

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
QUEENS DISCOUNT APPLIANCES, INC. AND MOHINDER SINGH, AS OFFICER	:	DECISION
	:	DTA No. 807403
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1984 through May 31, 1987.	:	

Petitioners Queens Discount Appliances, Inc. and Mohinder Singh, as Officer, 20 Stirup Lane, Glen Cove, New York 11542, filed an exception to the determination of the Administrative Law Judge issued on August 13, 1992. Petitioners appeared by John R. Serpico, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Andrew S. Haber, Esq. of counsel).

Petitioners did not file a brief in support of their exception. The Division of Taxation filed a letter in lieu of a brief in opposition. Petitioners submitted a letter in reply that was received on July 22, 1993 which 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.

ISSUE

Whether the Division of Taxation properly determined that petitioners owed additional sales and/or use taxes for the period June 1, 1984 through May 31, 1987.

FINDINGS OF FACT

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

Petitioner Queens Discount Appliances, Inc. ("Queens Discount") was engaged in the business of selling electrical appliances, at wholesale and retail, from premises located at 40-16 82nd Street, Jackson Heights, New York. Petitioner Mohinder Singh was president of Queens Discount.

On or about May 21, 1987, the Division of Taxation ("Division") assigned an auditor to conduct an audit of the corporate petitioner's business. On May 22, 1987, an appointment letter was issued to QueensDiscount scheduling an audit to commence on June 19, 1987 at 9:30 A.M. The audit period was specified to be "from inception of business to 2/28/87". This letter specified the following:

"[a]ll books and records pertinent to your Sales Tax liability for the period under audit should be available. This would include journals, ledgers, Sales invoices, purchase invoices, cash register tapes, exemption certificates, and all Sales Tax records. Additional information may be required during the course of the audit."

A checklist of records required also accompanied this appointment letter, adding bank statements for the audit period to the list of records specified as necessary.

The first field audit appointment with Queens Discount's accountant, scheduled for June 19, 1987, was postponed until July 20, 1987. During this period of postponement, the Division received a Notification of Sale, Transfer or Assignment in Bulk indicating that Queens Discount's business was being sold. This notification, which indicated a scheduled selling date of May 18, 1987, was not received until June 24, 1987. The notification listed the seller as the corporate petitioner herein, and the purchaser as Queens Discount Electronics, Inc.

The auditor's "log of contacts and comments of all audit actions" ("auditor's log") includes an entry for July 20, 1987 as follows:

"Field App't; it should be noted that only a very minimal amount of records arrived at approximately 12:00. Received copies of FIT's; ...left list with accountant...."¹

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"FIT's" presumably refers to Federal income tax returns.

The audit report also notes "records could not be obtained prior to expiration of purchaser's due date of 9/24/87."

On September 17, 1987, the Division issued to the corporate petitioner two notices of determination and demands for payment of sales and use taxes due for the period June 1, 1984 through May 31, 1987. The first of these notices assessed tax due in the amount of \$822,449.13, plus penalty and interest, while the second such notice assessed omnibus penalty (only) for the period June 1, 1985 through May 31, 1987. On the same date, the Division of Taxation issued to petitioner Mohinder Singh two additional notices, identical in amounts assessed and periods covered to those described above, holding said petitioner individually liable for the taxes and penalties assessed against the corporate petitioner, pursuant to the provisions of Tax Law §§ 1131(1) and 1133(a).

The Division's documents reveal that the above assessments were "estimated" due to the fact that the corporate petitioner's books and records were not made available for audit, as requested, within the time constraints imposed in light of petitioners' bulk sale of the business (i.e., by September 24, 1987; see, above). The initial assessment method involved subtracting taxable sales reported per sales tax returns from total bank deposits (excluding sales tax) to arrive at nontaxable sales. In turn, tax was assessed on such resulting balance presumably upon the claim that substantiation of nontaxability was not available as of the date of assessment. It is noted that the period covered by the assessments (6/1/84 - 5/31/87) extends for one quarterly period beyond the period specified in the audit appointment letter as "under audit" (inception of business - 2/28/87). However, a June 22, 1987 entry in the auditor's log provides: "Told accountant records will be needed for the period 6/1/84 through May 15, 1987, the date of sale [of the business]." It is further noted that petitioners raised no issue or objection to the extension of the audit period to include such later quarterly period, nor have petitioners challenged the accuracy of the comment with respect thereto in the auditor's log.

Notwithstanding issuance of the assessments as described, audit work continued. On July 22, 1988, some 10 months after such issuance and following an audit conference between petitioners and the Division, four notices of assessment review were issued to petitioners, revising and reducing the assessments from \$822,449.13 to \$81,856.67 in tax due, plus penalty and interest, and \$4,514.43 in omnibus penalty.

As gleaned from the field audit report and accompanying workpapers, those records ultimately made available by the corporate petitioner included the following: Federal income tax returns and sales tax returns for the period under audit, cash receipts journals, cash disbursements journals, general ledger, purchase invoices, sales invoices, bank statements, and resale and exempt organization certificates. It was noted that the corporate petitioner did not provide a general ledger for its fiscal year ended August 31, 1984, and that sales invoices were not sequentially numbered.

The Division argues that the corporate petitioner's books and records, as provided post-assessment, were inadequate for purposes of conducting a complete and detailed audit thereof. More specifically, the Division alleges that because the general ledger was not available for the fiscal year ended August 31, 1984, and because sales invoices were not numbered in sequential order, the corporate petitioner's records were "unauditable" and lacking in "internal controls". This position in regard to sales invoices stems from the auditor's detailed review of sales invoices for the quarterly period ended November 30, 1986, specifically with respect to claimed nontaxable sales. As described hereinafter, the results of such examination, as projected, formed the basis for reducing the initial assessments to the dollar amount of tax set forth on the notices of assessment review.

As to the specific method of audit resulting in the reduction, the auditor reviewed sales invoices and accompanying substantiation relating to claimed nontaxable sales for the quarterly period ended November 30, 1986. The auditor's review revealed that nontaxable sales for such quarter per invoices (\$422,926.67) exceeded nontaxable sales reported for such quarter per sales tax returns (\$407,887.00) by \$15,039.67, or 3.687%. In turn, the auditor applied such

percentage to claimed nontaxable sales per quarter for the entire audit period thus increasing total claimed nontaxable sales by \$212,361.02. The auditor also reviewed substantiation presented for the 62 customers to whom claimed nontaxable sales were made during the quarterly period ended November 30, 1986. Of such 62 customers, the auditor disallowed sales to the following five individual customers for lack of adequate verification of nontaxability:

<u>Customer</u>	<u>Amount</u>
Wheels Electronics ²	\$19,454.24
ATIF Enterprises, Inc.	1,851.50
A & F TV Service	529.00
ABC Video	6,018.00
Juan Jose Villanueva	<u>42,415.00</u>
	<u>\$70,267.74</u>

Sales to the first four customers were disallowed as nontaxable for lack of adequate verification of resale, while for the last customer exemption was disallowed for failure to supply sufficient documentation to support claimed export out of the United States. The auditor compared the total dollar amount of these disallowed sales (\$70,267.74) to total nontaxable sales during the quarterly period (\$422,926.67 [which amount includes the 3.687% increase described]), thereby arriving at a nontaxable sales error rate of 16.614%. In turn, the auditor applied such percentage to claimed nontaxable sales (as increased by 3.687%) for the audit period (\$5,972,085.02) resulting in disallowed claimed nontaxable sales of \$992,202.21 and tax due

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The sales to Wheels Electronics involved dates and amounts as follows:

<u>Date</u>	<u>Amount</u>
9/5/86	\$ 2,120.00
9/11/86	1,880.00
9/29/86	3,383.24
10/7/86	1,365.00
10/12/86	2,875.50
10/24/86	3,356.00
11/4/86	1,599.00
11/18/86	<u>2,875.50</u>
<u>Total</u>	<u>\$19,454.24</u>

thereon in the amount of \$81,856.67. Such amount, in turn, appears on the notices of assessment review described heretofore.

Petitions were filed and a conciliation conference was requested and held. Following the conference, conciliation orders were issued to petitioners on June 23, 1989, further reducing the assessment of tax from \$81,856.67 to \$72,076.64, plus interest. All penalties, including the omnibus penalties, were cancelled. While not discussed in any of the pleadings or specifically mentioned in the conciliation orders, and while both parties devote considerable time in their briefs to discussing the sales to ATIF Enterprises, A & F TV Service and ABC Video, it is apparent that the reduction in the assessment set forth in the conciliation orders involves acceptance of nontaxability with respect to these three customers. Specifically, a schedule of additional taxes due included with the Division's submitted documents herein provides that the only remaining "errors" involve the initially disallowed sales to Wheels Electronics (\$19,454.24) and to Juan Jose Villanueva (\$42,415.00), and makes no mention of the other sales. This schedule computes a revised error percentage of 14.629%, and is set forth in its entirety as Appendix "A".

In turn, petitioners filed petitions protesting the remaining amount of tax assessed as due (\$72,076.64), arguing that the method of audit was arbitrary and involved an insufficient test period, that the corporate petitioner's records were good and sufficient, and that the Division had failed to make adequate inquiry as to the adequacy thereof. Finally, petitioners claim that sufficient proof has been submitted to support nontaxability with respect to sales made to Wheels Electronics and Juan Jose Villanueva.

Documentation in the file indicates the auditor made certain additional requests for records during the course of his examination post-assessment. The first such request, a list of "[i]tems needed for next appointment", was dated October 20, 1987 and included a request for exemption certificates for a number of named customers including, inter alia, Wheels Electronics. A second similar list, dated October 30, 1987, requested additional shipping documents for, inter alia, Juan Jose Villanueva ("Villanueva") for specific dates and amounts.

This latter request specified four separate sales transactions (on four separate dates) between petitioner and Villanueva in the amounts of \$11,775.00 (September 10, 1986), \$8,700.00 (September 18, 1986), \$8,170.00 (October 17, 1986), and \$13,770.00 (October 17, 1986)³, together totalling the \$42,415.00 amount disallowed for lack of proof of export. On each of these requests for additional records, other customers listed thereon are either marked "OK" or are "checked off", presumably meaning the documents requested by the auditor were furnished and exemption as claimed was allowed. A third additional request, dated January 15, 1988, specified a certificate of exemption for Wheels Electronics as among the records sought.

Among the Division's reasons for maintaining the corporate petitioner's records were inadequate (post-assessment) was the claim that gross sales per sales tax returns were greater than gross sales per books over the audit period (based on a comparison of sales tax returns to the general ledger). The Division calculates such overage on page 40 of the auditor's workpapers. However, page 41 of such workpapers, in turn, reconciles such difference (via year-end adjusting entries), and there is no claim that the Division did not accept the amount of petitioners' gross sales per sales tax returns.

In response to the Division's claim of a missing certificate with respect to Wheels Electronics, petitioners submitted a blanket resale certificate dated December 17, 1986 for Wheels Electronics. This certificate reveals Wheels Electronics' identification number to be 11-2788231, and is otherwise fully completed, save for a description of the nature of the customer's (Wheels Electronics) business (i.e., the area on the resale certificate for such description is left blank). In addition, the certificate includes a checkmark at box "C" thereof, indicating claimed exemption based on "service for resale", as opposed to exemption per checkmark at box "A" thereof, indicating "tangible personal property is for resale in its present form or as a component part of tangible personal property." The Division continues to disallow nontaxability on the sales to Wheels Electronics because no exemption certificate was presented to the auditor or

(later) at conciliation conference, because "[n]o certificate was presented; customer created 12/86; sales tested Q/E 11/30/86",⁴ and because of the noted failure to complete on the certificate the nature of the purchaser's business coupled with the apparent error in checking box "C" instead of box "A". It is noted that while the Division sent verification letters to some of the corporate petitioner's customers vis-a-vis nontaxable purchases, no such verification was sent to Wheels Electronics.

The sales to Villanueva were disallowed by the Division because "customer [Villanueva] made his own arrangements to take the goods to the shipper", and because there was "no evidence that the customer [Villanueva] or his designee took delivery at any place other than Queens Discount." To support its argument, the Division points to a letter from petitioner Mohinder Singh describing the transactions with Villanueva as follows:

"If you notice the documents we did charge him [Villanueva] the sales tax but [sic] upon presentation of Airway bill I had to refund him the sales tax. How stupid can a Broker or middleman would [sic] be to buy all items at one place /dealer if his prices are not insane. To fill up his container or to complete his order he goes from place to place makes his best deals, pays advance to confirm his orders & collects goods as they become available, makes his own arrangement to take it to shipper & collects his shipping documents, which he presented to us as proof that goods have gone out of country, therefore I refunded him the sales tax. Obviously no one is buying so many TV's, VCR's etc for his personal use. From the very beginning we were told that he is looking to buy so many things for export to such & such country. Took quotations [sic] from us. On repeated bargaining of prices final price was settled and agreed upon that I would refund him the sales tax upon presentation of export documentation" (emphasis added).

The merchandise purchased by Villanueva included televisions, VCRs and camcorders with an ultimate destination, as revealed by Varig Brazilian Airways air waybills, of Montevideo, Uruguay. Documents submitted herein include Queens Discount's invoices to Villanueva, each of which consistently states (on its face) that sales tax will be refunded upon presentation of export documents, as well as later invoices showing the refunding to Villanueva of sales tax initially collected on the four transactions. Petitioners also submitted a Uniform

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The thrust of the Division's argument is that because the certificate was dated after the sales in question were made and was not presented to the auditor or conciliation conferee, such certificate may have been only "recently created."

Straight Bill of Lading for each of the Villanueva transactions, showing that the merchandise was picked up at Queens Discount's premises in New York by "Lucky Trucking, N.Y." with the destination listed as Villanueva's premises in North Bergen, New Jersey. The "ship to" areas on the Queens Discount invoices to Villanueva are left blank and two of such invoices, those dated October 9, 1986 and October 17, 1986, are stamped "picked up". In addition, the Lucky Trucking bills of lading do not specify or reflect any charges for transport.

Petitioner Mohinder Singh does not raise any dispute against the claim that he is a person responsible to collect and remit sales and use taxes on behalf of the corporate petitioner, but rather argues only for reduction or cancellation of the assessments matching any such reduction or cancellation afforded the corporate petitioner.

OPINION

The Administrative Law Judge determined that by its letter issued May 22, 1987 the Division made a clear written request for the corporate petitioner's records and that petitioners did not claim, much less prove, that they provided complete and adequate records to the auditor prior to the issuance of the assessments. As a result, the Administrative Law Judge concluded that the Division properly resorted to an estimation technique to determine petitioners' sales tax liability. The Administrative Law Judge also concluded that the estimation technique, i.e., treating the difference between total bank deposits and reported sales as additional taxable sales, had a rational basis. In view of these conclusions, the Administrative Law Judge reasoned that the parties' arguments about the adequacy of the books and records provided after the assessments had been issued were academic. Instead, the Administrative Law Judge opined that petitioners' burden was to prove the nontaxable status of the additional taxable sales determined by the Division and that petitioners had failed to prove that they were entitled to any reductions to nontaxable sales beyond those allowed by the Division after the assessments were issued. Specifically, the Administrative Law Judge held that absent any clarification offered by petitioners at hearing, the Wheels Electronics' blanket resale certificate was insufficient to exclude the Wheels' purchases from tax because it was dated after the sales in question and was

incorrectly and incompletely filled out. With respect to the Villanueva transactions, the Administrative Law Judge determined that the documents submitted clearly revealed that the merchandise was transferred to the purchaser's designee in New York and, thus, the transactions were properly treated as taxable. Finally, the Administrative Law Judge found that petitioners did not prove that the Villanueva sales were aberrant and non-recurring and, therefore, did not establish that the error rate was unreasonable.

We affirm the determination of the Administrative Law Judge.

Although petitioners do not explicitly challenge it, we first state our agreement with the Administrative Law Judge's conclusion that the central question is not whether petitioners ultimately provided complete books and records to the Division, but is, instead, whether petitioners provided complete books and records when requested and prior to the issuance of the assessments. We think this conclusion is correct because whether an audit methodology "is reasonably calculated to reflect the taxes due" (Matter of Grant Co. v. Joseph, 2 NY2d 196, 159 NYS2d 150, 157, cert denied 355 US 869) can only be determined based on information made available to the auditor before the assessment is issued (Matter of House of Audio of Lynbrook, Tax Appeals Tribunal, January 2, 1992).

On exception, petitioners imply that the Division did not request books and records for the entire audit period, but, instead, only requested invoices for nontaxable sales for the quarter ending November 30, 1986 (Petitioners' exception, p. 8).⁵ We find nothing in the record that causes us to disagree with the conclusion of the Administrative Law Judge that the letter issued by the Division on May 22, 1987 constituted a clear, written request for all of the corporate petitioner's records. If something happened during the audit that undermined the statement in this letter and limited the request for records, petitioners have not established it. Petitioners

⁵Although petitioners make this point, their position on the request for records is inconsistent. Petitioners did not take exception to the Administrative Law Judge's finding of fact "4" where it was stated that, by letter issued on May 22, 1987, the Division requested all books and records pertinent to petitioners' sales tax liability for the period under audit, including sales invoices and exemption certificates. Further, petitioners did not take exception to the Administrative Law Judge's statement in conclusion of law "B" that the Division made a clear written request for the corporate petitioner's records. In fact, petitioners repeat this exact language in their proposed conclusion of law "B" (Petitioners' exception, p. 8).

have the burden of proof (Matter of Surface Line Operators Fraternal Org. v. Tully, 85 AD2d 858, 446 NYS2d 451) and petitioners have elected to attempt to satisfy this burden through the submission of documents and to forego their right to a hearing. The documents before us simply do not support the contentions petitioners assert.

Next, petitioners appear to argue that they did provide complete books and records prior to the issuance of the assessments because the auditor's log indicates, according to petitioners, that the "auditor did have copies of sales invoices for the quarter ended 11/30/86 as well as the general ledger; bank statements; sales invoices; cash receipts journal; check disbursements journal; Federal and State Income tax returns and exemption certificates prior to 9/17/87" (Petitioners' exception, attachment B). Contrary to petitioners' assertion, we find nothing in the auditor's log, or elsewhere in the record, that indicates that the auditor had received, prior to the issuance of the assessments, the cash receipts journal, the cash disbursements journal, exemption certificates or sales invoices for any quarter other than that ending November 30, 1986. Petitioners' failure to prove that they provided the auditor with these records prior to the issuance of the assessments requires the conclusion that the Division properly resorted to an estimate technique to determine the sales and use taxes due (see, Matter of Bitable on Broadway v. Wetzler, ___AD2d___ [Dec. 9, 1993]).

Petitioners also argue, relying on Matter of King Crab Rest. v. Chu (134 AD2d 51, 522 NYS2d 978), that the Division failed to perform a thorough investigation of their records and, therefore, that the auditor had an insufficient basis to determine the inadequacy of the records. Again, we find nothing in the record to suggest that the Division failed to examine the records petitioners made available at the time the records were presented to the Division. As petitioners have not established that they provided the auditor with complete books and records prior to the issuance of the assessments, we obviously cannot impose on the Division the responsibility to examine these records before issuing the assessments.

Petitioners also challenge the Administrative Law Judge's finding of fact that the auditor notified them of the extension of the audit period to include the quarter ending May 31, 1987. We agree with the Administrative Law Judge that in the material presented to the Administrative Law Judge petitioners did not raise this issue nor object to the accuracy of the statements relied on by the Administrative Law Judge. As a result, we will not allow petitioners to raise this factual issue for the first time on exception (Matter of Sandrich, Inc., Tax Appeals Tribunal, April 15, 1993).

Petitioners have also challenged the Administrative Law Judge's conclusions with respect to the Wheels Electronics' resale certificate, the Villanueva transactions and the effect of the Villanueva transactions on the error rate. We conclude that the Administrative Law Judge adequately and correctly addressed these issues and affirm his determination for the reasons stated in the determination.

Finally, petitioners have stated that "[i]t may, if proper, at this time be necessary to withdraw the submission and have a full hearing to enable the vendor to receive due process and a fair settlement that will be paid" (Petitioners' letter, July 20, 1993). Other than being unhappy with the unfavorable Administrative Law Judge determination, premised, for the most part, on the failure of petitioners to submit evidence, petitioners have indicated no legal or factual grounds for setting aside the waiver of hearing executed by the parties. Accordingly, petitioners are bound by their election to have the case decided on the submitted documents.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Queens Discount Appliances, Inc. and Mohinder Singh, as Officer is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of Queens Discount Appliances, Inc. and Mohinder Singh, as Officer are denied; and

4. The notices of determination dated September 17, 1989, as revised prior to hearing, are sustained.

DATED: Troy, New York
December 30, 1993

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

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