

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition

of

3 GUYS ELECTRONICS, INC.

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, 1982
through May 31, 1984.

DECISION
DTA NO. 801941

Petitioner, 3 Guys Electronics, Inc., c/o Intrusco, 312 93rd Street, Brooklyn, New York 11209, filed an exception to the determination of the Administrative Law Judge issued on February 4, 1988 with respect to its 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, 1982 through May 31, 1984 (File No. 801941). Petitioner appeared by Norman Elias Lahage, P.A. The Division of Taxation appeared by William F. Collins, Esq. (Angelo A. Scopellito, Esq., of counsel).

Neither of the parties requested oral argument on this exception and only the Division of Taxation submitted a brief in support of its position.

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

ISSUE

I. Whether petitioner's rights were violated due to the failure of the auditor who performed the audit to testify at the hearing.

II. Whether a sales tax audit utilizing gross sales reported on petitioner's Federal income tax return properly determined sales and use tax due.

FINDINGS OF FACT

We find the facts as stated in the Administrative Law Judge's determination and such facts are incorporated herein by this reference. These facts may be summarized as follows.

During the period at issue, petitioner, 3 Guys Electronics, Inc., operated a retail appliance and electronics store at 5423 5th Avenue, Brooklyn, New York. The president of the corporation was Lucien Moughrabie.

A sales tax audit of petitioner's books and records was commenced by the Brooklyn District Office in August 1984.

(a) Petitioner's books and records were found to be incomplete; no accounting books, cash register tapes or sales slips were produced. Petitioner had no daily or weekly records. The auditor found that petitioner's accountant had prepared Federal income tax returns from bank statements.

(b) Gross sales per petitioner's Federal income tax returns for the fiscal years ending April 30, 1983 and April 30, 1984 were found to be higher than gross sales reported on petitioner's sales tax returns for the comparable periods by \$117,118.00. The auditor considered the difference to be taxable sales and calculated additional sales tax due based on said amount.

(c) The Federal income tax returns showed furniture and fixtures purchased in 1982 (during the fiscal year ending April 30, 1983) at a cost of \$20,000.00. As petitioner produced no evidence that tax was paid on the purchase of said furniture and fixtures, use tax was determined to be due based on said cost.

On February 27, 1985, the Division of Taxation issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner for the period June 1, 1982 through May 31, 1984 in the amount of \$11,312.24 in tax, \$2,284.81 in penalty and \$1,998.87 in interest for a total due of \$15,595.92.

The tax was subsequently reduced to \$9,775.84 on the basis that petitioner had included insurance proceeds of \$18,623.09 in sales on the Federal income tax returns. This reduction was made at a Tax Appeals Bureau conference.

The sales tax worksheets of petitioner's accountant show that taxable sales were calculated by taking all bank deposits on petitioner's checking account statements and deducting "Sales Exempted". For example, the amount of "Total Credits" on the May 11, 1982 bank statement (the opening monthly statement for petitioner's checking account) shows \$18,962.00. Two deposits, one of \$12,000.00 and one of \$4,000.00, were deducted as capital. The accountant then deducted an additional \$1,000.00 as "Rent," although there was no \$1,000.00 deposit shown in the checking account. The balance remaining, \$1,962.00, was shown as an adjusting entry with the notation "SH." (apparently meaning shortage, as other months carried the reference "Short"). No sales tax return was filed for the quarter ending May 31, 1982. For the quarter ending August 31, 1982, total checking account credits were \$47,202.00. It appears that the prior quarter's shortfall was added to this, with \$3,666.00 in tax and \$3,000.00 in "Rent" being deducted. A "plus" adjusting entry brought total taxable sales to \$44,432.00, with tax of \$3,665.64 (i.e., the \$3,666.00 in tax deducted against deposits for said quarter). This system appears to have been used for all quarters. The adjusting entries, sometimes plus, sometimes minus, varied from quarter to quarter and were not explained in the record.

Petitioner's representative claimed to have calculated Federal income tax return gross sales figures by using the checkbook credits and maintains that they should not be taken as taxable sales, since numerous items which did not represent taxable sales were included in such deposits. In addition to the insurance proceeds for which petitioner was given credit at the Tax Appeals Bureau conference, petitioner's representative argued that the Federal income tax return gross sales figures include export sales, rents, sales tax and returned checks.

Through documents and testimony offered at the hearing, petitioner established that the bank deposits included an export sale of \$19,943.38. This sale consisted of shipments of goods to Lebanon, Kuwait and Saudi Arabia. The purchaser paid Mr. Moughrabie personally, as the purchaser knew him but not the "3 Guys" name. The funds were transferred by Mr. Moughrabie from the joint checking account maintained by him and his wife to the corporate checking account.

Petitioner claims that rents of \$1,000.00 per month for the building in which petitioner was located were deposited in the corporate checking account and were thus included in Federal gross sales, which constituted the basis of the assessment. The building was owned by Lucien Moughrabie, not by petitioner, and no rental income was shown on the Federal income tax returns filed by Mr. Moughrabie and his wife. Petitioner's Federal income tax returns showed no rental income. The return for the fiscal year ending April 30, 1983 showed a corporate deduction of \$2,843.00 for rent, while the 1984 return showed no rent paid, but a deduction of \$4,300.00 for "Interest on building" and a deduction of \$2,700.00 for real estate. Examination of a rent receipt book offered into evidence by petitioner showed that an average total rental of \$800.00 per month was collected from five tenants. Comparison of the receipt book with the bank statements, however, does not confirm that the funds were deposited in the corporate checking account. If they were so deposited, they were hopelessly commingled with other funds and cannot be identified.

While returned checks appear to have been included in the total monthly credits of the bank checking account, there is no evidence that they were included in gross sales on the Federal income tax returns. Gross sales on the Federal income tax returns for the two fiscal years totaled \$376,240.00, while deposit credits per the checking account for the same period totaled \$415,605.00. Thus, \$39,365.00 had been deducted by petitioner in calculating gross sales for the Federal income tax return.

There is no evidence to show that sales tax was included in the gross sales as per the Federal income tax returns. As noted above, gross sales per the Federal income tax returns totaled \$39,365.00 less than the checking account credits. This difference is substantially in excess of the \$21,373.00 in sales tax paid with petitioner's returns.

The Federal income tax returns show \$20,000.00 in furniture and fixtures purchased by petitioner. The sum of \$2,000.00 was deducted in each of the fiscal years ending April 30, 1983 and April 30, 1984 by petitioner. Mr. Moughrabie paid \$2,800.00 for the fixtures when he purchased the building. Additional improvements were subsequently made, such as a dropped ceiling, new

lighting and other improvements. The actual cost was said to be unknown. Petitioner's accountant claimed that all except the \$2,800.00 should be treated as nontaxable good will.

We find as an additional fact that although the auditor who conducted the audit did not testify at the hearing, his supervisor, who was familiar with the audit, did testify.

OPINION

The Administrative Law Judge determined that the taxable sales were appropriately determined from gross sales reported on the petitioner's Federal tax returns due to the incomplete and insufficient records. He also determined that the petitioner failed to sustain its burden of proof to demonstrate that certain adjustments should have been made to gross sales reported on the Federal returns in order to reflect nontaxable transactions.

The petitioner has taken exception to the Administrative Law Judge's determination due to the manner in which the hearing was conducted. The petitioner in its exception asserts that the State judiciary laws were violated due to the failure of the auditor to testify.

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

The State Administrative Procedure Act, which governs the procedure at the hearing below, provides the presiding officers with the authority to:

"Sign and issue subpoenas in the name of the agency, at the request of any party, requiring attendance and giving of testimony by witnesses and the production of books, papers, documents and other evidence and said subpoenas shall be regulated by the civil practice law and rules. Nothing herein contained shall affect the authority of an attorney for a party to issue such subpoenas under the provisions of the civil practice law and rules." (State Administrative Procedure Act {304[2].})

The petitioner did not request that the auditor be subpoenaed. Without such a request, there was no violation of the State Administrative Procedure Law as the petitioner contends. " . . . [P]etitioners must request a witness pursuant to this section of the State Administrative Procedure Act in order for failure to produce such witness to offend petitioner's due process rights." (In the Matter of the Petition of Hugo Matson and Joan Matson, Tax Appeals Tribunal, March 10, 1988, citing Eagle v. Paterson, 57 NY2d 831.) Section 601.11(c) of the Rules of Practice and Procedure of the State Tax Commission sets forth the procedures for subpoenaing witnesses (former 20

NYCRR 601.11[e], see also, 20 NYCRR 3000.6[c] for the current procedures under the Tax Appeals Tribunal).

The petitioner on exception also asserts that specific aspects of the audit were incorrect. In order for the petitioner to succeed on these points it must show by clear and convincing evidence that the audit method or tax assessment was erroneous (Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858). According to the petitioner, bank and cash disbursement ledger sheets and monthly work sheets which existed at the time of the audit should have been used by the auditor. Such ledger sheets were not records of every sale as required by Tax Law, section 1135 and did not constitute sufficient books and records to enable the Division to conduct a complete audit. Therefore, the Division was correct in employing external indices.

The petitioner further asserts that the Division incorrectly valued the furniture and fixtures purchased by the petitioner. According to the petitioner, the value placed on these shelves should have been less than \$2,000 instead of \$20,000. The audit assessed use tax based on the cost shown on petitioner's Federal income tax returns. Petitioner failed to prove that this was not the price paid.

Finally, the petitioner on exception asserts that an error was made in determining the amount of taxable sales because the rent collected from the apartments, reversed returned checks and the sales tax paid by customers were not excluded from the calculation. Petitioner failed to prove that amounts for these three items were included in gross sales on its Federal income tax return.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the petitioner, 3 Guys Electronics, Inc., is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of 3 Guys Electronics, Inc. is granted to the extent indicated in conclusions of law "D" and "G" of the Administrative Law Judge's determination but, except as so granted, is in all other respects denied.

Dated: Albany, New York
September 9, 1988

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

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