

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>ROBERT DeFILIPPIS CRANE SERVICE, INC.</b>	:	DECISION
<b>AND ROBERT DeFILIPPIS, AS OFFICER<sup>1</sup></b>	:	DTA No. 807042
	:	
for Revision of Determinations or for Refund of Sales and	:	
Use Taxes under Articles 28 and 29 of the Tax Law for the	:	
Period September 1, 1982 through November 30, 1985.	:	

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Petitioners Robert DeFilippis Crane Service, Inc. and Robert DeFilippis, as Officer, 15-10 130th Street, College Point, New York 11356, filed an exception to the determination of the Administrative Law Judge issued on August 19, 1993. Petitioners appeared by DeGraff, Foy, Holt-Harris & Mealey (James H. Tully, Jr., Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Michael B. Infantino, Esq., of counsel)

Petitioners filed a brief in support of their exception. The Division of Taxation filed a letter in lieu of a brief in opposition referring the Tax Appeals Tribunal to its brief filed before the Administrative Law Judge. Petitioners reply brief was received on January 11, 1994, which date began the six-month period to issue this decision. Petitioners' request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

***ISSUES***

I. Whether the Division of Taxation made an adequate request for petitioner corporation's books and records.

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A petition was also filed with the Division of Tax Appeals on behalf of Madeline DeFilippis. However, since the Division of Taxation cancelled the notices of determination issued to Madeline DeFilippis in November of 1992, she is not a party to this exception.

II. Whether the penalties and that part of interest exceeding minimum interest should be cancelled.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge except for findings of fact "2," "3," "4," and "5" which have been modified. We have also made an additional finding of fact. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional finding of fact are set forth below.

Petitioner Robert DeFilippis Crane Service, Inc. ("the corporation") was engaged in the rental of cranes and other construction equipment. Robert DeFilippis was president of the corporation and Madeline DeFilippis was the secretary.

We modify finding of fact "2" of the Administrative Law Judge's determination to read as follows:

On November 21, 1986, following an audit of the corporation's available books and records, the Division of Taxation ("Division") issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against the corporation covering the period September 1, 1982 through November 30, 1985 for taxes due of \$1,694,862.14, plus penalty and interest of \$967,422.82, for a total amount due of \$2,662,284.96. On the same date, a separate notice was issued to the corporation which assessed additional penalties of \$27,054.35 under Tax Law § 1145(a)(1)(vi) for omitting more than 25% of the sales tax found due in the quarterly periods beginning June 1, 1985.

Identical notices were issued to petitioners Robert DeFilippis and Madeline DeFilippis, as officers of the corporation, under Tax Law §§ 1131(1) and 1133.<sup>2</sup>

We modify finding of fact "3" of the Administrative Law Judge's determination to read as follows:

On September 3, 1985, the Division mailed a letter to the

corporation scheduling a field examination of its books and records for October 1, 1985. The letter indicated that the period under audit was "9/1/82-8/31/85".

The corporation was instructed to make available all books and records pertaining to its sales tax liability for the period under audit.

Accompanying the appointment letter was a listing of specific records requested to be available on the appointment date as follows:

"REQUIRED RECORDS FOR SALES TAX AUDIT"

To Be Held On 10/1/85

Records for Audit Period 9/1/82 To 8/31/85

Includes the Following:

1. GENERAL LEDGER 9/82-8/85
2. CASH RECEIPTS JOURNAL 9/82-8/85
3. CASH DISBURSEMENT JOURNAL 9/82-8/85
4. FEDERAL INCOME TAX RETURNS FOR YEARS: Last 3 years 1982 & 1983 1984 on ext.
5. SALES TAX RETURNS AND CANCELLED CHECKS FOR QUARTERS ENDED 11/30/82-8/31/85
6. PURCHASE INVOICES FOR >
7. SALES INVOICES FOR: > To Be Determined
8. EXPENSE INVOICES FOR: >

9. ALL FIXED ASSET INVOICES FOR FIXED ASSETS

ACQUIRED DURING AUDIT PERIOD

10. GUEST CHECKS AND REGISTER TAPES FOR:

11. RESALE, EXEMPT AND CAPITAL IMPROVEMENT CERTIFICATES

SUPPORTING NON-TAXABLE SALES FOR: To Be Determined

12. OTHER: Sales Journal >

Purchase Journal > To Be Determined

Bank Statements >"

The audit actually commenced on November 6, 1985. During the course of the audit, the auditor orally requested the same records as in his original appointment letter for the period September 1, 1985 through November 30, 1985. In addition, the auditor left a handwritten document entitled "Records Required For Next Appointment". Included on the list were all sales invoices for equipment leased or rented for all of 1984 and any exemption certificates required to substantiate all nontaxable sales for 1984. The auditor testified that this sheet was left after petitioner's representative on audit, Max Felberbaum, admitted not having all sales tax records required to perform a complete audit.<sup>3</sup>

We modify finding of fact "4" of the Administrative Law Judge's determination to read as follows:

The corporation provided the auditor with sales tax returns, Federal and State income tax returns except for 1985, cash receipts journal, check disbursements journal, general ledger worksheet, cancelled checks, bank statements and 41 sales invoices pertaining to sales of fixed assets. The bank statements and sales invoices covered the

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We modified the Administrative Law Judge's finding of fact "3" by adding the last sentence.

period through November 30, 1985. Other records requested but not provided were sales journal, purchases journal, exemption certificates and any other sales invoices for the audit period.<sup>4</sup>

We modify finding of fact "5" of the Administrative Law Judge's determination to read as follows:

The auditor examined the 41 sales invoices pertaining to sales of fixed assets and found that sales tax was not charged on any of the invoices. The auditor also attempted to reconcile bank deposits for 1983 with the Federal corporation income tax return for that year, but such reconciliation revealed that the bank deposits exceeded gross sales by \$1,185,060.00. The corporation did not explain the discrepancy.

In the absence of any verifiable sales records pertaining to equipment leased or rented, the auditor determined the corporation's sales on the basis of bank deposits. The deposits totalled \$24,088,873.00<sup>5</sup> for the period September 1, 1982 through November 30, 1985. Sales taxes paid with returns filed for the period amounting to \$270,180.00 were deducted from the bank deposits to arrive at gross sales of \$23,818,693.00. The corporation had reported taxable sales of \$3,274,909.00, leaving unsubstantiated nontaxable sales of \$20,543,784.00. The corporation did not produce any exemption certificates for these sales which resulted in the auditor's assessing additional tax due of \$1,694,862.14.

The auditor imposed penalties because of the substantial underreporting and the lack of records maintained by the corporation.<sup>6</sup>

The corporation was not able to provide many of the books and records required for the audit because they were in the possession of the U.S. Attorney's office as part of an

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Finding of fact "4" of the Administrative Law Judge's determination read as follows:

"The corporation provided the auditor with sales tax returns, Federal and State income tax returns except for 1985, cash receipts journal, check disbursements journal, general ledger worksheet, bank statements and 41 sales invoices. Other records requested but not provided were sales journal, purchases journal, exemption certificates and any other sales invoices for the audit period.

We modified this fact to more adequately reflect the record.

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The auditor allowed for any deposit determined to be a non-business receipt such as a loan or redeposited check.

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Finding of fact "5" of the Administrative Law Judge's determination was modified by adding the words "pertaining to sales of fixed assets" in the first sentence of the first paragraph and the words "pertaining to equipment leased or rented" in the first sentence of the second paragraph. We made this change to reflect that the absence of verifiable sales records related to invoices on equipment rental and lease sales.

investigation of New York City construction contractors. These records included sales invoices along with an exemption certificate, attached if applicable, and cash receipts records.

The corporation's representative, Max Felberbaum, indicated that he now had many of the records that were not available at the time of audit and requested time for the auditor and himself to examine the records for the purpose of a possible resolution of the case. Mr. Felberbaum's request was granted with the agreement of the Division's representative.

We make the following additional finding of fact:

Max Felberbaum filed the petitions on behalf of the corporation protesting the assessments issued to the corporation. Mr. Felberbaum also appeared on behalf of the corporation and Robert DeFilippis at the Bureau of Conciliation and Mediation Services conference and at the first day of hearing. At the first day of hearing, the Division of Tax Appeals did not have an individual power of attorney authorizing Max Felberbaum to represent petitioner, Robert DeFilippis. The Division's attorney made a motion to dismiss for default based on the failure of a duly authorized representative to appear on behalf of Mr. DeFilippis. The Administrative Law Judge held the motion in abeyance pending the receipt of a power of attorney after the hearing. On July 24, 1991, a form, signed by Robert DeFilippis naming Joel G. Post, Esq. and Jack Greenberg, CPA to represent Robert DeFilippis Crane Service, Inc. and Robert DeFilippis, was sent via facsimile to the Division of Appeals. Additionally, the form stated that Robert DeFilippis Crane Service, Inc. and Robert DeFilippis "ratifies the prior representation of Max Felberbaum, C.P.A on behalf of the taxpayer(s) during all prior communications, hearings, audits, etc." The form stated that it applied to the year or period 9/1/82-11/30/85 and 1976-present. The form was signed by Robert DeFilippis, individually and as president of the corporation, but his signature was not acknowledged.

The hearing was reconvened on January 16, 1992. Petitioners appeared by a new representative, David A. Fusco, CPA. During the time that elapsed between hearing dates, the Division's auditor met with Mr. Felberbaum on nine occasions. Mr. Felberbaum presented cash receipts reconstructions for 1983 and 1984, sales invoices for 1984 and a limited number of exemption certificates. Based on the auditor's review of the foregoing records, he made certain adjustments to the original audit. From the bank deposits, the auditor extracted additional deposits from non-business sources totalling \$793,922.00. Also, bank deposits were adjusted for the sale of fixed assets amounting to \$1,986,165.00 which were examined in detail separately. The adjusted deposits, \$21,308,786.00, were applicable to receipts from equipment

rentals including sales tax. The sales tax paid of \$270,180.00 was deducted, leaving gross equipment rentals of \$21,038,606.00.

Mr. Felberbaum and the auditor had agreed to utilize a test period for purposes of determining an allowance for nontaxable sales. Initially, it was agreed the test would encompass sales invoices and the cash receipts book for the year 1984. However, due to the volume of records and time limitations, it was mutually agreed to curtail the test period to March 1, 1984 through August 31, 1984. The corporation had exemption certificates to substantiate 11.25% of the claimed nontaxable sales.

The nontaxable percentage was applied to equipment rental bank deposits to determine taxable equipment rentals of \$18,671,762.00 with tax due thereon of \$1,540,420.38. This amount was combined with the tax due on the sale of fixed assets for a total revised tax liability of \$1,673,341.49. The sales tax paid of \$270,180.03 was deducted, leaving additional tax due of \$1,403,161.46.

The parties agreed to adjourn the hearing once again to review additional records in the possession of Mr. Fusco.

The hearing was reconvened on October 27, 1992. The corporation and Robert DeFilippis were now represented by James H. Tully, Jr., Esq., and Stewart Buxbaum, CPA, in addition to David Fusco from the previous hearing. The Division has agreed to cancel the notices issued to Madeline DeFilippis based on information obtained between hearing dates. Also, Robert DeFilippis agreed to his personal responsibility for any taxes due from the corporation.

During the interim period between hearing dates, David Fusco made additional records available to the auditor for review. The records included exemption certificates, documentation of non-sale deposits, deposits applicable to sales of assets and sales delivered to taxing jurisdictions with tax rates lower than 8¼%. Using the same procedures outlined above, the auditor revised the amount of tax due to \$1,029,935.95. The allowance for nontaxable sales for

the test period increased to 22.79% based upon the additional exemption certificates. Mr. Fusco did not produce any additional sales invoices.

### ***OPINION***

The Administrative Law Judge concluded that: (1) the appointment letter was a clear and unequivocal request for books and records for the audit period September 1, 1982 through August 31, 1985; (2) there was no confusion on petitioners' part as to what period for which books and records were to be produced; (3) the auditor made a specific oral request for books and records for the period September 1, 1985 through November 30, 1985; (4) although the power of attorney executed by Robert DeFilippis authorizing Max Felberbaum to represent the corporation on audit was for the period August 1, 1982 - August 31, 1985, Mr. Felberbaum's authority to act for petitioners for the period September 1, 1985 through November 30, 1985 was ratified by petitioners because Mr. Felberbaum filed the initial petition contesting the assessment and appeared at the conciliation conference and the first day of hearing on behalf of petitioners; and (5) petitioners did not establish reasonable cause for abatement of penalties and interest exceeding minimum interest.

The Administrative Law Judge denied the petitions of Robert DeFilippis Crane Service, Inc. and Robert DeFilippis, as officer, and sustained the notices of determination and demand for payment of sales and use taxes due issued November 21, 1986 as modified by the Division's auditor.

On exception, petitioners assert that: (1) the attachment to the appointment letter negated any specific request for books and records for the period August 1, 1982 through August 31, 1985; (2) the letter with the heading "Required Records for Next Appointment" left with petitioners sometime during the audit was the only adequate request for the corporation's books and records and, thus, only that part of the assessment pertaining to 1984 should stand; (3) no adequate request was made for books and records for the extended audit period, i.e., September 1, 1985 through November 30, 1985; (4) the Administrative Law Judge's finding that after adjourning the hearing for purposes of resolving the case, the auditor and Mr.



Felberbaum agreed to use a test period for purposes of determining an allowance for nontaxable sales is not supported by the record; and (5) reasonable cause existed because had Mr. Felberbaum not intentionally engaged in misconduct during the audit, there would have been no tax due.

In response, the Division contends that: (1) the auditor made an adequate request for books and records; (2) the records made available were insufficient to perform a complete audit and, therefore, the use of an indirect audit method was justified; (3) an oral request was made for books and records for the September 1, 1985 through November 30, 1985 audit period; (4) if Mr. Felberbaum did not have authority to act for petitioners for the extended audit period, then petitioners are in default as to that period inasmuch as Mr. Felberbaum was the only person to sign the petitions; and (5) petitioners have not established reasonable cause in that the record is devoid of any causal relationship between the audit results and any misconduct on the part of Mr. Felberbaum as alleged by petitioners.

We affirm the determination of the Administrative Law Judge.

We first address whether the Division made an adequate request for petitioner corporation's books and records.

To begin with, it is undisputed that the Division may use an indirect audit method when available records are so insufficient it is "virtually impossible 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). To determine the sufficiency of a taxpayer's records, the Division must first request (Matter of Adamides v. Chu, 134 AD2d 776, 521 NYS2d 826, lv denied 71 NY2d 806, 530 NYS2d 109), and then thoroughly examine the taxpayer's books and records (Matter of King Crab Rest. v. Chu, 134 AD2d 51, 522 NYS2d 978). It is the inadequacy of the taxpayer's records that justifies the use of an indirect audit methodology for "[t]he honest and conscientious taxpayer who maintains comprehensive records . . . has a right to expect they will be used in any audit to determine his ultimate tax liability" (Matter of Chartair, Inc. v. State Tax Commn., supra, 411 NYS2d 41, 43).

The Administrative Law Judge held that the appointment letter was a clear and unequivocal request for all books and records for the period September 1, 1982 through August 31, 1985 and the attached checklist did not produce any confusion on petitioners' part as to the period for which books and records were to be produced. We agree.

The record reveals that the appointment letter sent to petitioners stated that "All books and records pertaining to sales tax liability should be available" (Exhibit "H," emphasis added). In our view, this appointment letter satisfied the requirement of Matter of Christ Cella, Inc. v. State Tax Commn. (102 AD2d 352, 477 NYS2d 858) and was more than a weak and casual request.

Petitioners argue the checklist attached to the appointment letter negated the general request contained in the appointment letter because the handwritten notation "To Be Determined" next to various categories of sales tax records left them guessing as to what records were actually required to be made available. Petitioners further argue that the only "serious" request for books and records came from the handwritten sheet entitled "Records Required for Next Appointment" upon which was a request for sales invoices for equipment leased or rented for 1984 and, thus, only that part of the assessment as it pertains to 1984 should stand. We believe that petitioners could prevail with this argument only if they could show that they were confused or misled by these subsequent requests (Matter of Scholastic Specialty Corp., Tax Appeals Tribunal, September 10, 1992, affd Matter of Scholastic Specialty Corp. v. Tax Appeals Tribunal, \_\_\_ AD2d \_\_\_, 603 NYS2d 357).

The checklist attached to the appointment letter did not negate the general statement found in such letter. The checklist had the audit period clearly specified at the top of the page and the listing of records were records which were to be included. This signifies that the attachment was not intended to be an all inclusive list as petitioners seem to be arguing.<sup>7</sup> Furthermore, any suggestion by petitioners that they did not provide records for the entire audit period because they were confused by the checklist is severely undermined by the fact that

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<sup>7</sup>It is worth noting that the appointment letter stated "additional information may be required."

books and records made available on audit were even insufficient to perform a complete audit for 1984. Based upon the foregoing, we find the Division made an adequate request for petitioner corporation's books and records for the period September 1, 1982 through August 31, 1985.

Petitioners next contend that the Division's extension of the audit period was improper because there was not an adequate request for books and records for the extended period, September 1, 1985 through November 30, 1985. Petitioners argue that since the auditor did not leave a written request for such books and records, nor did the auditor document in his log such request was made, there is no basis for finding that an adequate request for such period was ever made. We find petitioners' argument without merit.

First, petitioners have directed us to no authority for the proposition that a request for records must be in writing and cannot be oral. Lacking such authority, we conclude that an oral request is adequate as long as it is not weak and casual. Second, the auditor testified that he made an oral request for records and the Administrative Law Judge found this testimony credible. We defer to the Administrative Law Judge's evaluation of credibility (Matter of Spallina, Tax Appeals Tribunal, February 27, 1992). Therefore, there is an adequate basis for finding an oral request was made.

Finally, petitioners' argument that no request was made for the period September 1, 1985 through November 30 1985 is undermined by the fact that bank deposit records and sales invoices pertaining to sales of fixed assets for the extended period were made available upon audit. In petitioners' exception, petitioners state that the actual production of records for the extended period is inconsequential because an adequate request was never made. It seems highly improbable that records would be produced for a period never requested, while not producing records for a period for which it is undisputed an adequate request was made, i.e., 1984.

Petitioners further argue that even if the auditor requested books and records for September 1, 1985 through November 30, 1985 from Mr. Felberbaum, he had no authority to

represent the corporation for such period insomuch as the power of attorney only purported to give Mr. Felberbaum authority for the audit period August 1, 1982 through August 31, 1985. Petitioners contend that under Matter of Adamides v. Chu (supra), that part of the assessment as it relates to the extended period should be cancelled.

We disagree. This case can be distinguished from Adamides because in Adamides there were no facts indicating that the taxpayer had subsequently ratified the representation by the individual named in the improperly executed power of attorney. Here, Mr. Felberbaum's authority to act for the corporation with respect to the extended audit period was ratified by his filing of the petitions contesting the assessment that included this period, his appearance at the conciliation conference and his appearance on the first day of hearing on behalf of the corporation (see, Matter of Jenkins Covington, N.Y., Tax Appeals Tribunal, November 21, 1991, affd Matter of Jenkins Covington, N.Y. v. Tax Appeals Tribunal, 195 AD2d 625, 600 NYS2d 281, lv denied 82 NY2d 664, \_\_\_ NYS2d \_\_\_). Additionally, the form sent via facsimile to the Division of Tax Appeals on July 24, 1991 expressly ratified the prior representation by Mr. Felberbaum on behalf of the corporation. Although this form was not a properly executed power of attorney,<sup>8</sup> the statement on the form is still evidence indicating the ratification of Mr. Felberbaum's prior representation (see, Matter of Jenkins Covington, N.Y., supra).

Next, petitioners dispute the Administrative Law Judge's finding that after adjourning the hearing for purposes of resolving the case, the auditor and Mr. Felberbaum had agreed to utilize a test period for purposes of determining an allowance for nontaxable sales. Petitioners argue that this finding "suggests that the taxpayer consented to the auditor's resort to external indicia to calculate the taxpayer's liability" (Petitioners' exception). To clarify, as the facts indicate, a test period was not used in calculating the initial assessment. The assessment was based upon an analysis of bank deposit records for the audit period after the auditor determined a direct audit could not be performed. Petitioners, after hiring a new representative, utilized the same

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<sup>8</sup>The execution of this form was not acknowledged as required in Division of Tax Appeals proceedings (see, Form TA-15.1; see also, General Obligations Law § 5-1501).

estimate methodology to further reduce the assessment. If petitioners are arguing the use of the estimate methodology did not produce a true indication of their ultimate tax liability, then it was incumbent upon petitioners to provide clear and convincing evidence that the assessment was erroneous or that the audit methodology was unreasonable (Matter of Surface Line Operators Fraternal Org. v. Tully, 85 AD2d 858, 446 NYS2d 451). Petitioners have not done so.

Finally, we address whether reasonable cause exists for abatement of the penalties and interest exceeding minimum interest. Petitioners argue that reasonable cause exists for abatement of the penalties and interest thereon because unbeknownst to petitioners, Mr. Felberbaum intentionally withheld records during the course of the audit and it was not until July 1991 that petitioners learned of the assessments resulting from the audit. Petitioners contend that had it not been for Mr. Felberbaum's intentional misconduct, there would have been no tax due. We reject petitioners' contentions.

Tax Law § 1145(a)(1)(i) authorizes imposition of a penalty plus interest for failure to pay over any tax in a timely manner. These charges may be cancelled if "reasonable cause" is affirmatively shown by the taxpayer (Tax Law § 1145[a][1][iii], 20 NYCRR 536.5[b]). The regulation in 20 NYCRR 536.5(c)(5) provides, in pertinent part, that reasonable cause, where clearly established, may encompass the following:

"[a]ny other cause for delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay and which clearly indicates an absence of willful neglect may be determined to be reasonable cause. Ignorance of the law, however, will not be considered as a basis for reasonable cause."

In order to abate the penalties, the burden is on petitioners to show the failure to comply with the law was due to reasonable cause and not due to willful neglect. Petitioners have failed to affirmatively carry that burden. Petitioners merely allege that Mr. Felberbaum had intentionally mismanaged the audit and tried to conceal the results from petitioners. While we agree that Mr. Felberbaum's performance was not exemplary, the record does not support a finding that there was any intentional misconduct on his part with respect to petitioners. Furthermore, we agree with the Administrative Law Judge that petitioners have not proved that Mr. Felberbaum's

actions were the cause of the corporation's failure to pay the tax.

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

1. The exception of Robert DeFilippis Crane Service, Inc., and Robert DeFilippis, as officer, is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Robert DeFilippis Crane Service, Inc. and Robert DeFilippis, as Officer is granted to the extent indicated in paragraph "F" of the Administrative Law Judge's determination, but is otherwise denied; and
4. The Division of Taxation is directed to modify the notices of determination issued on November 21, 1986 in accordance with paragraph "3" above, but such notices are otherwise sustained.

DATED: Troy, New York  
June 9, 1994

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

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