 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 tax liability" (Matter of Chartair, Inc. v. State Tax Commn., 65 AD2d 44, 411 NYS2d 41, 43).

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, 859) and thoroughly examine (Matter of King Crab Rest. v. Chu, 134 AD2d 51, 522 NYS2d 978, 979-80) 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, 828, lv denied 71 NY2d 806, 530 NYS2d 109).

In the matter at hand, the Division did not follow this procedure. There is no evidence in the record of a written request to the taxpayer for books and records and, while this may not be fatal to the sufficiency of the request for records, the evidence presented does not support the conclusion that there was a request in any form for specific books and records. Instead, testimony by two Division auditors points out rather vividly that there never was a formal request by the Division for specific books and records.

The first auditor, when asked by the Division's attorney, "Specifically what books and records did you request of Mr. Portney?" stated, "Well, we didn't go, I believe, into exactly. I think I might have mentioned the cash receipts and disbursements. I said we would need the records as this case would probably be opened up" (Tr., p. 12).

The second auditor testified, "I had the case assigned to me for a total of one day" (Tr., p. 45) and further when asked, "Did you contact the taxpayer or the taxpayer's representative" stated, "No, never made any contact" (Tr., p. 46).

The record before us lacks any evidence of the clear and formal request for specific books and records required by Matter of Christ Cella, Inc. v. State Tax Commn. (supra, 477 NYS2d

858, 859); therefore, we conclude that the assessment for the period December 1, 1979 through November 30, 1982 must be cancelled. Without a specific request for the records, it is not necessary to examine any other aspect of the audit. Thus, the resort to external indices to estimate tax for this period was improper (Matter of Adamides v. Chu, *supra*; Matter of Christ Cella, Inc. v. State Tax Commn., *supra*; Matter of Anton's Car Care Ctr., Ltd., Tax Appeals Tribunal, November 23, 1988; Matter of Ahmed, Tax Appeals Tribunal, November 10, 1988).

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of the Division of Taxation is in all respects denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Perar Discount Center, Ltd. is granted; and
4. The notice of determination issued February 24, 1984 is cancelled.

DATED: Troy, New York  
June 27, 1991

/s/John P. Dugan  
John P. Dugan  
President

/s/Francis R. Koenig  
Francis R. Koenig  
Commissioner

/s/Maria T. Jones  
Maria T. Jones  
Commissioner