

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>RAMI INDUSTRIES, LTD.</b>	:	DECISION
<b>AND SANDY KAHMI, AS OFFICER</b>	:	DTA No. 807093
	:	
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 March 1, 1984	:	
through May 31, 1987.	:	

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Petitioners Rami Industries, Ltd. and Sandy Kamhi, as officer, 135 West 36th Street, New York, New York 10018, filed an exception to the determination of the Administrative Law Judge issued on February 13, 1992 with respect to their 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 March 1, 1984 through May 31, 1987. Petitioners appeared by Gerald B. Tepper, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Robert J. Jarvis, Esq., of counsel).

Petitioners filed 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 the Division of Taxation's resort to an observation method of audit in determining petitioners' sales tax liability was appropriate and, if so, whether petitioners have established any error in the resulting dollar amount of tax due as determined from the application of such method.

II. Whether petitioner Sandy Kamhi was a person required to collect and remit sales and use taxes on behalf of petitioner Rami Industries, Ltd. pursuant to Tax Law §§ 1131(1) and 1133(a).

III. Whether petitioners have established any basis warranting abatement of penalties imposed by the Division of Taxation.

IV. Whether the possible failure of petitioners' current representative to have received an answer to the petition herein warrants cancellation of the assessments at issue or any other relief.

### ***FINDINGS OF FACT***

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

On December 1, 1987, following a field audit, the Division of Taxation issued to petitioner Rami Industries, Ltd. (hereinafter "Rami") two notices of determination and demands for payment of sales and use taxes due. On the same date, the Division also issued two identical notices of determination to petitioner Sandy Kamhi, as an officer of Rami. The first of such notices of determination issued to each of the named petitioners assessed tax in the amount of \$61,542.69, plus penalty and interest, for the period March 1, 1984 through May 31, 1987. The second of such notices of determination issued against each petitioner assessed omnibus penalties for the period June 1, 1985 through May 31, 1987. Validated consents extending the period of limitations on assessment were executed on behalf of each of the petitioners permitting the Division to assess tax for the period March 1, 1984 through August 31, 1984 at any time on or before December 20, 1987.

Audit activity in this matter was commenced on or about February 12, 1987, when the Division of Taxation's auditor telephoned Rami's accountant<sup>1</sup> and scheduled an audit appointment for March 16, 1987 at 9:30 A.M. On the same date, the auditor also mailed an audit appointment letter to Rami confirming the date, time and place of the audit appointment. The audit appointment letter specifies the period under audit to be March 1, 1984 through November 30, 1986 and indicates the following:

"[a]ll books and records pertaining to your Sales Tax liability for the period under audit should be available. This would include journals, ledgers, sales invoices, purchase invoices, cash register

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<sup>1</sup>Rami's accountant at the time of audit is not the same person as the individual who represents petitioners in these proceedings. Rami's accountant at the time of the audit was not called as a witness at hearing.

tapes, exemption certificates and all Sales Tax records. Additional information may be required during the course of the audit.

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"All exemption certificates for all locations must be available at the place of audit for inspection and verification on the starting date of the audit. Any exemption certificate not provided at that time may not be recognized as being timely filed."

Petitioner Rami operates as a wholesale and retail seller through three store locations in New Jersey and two in New York. Its offices are located at 135 West 36th Street, New York, New York. Only the New York retail stores were the subject of this audit. The audited stores are known as Sydelles Fabric Store, located at 295 Livingston Street in Brooklyn, New York, and Kamhis Fashion, located at 54-26 Myrtle Avenue, Ridgewood, New York (hereinafter sometimes referred to respectively as the "Brooklyn Store" and the "Ridgewood Store"). These stores made only retail sales, and no wholesale sales, of merchandise such as buttons, zippers, patterns, ribbons, notions, dresses, skirts, shirts, and fabric. The main items sold were fabric remnants with very few dresses, skirts and shirts sold.<sup>2</sup> Neither store accepted checks or credit cards, leaving cash as the only acceptable means of paying for merchandise purchased.

On the scheduled March 16, 1987 audit appointment date, the auditor went to Rami's offices and reviewed Rami's general ledger, sales tax returns and Federal income tax returns. The auditor allegedly found no cash receipts or cash disbursements journals. Bank deposit slips and bank statements were available but were not reviewed by the auditor. Some purchase invoices and a purchase journal were reviewed by the auditor. The auditor spent approximately two days at Rami's offices. On these initial audit dates, as well as at subsequent meetings the auditor, and later her supervisor, specifically asked Rami's accountant to provide cash register tapes or sales invoices for the purpose of verifying sales receipts as reported. Rami's accountant advised in response that such tapes and invoices were not maintained by Rami. The auditor was advised that sales figures were obtained by telephone calls from the store locations. This advice, coupled with the inability to obtain any sales invoices or cash register tapes, led the auditor to

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<sup>2</sup>It appears these latter three items of merchandise were not carried as available for sale until nearly the end of the audit period.

conclude that Rami's records were inadequate for purposes of verifying sales. In turn, the auditor decided to conduct full-day observations of Rami's sales at both the Brooklyn and Ridgewood store locations in order to calculate Rami's sales tax liability and determine the accuracy of Rami's returns as filed.

On April 22, 1987 the auditor, with the assistance of another auditor, observed and recorded each sale at the Brooklyn store for the entire period that the store was open on such date (from 10:00 A.M. to 6:00 P.M.). The auditors were stationed next to the store's one cash register in use during the observation day. On an ongoing hourly basis the sales total on the store's cash register was tallied and compared to the sales as observed and recorded by the auditors. Subsequently, on April 27, 1987, the auditors conducted the same method of observation in the Ridgewood store, again recording every sale transacted and comparing the same on an hourly total basis to the cash register hourly tally.

The auditor utilized the results of the observations in calculating the assessments at issue herein as follows:

a) Retail sales observed at each of the two store locations on the two observation days (\$380.60 for Sydelles and \$269.52 for Kamhis) were totalled to arrive at observed taxable sales of \$650.12.

b) Total taxable sales observed (\$650.12) was multiplied by the six days per week that the stores were open, and the resultant total was multiplied by the thirteen weeks in the sales tax quarterly period during which the observation occurred to arrive at estimated quarterly taxable sales of \$50,709.00.

c) Reported taxable sales per Rami's sales tax return for the observation quarter (\$18,444.00) were subtracted from estimated quarterly taxable sales (\$50,709.00), resulting in unreported taxable sales of \$32,265.00.

d) Comparing unreported taxable sales (\$32,265.00) to reported taxable sales (\$18,444.00) resulted in a margin of error (underreporting) of 1.74935. In turn, reported taxable sales for the entire audit period per sales tax returns (\$422,742.00) were multiplied by such margin of error to arrive at unreported taxable sales of \$739,524.00, and additional tax due thereon was calculated in the amount of \$61,010.73.

In addition to the foregoing, the auditor reviewed Rami's fixed asset acquisitions. Such review revealed seven items for which invoices could not be supplied or for which invoices showed that no tax was paid by petitioners, as follows:

<u>Name</u>	<u>Amount</u>	<u>Date</u>	<u>Reason</u>
Ancre Victory	\$1,740.00	6/25/85	No tax paid
Kring Swings and Shade	800.00	7/30/85	No tax paid
Reliable Typewriter	400.00	10/31/85	No tax paid
C & S Fencing	1,925.00	11/30/85	Invoice missing
Sepe's Inc. (air condition)	600.00	6/6/86	No tax paid
Schnoll Monument	327.00	10/8/86	Invoice missing
International Electric	656.00	10/24/86	Invoice missing
	<u>\$6,448.00</u>		

The auditor calculated use tax due on the above items in the amount of \$531.96.

Totalling sales tax due on unreported taxable sales (\$61,010.73), plus use tax due on fixed assets (\$531.96), results in a total tax due of \$61,542.69, which amount was assessed by the notices of determination described above.

Petitioners challenged the results of the audit and a prehearing conciliation conference was held. On April 14, 1989, a conciliation order was issued reducing the amount of tax due to \$52,936.96, plus penalty and interest. The basis for this reduction was that an additional seven religious holidays per quarter were allowed as days during which both stores were closed, thereby reducing the number of days open for business per quarter from 78 to 71 and, in turn, reducing the amount of taxable sales per quarter. The amount of tax due reflects a recalculation (reduction) of the error rate from 1.74936 to 1.5026.<sup>3</sup>

Petitioner Rami made wholesale sales as well as retail sales. The auditor's review of Rami's general ledger and other records revealed no distinction therein between wholesale sales receipts and retail sales receipts, nor any separate statement of the receipts received from each of the two stores in question. The auditor noted that at the time of her visits to the stores in question, the store cashier did prepare invoices for each sale, providing one copy of the invoice to the customer while retaining one copy for the store's records. The auditor was advised, apparently

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<sup>3</sup>This revised error rate results from dividing recalculated unreported taxable sales for the quarterly period ended 5/31/87 (\$27,714.52) by reported taxable sales for the same quarter (\$18,444.00).

by the store cashier, that at the end of each day the cash received, together with the invoices, were given to the store manager.<sup>4</sup> Cash register tapes were allegedly given to the manager at the end of each month. In turn, the auditor was advised (apparently by the store cashier) that cash receipts and sales invoices were brought to Rami's offices at 135 West 36th Street two or three times per week, with the cash thereafter deposited into Rami's bank account. This information, recorded by the auditor in her audit report and in her log of contacts and comments ("log"), is in apparent direct contradiction to the information provided by petitioner's accountant, who indicated to the auditor that invoices and cash register tapes were not kept and that sales receipts were determined based upon telephone calls from the stores to Rami's main office. The auditor noted that, although bank deposit slips and bank statements were available, the same were not reviewed because without source documents in support of sales, the bank documents would not necessarily verify the total amount of sales without the assumption that all such sales receipts were in fact deposited into the bank.

Petitioners presented the testimony of one Shirley Sercus, who had been Rami's bookkeeper for a number of years including those under audit. She signed a statement indicating that Rami maintained a "full set of accounting records and all normal books required to run a business, including a cash receipts book, cash disbursements, payroll book and general ledger." She noted that all sales were recorded through the cash receipts book, and that the main office received cash from the stores two to three times per week for deposit to the bank. She also indicated that the sales invoices were forwarded to the main office. Ms. Sercus explained that the Brooklyn store had four to five employees, while the Ridgewood store was somewhat smaller and had three to four employees.

Petitioners also introduced into evidence two packets of sales invoices, one for the Brooklyn store and one for the Ridgewood store, which reflect sales made at each store within the quarterly period spanning March through May 1987 (the final quarterly period in question here). These invoices indicate the date of sale, and a description of the type, quantity and price of

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<sup>4</sup>Although not entirely clear from the record, it appears there was one store manager who had charge of both stores.

the items purchased. In no case is a customer number, name or address included on the face of an invoice. No other sales invoices were provided at the time of audit, or thereafter through the time of the subject proceedings. It is alleged by petitioners that all such invoices were destroyed as the result of two separate incidents occurring at the Brooklyn store (see, below).

Petitioners also presented the testimony of Ralph Kamhi. Ralph Kamhi described Rami as a corporation which was founded, owned and operated entirely by his father. Ralph Kamhi held the office of treasurer of Rami (at least for the period after late 1986), while petitioner Sandy Kamhi held the office of secretary. Ralph Kamhi testified that his father owned all of Rami's stock, and ran the business as the "ultimate boss." Ralph Kamhi testified that petitioner Sandy Kamhi was never in the retail stores, never collected, deposited or in any way controlled cash receipts, had no involvement in hiring or firing employees and had nothing to do with the operation of Rami except that he was an officer "in name only." Ralph Kamhi testified that petitioner Sandy Kamhi<sup>5</sup> had no authority to write checks on behalf of Rami.

Ralph Kamhi explained that his father died near the end of 1986, at which time Ralph Kamhi first became involved in Rami's business. He testified that he had no actual involvement with Rami prior to such time, but rather worked in the trucking industry. His knowledge of Rami's business comes from discussions with his father and from his involvement with Rami starting in late 1986 after his father's death. Ralph Kamhi signed certain checks and tax returns on behalf of Rami at the time of his father's death and thereafter. Ralph Kamhi described Sandy Kamhi as "an officer, but he wasn't an operating officer" of Rami during the audit period. He went on to state:

"[b]efore coming [to the hearing], I specifically asked [Sandy Kamhi] if he was involved [in the business of Rami Industries, Ltd. during the audit period], and to the best of his memory, he was not."

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<sup>5</sup>Petitioner Sandy Kamhi also utilized the name Sandy Kay, as indicated on certain documents in the record and as noted in testimony by Ralph Kamhi.

Ralph Kamhi admitted that at the time of hearing, Sandy Kamhi was working in Manhattan but chose (apparently) not to appear personally at the hearing, allegedly because he would have had no knowledge of the matters being discussed.

Ralph Kamhi also testified, in response to questions on cross-examination, that Sandy Kamhi never prepared or signed tax returns on behalf of Rami. Thereafter, however, when shown a sales tax return for the quarterly period ended May 31, 1984 and two corporation franchise tax reports for the period April 1, 1983 through March 31, 1984, on each of which the name Sandy Kamhi is signed, Ralph Kamhi testified first that such signatures were in fact Sandy Kamhi's. He later testified that they might not have been Sandy Kamhi's signature. At best, it appears Ralph Kamhi could only guess as to whether the signatures shown were in fact made by Sandy Kamhi. The signatures on the tax returns are clearly similar to those appearing on the power of attorney appointing petitioners' representative in this proceeding, as well as on the consents extending the period of limitations and on the petition filed herein.

Petitioners submitted in evidence two invoices, one from Standard Renovation, Inc. and one from Jamaica Home Improvement Contractors. The former bears a date of December 24, 1986, is issued to Rami Industries, Ltd. at 135 West 36th Street, and includes the description "pump basement of water . . . 7 hrs[,] reason broken pipe." A description of the work location is not included on the invoice. The second invoice was also issued to Rami Industries, Ltd. at 135 West 36th Street, and indicates a job name and location of "295 Livingston St., Brooklyn, N.Y." (the Brooklyn store). This invoice includes a description of the work performed as: "[b]ackup of sewer, 4 ft. of water in basement pumped out." The date promised for completion of this described work was June 10, 1987. In connection with these two invoices, Ralph Kamhi testified that at the end of December 1986 a water pipe burst in the basement of the Brooklyn store, causing a flood in the basement where the records and invoices of Rami's sales were allegedly stored. He testified that in April of 1987, a city sewer pipe backed up and again flooded the same basement with sewage. Mr. Kamhi indicated that the records of the business, as well as certain inventory, were destroyed and had to be disposed of as a result of these incidents. It was not specified as to whether these items were destroyed as the result of the first or second flooding

(separately), or rather were destroyed by the cumulative effects of both floodings. Mr. Kamhi explained that the invoices for the quarterly period ended May 31, 1987 (those submitted in evidence above) were "at the top of the stack" and had survived the flood and sewage backup.

With respect to the use tax portion of the assessments, the invoices relating thereto (see, above) were not offered in evidence. The only evidence provided on this issue consisted of Ralph Kamhi's testimony that each of the invoiced expenses related to work performed in or at Rami's New Jersey stores. More specifically, he testified that the fencing was installed at Rami's Bloomfield, New Jersey store to provide rear yard security, that the Schnoll monument work involved resetting cornerstones at the Bloomfield store, and that the shelving was attached to the walls of the same store. He noted further that the air conditioning work involved placing an air conditioner in a wall "cut-out" in Rami's Bayonne, New Jersey store, that the electrical invoice related to rewiring the same store, and that the CNS Screens and Shades invoice related to a special window plastic installed to stop sun damage to garments displayed at the Bayonne store. No explanation was offered relative to the Reliable Typewriter invoice.

The auditor's log of contacts and comments includes an entry on August 19, 1987 stating: "[e]xtended two more current quarters in the audit period." This entry is in regard to the fact that the audit period specified in the audit appointment letter extended through the quarterly period ended November 30, 1986, yet the period of assessment covered herein includes the two additional quarterly periods ended February 28, 1987 and May 31, 1987. When questioned about this extension, the auditor admitted that she never specifically asked for any records for any quarterly periods after November 30, 1986.

### ***OPINION***

In the determination below, the Administrative Law Judge held that the auditor for the Division of Taxation (hereinafter the "Division") requested an opportunity to examine Rami's books and records. The Administrative Law Judge further held that the Division was not provided with any original sales documents, such as invoices or cash register tapes for examination, and, notwithstanding that upon observation the auditor saw invoices being created

at the point of sale, the auditor was told repeatedly by Rami's accountant at the time of audit that sales invoices and cash register tapes were not maintained.

The Administrative Law Judge addressed in detail the allegations and evidence presented relating to the broken pipe, sewer backup and invoices, holding that the Division's auditor made repeated requests for source documents to verify sales but was provided with none. The Administrative Law Judge further held that, although at the time of the observations such source records were being created, the balance of evidence was insufficient to support a conclusion that the records were created and maintained during the audit period or were at any time made available to the auditor.

The use of an indirect method of computing petitioners' taxable sales (namely, an observation of sales) was sustained by the Administrative Law Judge, who held that petitioners offered no evidence warranting adjustment of the audit results, including the use tax portion of the assessment. The Administrative Law Judge did, however, cancel that portion of the assessment relating to the last two quarterly periods, holding that the Division failed to request records for periods subsequent to the specified November 30, 1986 audit ending date.

Turning to the issue of petitioner Sandy Kamhi's personal liability, the Administrative Law Judge held that: 1) it was admitted that Sandy Kamhi was an officer of the corporation; 2) there is evidence that he signed tax returns; 3) the testimony of Ralph Kamhi is less than convincing in view of the documentary evidence submitted; and 4) Sandy Kamhi was working in Manhattan, aware of the hearing, and was presumably able to come to the hearing but chose not to. The Administrative Law Judge, in sustaining the assessment against Sandy Kamhi, held that he completely failed to meet his burden of establishing that he was not a person or officer under a duty to act on behalf of the corporate petitioner.

The Administrative Law Judge also held that petitioners advanced neither argument nor evidence sufficient to support a reduction or abatement of the penalties imposed, and further rejected, as unsupported and of no consequence, petitioners' representative's claim that the failure to have received a copy of the Division's answer was prejudicial in that he was unable to

properly prepare for the subject hearing. The Administrative Law Judge noted that the current representative's power of attorney was dated approximately one year after the date of the answer.

On exception, petitioners allege that: 1) each and every finding of fact has been totally distorted; 2) the issues being contested have been improperly listed and the main issues have not been included in the Administrative Law Judge's determination, nor even addressed by the Administrative Law Judge, to hinder further court action; 3) the findings of fact appear to have been prepared without ever reading the transcript of the trial and are improperly stated so as to distort and contradict the testimony by the auditor; 4) the conclusions of law do not reflect the evidence at the hearing; 5) all of plaintiffs' witnesses have been disregarded and the entire conclusions of law are based on one auditor's statement, where this auditor has completely contradicted her own statements and has introduced manufactured evidence to further her case; 6) the Administrative Law Judge has been very prejudiced in his decision by including Sandy Kamhi as a liable party; and 7) no proof has been introduced by the State to make Sandy Kamhi a liable party as intended by both Federal and State law. Petitioners state that they fully dispute the rendered conclusions of law and argue that all of the above will be proven at the time of oral argument. Petitioners also state that affidavits now obtained will show that sales slips and tapes were partially available for the whole audit period, but that the auditor had asked only for a three-month (3) trial period. Petitioners further argue that the following conditions were never considered: 1) that on rainy days the stores do no business; 2) that winter days have very small sales; 3) the economic status of funds being available (welfare checks); 4) that stores were only open 5 1/2 days a week and closed early in inclement weather; 5) that stores closed on holidays; and 6) that spring is a high purchase time for remnants which will be made into necessary clothing, etc. Petitioners argue that the auditor, in computing an error ratio, took her estimates and then compared them to the actual quarter sales tax return, alleging that all sales invoices and tapes were available right in that store for that period. Petitioners also state that "the holding of Sandy Kamhi as a responsible officer is beyond all concepts of the intended law" (Petitioners' brief, p. 4).

The Division argues that: 1) using an observation test to determine petitioners' tax liability was a proper audit methodology; 2) petitioners have not shown that the amount of tax determined due by this audit should be adjusted; 3) petitioners have not provided clear and convincing evidence that Sandy Kamhi is not a person required to collect tax for Rami Industries, Inc.; and 4) petitioners have also failed to meet their burden of proving that the failure to report and pay the required amount of tax was due to reasonable cause. The Division further argues that petitioners' exception should be denied and the determination of the Administrative Law Judge should be sustained in full.

We find no basis in the record before us for modifying in any respect the determination of the Administrative Law Judge.

However, we must address petitioners' intent to place before this Tribunal additional evidence in the form of affidavits which are not part of the record below showing that sales slips and tapes were partially available for the whole audit period.

The record before us shows that the Administrative Law Judge, in closing the hearing below, stated, "[t]he only thing I will add is that I won't take further evidence once I close the record. The only exception to that are the sales tax returns that I have made allowances for. If there is nothing else to be added?" (Tr., pp. 183-184). The Division's representative stated, "[n]othing further," and petitioners' representative stated, "[t]hank you for your patience" (Tr., p. 184). The Administrative Law Judge ended the hearing stating, "I will close the record" (Tr., p. 184).

We reject petitioner's attempt, at this late date, to introduce new evidence after the record has been closed. As we held in Matter of Schoonover, Tax Appeals Tribunal, August 15, 1991):

"[i]n order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing. Further, the submission of evidence after the closing of the record denies the adversary the right to question the evidence on the record. For these reasons we must follow our policy of not allowing the submission of evidence after the closing of the record (see, Matter of Oggi Rest., Tax Appeals Tribunal, November 30, 1990; Matter of Morgan Guar. Trust Co. of N.Y., Tax Appeals Tribunal, May 10, 1990; Matter of International Ore & Fertilizer

Corp., Tax Appeals Tribunal, March 1, 1990; Matter of Ronnie's Suburban Inn, Tax Appeals Tribunal, May 11, 1989; Matter of Modern Refractories, Tax Appeals Tribunal, December 15, 1988" (Matter of Schoonover, *supra*).

As previously stated, 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 petitioners Rami Industries, Ltd. and Sandy Kamhi, as officer, is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Rami Industries, Ltd. and Sandy Kamhi, as officer, is granted to the extent indicated in conclusions of law "E" and "I" of the Administrative Law Judge's determination but is otherwise denied; and
4. The Division of Taxation shall modify the notices of determination and demand for payment of sales and use taxes due dated December 1, 1987 accordingly, but such notices are otherwise sustained.

DATED: Troy, New York  
April 15, 1993

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

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

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