

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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| In the Matter of the Petition                             | : |          |
| of  | : |          |
| <b>WILLIAM SIDEL AND DEBRA SIDEL</b>                      | : | DECISION |
| <b>D/B/A HALF &amp; HALF TRADING CO.</b>                  | : |          |
| for Revision of Determinations or for Refund of Sales and | : |          |
| Use Taxes under Articles 28 and 29 of the Tax Law for     | : |          |
| the Period March 1, 1984 through February 28, 1986        | : |          |

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Petitioners William Sidel and Debra Sidel d/b/a Half & Half Trading Co., 82 Parkside Court, Buffalo, New York 14214, filed an exception to the determination of the Administrative Law Judge issued on October 18, 1990 with respect to their petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1984 through February 28, 1986 (File No. 806475). Petitioners appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

Petitioners did not file a brief on exception. The Division of Taxation filed a letter in lieu of a brief. Oral argument, requested by petitioners, was denied.

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

***ISSUES***

- I. Whether, as a result of a field audit, the Division of Taxation properly determined additional tax due.
- II. Whether petitioners have shown reasonable cause and an absence of willful neglect for abatement of penalties imposed herein.

**FINDINGS OF FACT**

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

On November 20, 1987, following an audit, the Division of Taxation issued to petitioner William Sidel d/b/a Half & Half Trading Co. a Notice of Determination and Demand for Payment of Sales and Use Taxes Due which assessed \$5,860.85 in tax due, plus penalty and interest, for the period March 1, 1984 through February 28, 1986.

Also on November 20, 1987, the Division issued a notice of determination to petitioner Debra Sidel d/b/a Half & Half Trading Co. which assessed identical amounts of tax, penalty and interest as that issued to William Sidel.

Half & Half Trading Co. was a sole proprietorship engaged in the retail sale of women's clothing. Half & Half Trading Co. had two retail stores in the Buffalo area during the audit period. Prior to 1986, the business was run on a day-to-day basis by petitioner William Sidel. During that time, Mr. Sidel was assisted by petitioner Debra Sidel who aided Mr. Sidel in purchasing merchandise and paying bills. Beginning in 1986, William Sidel was no longer involved in the business and Debra Sidel became the sole proprietor.

Federal schedule C's for the years 1984 and 1985 filed in respect of Half & Half Trading Co. listed Debra Sidel as the proprietor of the business.

The assessments herein consist of two components: \$5,503.08 in tax due on additional retail sales and \$357.77 in tax due arising from certain asset acquisitions. Petitioners did not offer evidence to refute the asset acquisitions component of the assessment.

On audit of petitioners' retail sales, the Division reviewed monthly sales summaries which had been prepared by petitioners' bookkeeper from information contained in petitioners' general ledger. The Division concluded that such summaries were inadequate as they did not tie into either gross receipts as reported on petitioners' schedule C's or gross sales as reported on

petitioners' sales tax returns. The Division therefore requested petitioners' sales invoices and cash register tapes for the audit period. Such invoices and cash register tapes were not provided.

As a result of the foregoing, the Division determined petitioners' additional taxable sales by calculating the difference between gross receipts as reported on Federal schedule C's and gross sales as reported on sales tax returns.<sup>1</sup> This difference was determined to be additional taxable sales.

For 1984, petitioners' schedule C listed \$418,426.00 in gross receipts, while petitioners' sales tax returns reported \$358,549.00 in gross sales for this same period.<sup>2</sup> The Division thus determined \$59,877.00 in additional taxable sales for this same period. The Division then allocated this additional taxable sales figure to sales tax periods based upon the ratio of gross sales reported per quarter (*i.e.* periods ended 2/84, 5/84, 8/84 and 11/84) to gross sales reported over the 12-month period December 1, 1983 through November 30, 1984.<sup>3</sup>

For 1985, the schedule C filed in respect of Half & Half Trading Co. reported gross receipts of \$294,174.00. Petitioners' gross sales per sales tax returns for this same period were \$274,715.00. The Division determined this difference of \$19,459.00 to be additional taxable sales and allocated this amount to the four sales tax periods ended February 28, 1985 through November 30, 1985 based upon the ratio of gross sales reported per quarter to the total of gross sales reported over the same 12-month period.

For the period ended February 28, 1986, the Division determined additional tax due by applying an error rate of .11742 to the sales tax reported for this period. This resulted in additional tax due for this quarter of \$643.81. The error rate was determined by dividing

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<sup>1</sup>For each of the sales tax periods at issue, petitioners' sales tax returns reported no nontaxable sales (*i.e.*, reported gross and taxable sales figures were identical).

<sup>2</sup>1984 calendar year gross sales figures, based upon gross sales as reported on sales tax returns, were determined by calculating the sum of two-thirds of the gross sales reported for the period ended February 29, 1984, the gross sales reported for the periods ended May 31, 1984, August 31, 1984 and November 30, 1984, and one-third of the gross sales reported for the period ended February 28, 1985. The same apportioning method was used to determine gross sales for 1985.

<sup>3</sup>The Division did not assess tax on the additional sales determined for the period ended February 28, 1984, as it concluded that this period was beyond the relevant period of limitations for assessment.

additional tax determined to be due on audit for the period March 1, 1984 through November 30, 1985 (\$4,859.27) by sales tax reported for the same period (\$41,383.00).

Petitioners' Federal income tax returns were prepared by a certified public accounting firm.

Petitioners' sales tax returns were prepared by their bookkeeper. Petitioners signed and filed the sales tax returns.

## **OPINION**

In the determination below, the Administrative Law Judge held that the Division of Taxation's (hereinafter the "Division") use of an indirect audit method was proper since the taxpayers did not have the records necessary to verify taxable sales. Further, the Administrative Law Judge held that petitioners failed to prove error in either the audit method or the result of the audit. The Administrative Law Judge found that while petitioners' attack on the audit result centered upon their contention that the amounts set forth as gross receipts on their 1984 and 1985 schedule C's were overstated due to the inclusion of certain layaway sales which were ultimately refunded to customers, no documentary evidence (e.g., receipts, invoices) of any specific layaway sales or refunds was introduced. The Administrative Law Judge found that the evidence submitted by petitioners was unconvincing, unreliable and insufficient for petitioners to meet their burden of proof. Finally, the Administrative Law Judge held that petitioners' reliance upon their bookkeeper did not constitute reasonable cause for abatement of penalties.

On exception, petitioners disagree that any monies are due and allege all monies were paid in full. Petitioners argue their records were adequate and were made available to the Division and the certified public accountant who prepared the Federal income tax returns. Petitioners further argue that the use of an indirect audit method was clearly for the sake of the Division's convenience. Further, they disagree with the conclusion that 1985 schedule C's were overstated, and they deny that they failed to maintain records sufficient to determine the correct amount of sales tax.

In response, the Division argues that contrary to petitioners' assertions, petitioners did not maintain adequate records and, therefore, the use of an indirect audit method was justified. The Division believes the Administrative Law Judge's decision was correct and should be sustained.

We find no basis in the record before us for modifying the Administrative Law Judge's determination in any respect. Therefore, we affirm the determination of the Administrative Law Judge for the reasons stated in said determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of William Sidel and Debra Sidel d/b/a Half & Half Trading Co. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of William Sidel and Debra Sidel d/b/a Half & Half Trading Co. is denied; and
4. The notices of determination and demand dated November 20, 1987 are sustained.

DATED: Troy, New York  
July 3, 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