STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
SOLE TO SOLE, INC. AND ROBIN LONGMATE, AS OFFICER	:	DECISION DTA No. 807925
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 December 1, 1984 through May 31, 1985.	:	

Petitioners Sole to Sole, Inc. and Robin Longmate, as Officer, 20 Hilton Avenue, Northport, New York 11768, filed an exception to the determination of the Administrative Law Judge issued on June 11, 1992. Petitioners appeared by Daniel Martin, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, 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 response, referring this Tribunal as well to its brief filed before the Administrative Law Judge. Any reply by petitioner was due January 13, 1993 which date began the six-month period for the issuance of this decision. Oral argument, requested by petitioners, was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether the audit methodology was reasonably calculated to determine the sales and use taxes due.

II. Whether petitioner Robin Longmate was a person required to collect and pay over sales tax on behalf of Sole to Sole, Inc.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "4" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

During the period in issue, petitioner Sole to Sole, Inc. (the "corporation") was a firm which operated under the name of Shoe Doctor. It sold prescription orthopedic shoes from a van which was equipped toenable the operator to obtain the patients' measurements and fittings. The corporation was organized in order to service Medicaid patients.

Mr. Robin Longmate was the corporation's president. During the period in issue, Mr. Longmate's time was consumed in the operations of a company known as Tri Medical Systems, Inc. He was not involved in the daily operations of Sole to Sole, Inc.

The Division of Taxation (hereinafter the "Division") mailed a letter dated February 3, 1988 to "Shoe Doctor-Sole to Sole, Inc." which sought to schedule a field audit of the corporation's sales and use tax returns on February 24, 1988. The letter requested that the corporation make available all books and records pertaining to its sales and use tax liability including journals, cash register tapes, Federal income tax returns and exemption certificates.

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

> On February 11, 1988, Mr. Longmate placed a telephone call to the auditor. However, the auditor was unavailable. On February 12, 1988, the auditor and Mr. Longmate spoke. At this time, Mr. Longmate advised the auditor that the firm's records had been taken by the Department of Social Services and that none of these records were returned. Mr. Longmate mentioned that he had some shoe prescription records which had been sent to the Department of Social Services, but which were not accepted. The auditor was never given these prescription records, but determined from Mr. Longmate's description of them, that they would not have been a sufficient basis from which to calculate petitioners' sales.

> The auditor was also advised that the business ceased operating in July 1985.[1]

In subsequent telephone calls, Mr. Longmate told the auditor that the business began on February 17, 1985 and continued for five months. On March 1, 1988, Mr. Longmate again stated that he had no records to document sales.

Petitioner Robin H. Longmate, as president, signed a document dated February 21, 1988 which consented to the extension of the period of limitation on assessment of sales and use taxes for the period December 1, 1984 through May 31, 1985 to any time on or before September 20, 1988.

In the course of her audit, the auditor determined that Sole to Sole, Inc. filed two New York State and local sales and use tax returns. One return, for the period December 1, 1984 through February 28, 1985, reported that there were no sales and that no taxes were due. The return was signed by Mr. Longmate as president. The second return was for the period March 1, 1985 through May 31, 1985. The latter return, which was unsigned, reported gross sales and services of $475,971.00 and taxable sales and services of $19,704.00. It also reported that tax was due in the amount of $1,625.60.

Mr. Longmate wrote a letter to the Division dated June 26, 1985 which set forth the amount of the corporation's gross sales, taxable sales and sales tax collected each month during the three-month period ending May 31, 1985. The letter noted that it included a check in the amount of $1,625.60 for the sales tax collected during the period March 1, 1985 through May 31, 1985.

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

> "On February 11, 1988 Mr. Longmate place a telephone call to the auditor. However, the auditor was unavailable. On February 12, 1988, the auditor and Mr. Longmate spoke. As this time, Mr. Longmate advised the auditor that the firm's records had been taken by the Department of Social Services and that very few of these records had been returned. The auditor was also advised that the business ceased operating in July 1985."

We modified finding of fact "4" to represent the record more accurately.

Since no records were available to conduct an audit, the Division chose to rely on a memorandum in its possession which showed that the New York State Department of Social Services reported payment of $767,331.00 to Shoe Doctor in 1985 on an Internal Revenue Service Form 1099. The Division concluded that since the corporation previously reported taxable sales of $19,704.00, the remainder of $747,627.00 constituted additional taxable sales for 1985. Further, because the corporation did not report any sales during the quarterly period December 1, 1984 through February 28, 1985, the additional gross sales (in excess of the $475,971.00 reported for the quarter ended May 31, 1985) of $291,360.00 were attributed to this period. The Division determined that sales and use tax was due in the amount of $56,072.00 by multiplying the additional taxable sales of $747,627.00 by the tax rate of 7.5 percent.

On the basis of the foregoing calculations, the Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated March 4, 1988, to "Shoe Doctor-Sole to Sole, Inc." which assessed sales and use taxes in the amount of $56,072.00, plus penalty of $14,018.00 and interest of $18,584.94, for a total amount due of $88,674.94. The penalty was asserted pursuant to Tax Law § 1145(a)(1) for failure to pay the tax when due. The Division also issued a Notice of Determination and Demand for Payment of Sales and Use taxes Due, dated March 4, 1988, to Robin Longmate as officer of "Shoe Doctor-Sole to Sole, Inc." which assessed the same amount of tax, penalty and interest which had been assessed against the corporation.

A "P. Longmate" signed Postal Service forms 3811, entitled Domestic Return Receipt, showing the receipt of certified mail addressed to, respectively, Shoe Doctor-Sole to Sole, Inc. and Robin Longmate, Officer. Each Domestic Return Receipt showed a delivery date of March 5, 1988. Mr. Longmate's wife is named Patricia.

The corporation's activities with respect to the Medicaid program resulted in Mr. Longmate and his associate, Brian Elenson, being charged with crimes. Ultimately, Mr. Longmate followed his attorney's advice and accepted a plea bargain which required him to perform 280 hours of

community service and pay New York State $100,000.00. Mr. Elenson was required to serve time in jail and make restitution in the amount of $150,000.00.

As a result of the criminal investigation, the New York State Attorney General's office acquired possession of Sole to Sole, Inc.'s records. Through their attorney, petitioners made repeated requests for the return of their records. Initially, petitioners were informed that the evidence was still being reviewed. Later, petitioners were advised that the evidence had been returned to Mr. Longmate. Despite the representations of the Attorney General's office, Mr. Longmate denies having received the records.

OPINION

The Administrative Law Judge determined that while the Division duly requested petitioners' books and records, petitioners failed to produce such documentation. The Administrative Law Judge rejected petitioners' argument that since the corporate books and records had been seized by the Attorney General's Office for Medicaid Fraud and Abuse (hereinafter the "Attorney General's Office") pending prior criminal proceedings against petitioner Robin Longmate, it was incumbent upon the Division to secure the records from this Office, and held that petitioners carried the burden of production. Because petitioners failed to carry this burden, reasoned the Administrative Law Judge, the Division was authorized to utilize external indices in determining petitioners' tax deficiency.

The Administrative Law Judge similarly rejected petitioners' arguments that: (1) the audit method used was improper under the Field Audit Guidelines and (2) the Division unreasonably relied on Federal Form 1099 to calculate the assessment. The Administrative Law Judge opined that due to the nature of Form 1099 -- a form on which governmental units are required by the Internal Revenue Code to report certain payments -- it was rational for the Division to have concluded that the payment from Social Services to petitioners evidenced by the Form 1099 represented petitioners' gross corporate sales. Additionally, the Administrative Law Judge held

that because petitioners could not prove to the contrary, it was rational for the Division to deem all of petitioners' receipts listed on this form to be taxable (citing Tax Law § 1132[c]).

Finally, the Administrative Law Judge determined that, as president of Sole to Sole, Inc., petitioner Robin Longmate is a person required to collect and remit sales taxes due by the corporation.

On exception, petitioners argue that the Administrative Law Judge erred in his reliance on Matter of Continental Arms Corp. v. State Tax Commn. (72 NY2d 976, 534 NYS2d 362) and Matter of Morano's Jewelers of Fifth Ave. (Tax Appeals Tribunal, January 2, 1992) to find petitioners' books and records inadequate and the use of external indices justified, since unlike the petitioners in Continental Arms and Morano's Jewelers, petitioners here did not deliberately frustrate the audit procedure. In this vein, petitioners urge that since they were not represented by an attorney at the time of the audit and hearing, they "therefore lacked the option of trying to subpoena [the corporate] books and records" from the Attorney General's Office (Petitioners' brief on exception, p. 4). Petitioners argue that the Administrative Law Judge erred in not allowing them the opportunity to engage legal counsel, and in neglecting to offer to keep the record open or to reopen the record so that they could supply additional documents.

Petitioners also argue that the particular audit method chosen was not reasonably calculated to reflect the taxes due. Specifically, petitioners challenge the rationality of the auditor's reliance on a Division memorandum (see, Exhibit "N") containing information from a Federal Form 1099 regarding monies paid by the Department of Social Services to an entity called "Shoe Doctor," without ever having examined the actual Form 1099 to verify its contents.[2] Petitioners claim that under the circumstances, the auditor had a duty to make inquiries into other documentation which may have been available and which would have led to a more accurate assessment.

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[2]As the findings of fact reveal, Sole to Sole operated under the name "Shoe Doctor" (see, Exhibit "L").

Referring to Tax Law § 1132(c),[3] petitioners further insist that no consideration was given to the fact that the Form 1099 in question indicates the amount of collectible and uncollected receivables, rather than taxable receipts. Petitioners argue, in effect, that reliance upon the figure representing receivables on the form is misplaced, since petitioners were prevented from collecting these monies pursuant to the aforementioned criminal proceedings.

Finally, petitioners dispute the Administrative Law Judge's determination that petitioner Robin Longmate is a corporate officer, personally liable for collecting and remitting sales taxes due by the corporation.

In response, the Division asks that the Administrative Law Judge's determination be affirmed and petitioners' exception denied.

In addition, the Division contends that: (1) petitioners' testimony at the hearing below proves that petitioners could have provided the Division with the requested books and records, but elected not to do so; consequently, the Division's use of an indirect audit method was authorized; (2) petitioner's attorney, Mr. Daniel Martin, could have used his subpoena powers to secure the records supposedly retained by the Attorney General; and (3) the Administrative Law Judge did not deny petitioners the opportunity to engage legal counsel.

We affirm the determination of the Administrative Law Judge.

First we turn to the issue of whether the Division was justified in resorting to an estimate methodology to assess petitioners' tax liability.

Petitioners claim, preliminarily, that the Division should not have resorted to external indices to calculate the assessment, for the insufficiency of corporate records was not in

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[3]Tax Law § 1132(c) provides, in pertinent part, that:

> "it shall be presumed that all receipts for property or services [of the type pertinent here] are subject to tax until the contrary is established, and the burden of proving that any receipt . . . is not taxable . . . shall be upon the person required to collect tax . . . ."

petitioners' control, but was the result of the Attorney General's Office's seizure of same.[4] Petitioners assert that it was the Division's duty to subpoena the records from the Attorney General's Office, or at least to look to other available documentation (e.g., the shoe prescriptions returned by the Attorney General's Office, the criminal proceeding against petitioner Robin Longmate resulting in the indictment, and the disposition of the indictment and restitution) before resorting to external indices.

In commencing an audit, the Division is required to make an explicit request for the taxpayer's books and records (see, Matter of Christ Cella, Inc. v. State Tax Commn., 102 AD2d 352, 477 NYS2d 858), for the entire period of the assessment (Matter of Adamides v. Chu, 134 AD2d 776, 521 NYS2d 826, lv denied 71 NY2d 806, 530 NYS2d 109). The auditor must then make a thorough review of these records (Matter of King Crab Rest. v. Chu, 134 AD2d 51, 522 NYS2d 978; Matter of Max Serv. Ctr, Tax Appeals Tribunal, September 29, 1988) before deeming them inadequate, for resort to external indices is permissible only after it has been determined that due to the insufficiency of the taxpayer's records, it is virtually impossible to verify sales receipts and calculate the tax liability (Matter of Chartair, Inc. v. State Tax Commn., 65 AD2d 44, 411 NYS2d 41).

There is no dispute that the auditor made a proper request for petitioners' books and records. In response, petitioner Robin Longmate apparently told the auditor that he had no records with which to provide her, except for some shoe prescriptions (Tr., p. 22). Mr. Longmate never gave the prescriptions to the auditor, but the auditor determined from Mr. Longmate's description of them that they would not be a sufficient basis from which to calculate petitioners' sales.

Petitioners did not introduce the prescription records into the record at the hearing, nor did they produce any evidence as to the content of these records. Without evidence as to the nature

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[4]Petitioners explain in their brief on exception that the records had been seized by the Department of Social Services and were being reviewed by the Special Attorney General.

of these records, we have no basis to find that the auditor erred in concluding that these records were inadequate.

We agree with the Administrative Law Judge that the Division had no duty to subpoena petitioners' records from the Attorney General's Office (see, Matter of Continental Arms Corp. v. State Tax Commn., supra; Matter of Arnmart Wholesale Beer Distribs. v. State Tax Commn., 140 AD2d 900, 528 NYS2d 923; Matter of Morano's Jewelers of Fifth Ave., supra; see also, Matter of Autex Corp., Tax Appeals Tribunal, November 23, 1988 [unintentional inability to produce records does not relieve petitioners of their burden of proof]; Matter of Harry's Exxon Serv. Sta., Tax Appeals Tribunal, December 6, 1988 [destruction of records by fire does not relieve petitioners of burden of production]), but, rather, that petitioners carried such an obligation (see, Tax Law § 1135[d]).

Petitioners insist that, notwithstanding section 1135(d), the situation was out of their control, as the Attorney General's Office had the records and since petitioners were not represented by an attorney, they were unable to obtain the records themselves. We disagree. Petitioners had such a representative in the form of Daniel Martin, Esq., who filed petitioners' petition and both briefs, was listed as petitioners' representative on the exception filed by petitioners, and was apparently consulted prior to the administrative hearing by Mr. Colonna, C.P.A., petitioners' representative at the hearing (see, Tr., p. 54). Indeed, according to Mr. Colonna, petitioners used Mr. Martin's position as an attorney to make "many, many" requests of the Attorney General's Office for the records, but to no avail (Tr., p. 56). In any case, Mr. Colonna stated that the necessary records could be duplicated, to wit: "[w]e can reconstruct many of the documents necessary for an in depth audit, and we can obtain photocopies of bank statements, of canceled checks, of everything that we feel is needed by the Sales Tax Bureau to conduct a full investigative examination" (Tr., p. 57).

In the face of these admissions, we fail to understand petitioners' argument. In fact, even had petitioners not had an attorney, and were not able to provide duplicate records, petitioners

could have applied to the Administrative Law Judge assigned to the case to issue a subpoena to the Attorney General's Office for the records, pursuant to 20 NYCRR 3000.6(c)(1).

Thus, despite petitioners attempts to distinguish Continental Arms and Morano's Jewelers from their own situation, we find petitioners have failed to establish that they were "cooperative and willing to participate in the conduct of a full audit" (Petitioners' brief on exception, p. 3) but were frustrated by the failure of the Attorney General's Office to return the books and records (see, Matter of Arnmart Wholesale Beer Distribs. v. State Tax Commn., supra).

As for petitioners' claim that the Administrative Law Judge should have offered to keep the record open or should have reopened the record so that various documents could be supplied, we note that it is not the duty of the Administrative Law Judge to make such an offer, but rather, the burden of the petitioner to request same. Here, petitioners' representative declined to request such permission at the hearing,[5] and cannot now make such a request (see, Matter of Schoonover, Tax Appeals Tribunal, August 15, 1991 [wherein we noted that our policy of limiting the submission of evidence after the hearing is closed, is based on the principle that there must be definition and finality to a hearing]).

Petitioners were made aware at the hearing below that any evidence they wished the Administrative Law Judge to consider in reaching his ultimate determination had to be submitted to him at the hearing (see, Tr., pp. 4-5) or, in the alternative, before he closed the record (see, Tr., p. 68 [wherein the Administrative Law Judge stated, "I point out that no other documents will be considered as part of this record unless permission to submit additional documentation is requested and that permission is granted" (emphasis added)]). And, in fact, petitioners' representative was asked several times by the Administrative Law Judge if he had any

[5]It should be noted that during his closing remarks at the hearing below, Mr. Colonna did ask the Administrative Law Judge "to reopen the case" to allow for a "fair and objective" "reaudit," but never made a formal request to the Administrative Law Judge to leave the record open pending the submission of corporate records (see, Tr., pp. 66-67; see also, pp. 47, 64).

documentation to support his testimony.[6] Yet, Mr. Colonna did not have the documents with him, nor did he ask the Administrative Law Judge for an extension of time to submit the records (see, Tr., pp. 57, 58, 66).

Petitioners' second objection to the audit is that the audit methodology employed by the auditor was irrational because the Division relied on the memo regarding the Form 1099 to calculate the deficiency without first seeking to verify the figures on the actual Form 1099, and/or seeking additional records for a more accurate assessment.

Petitioners' argument is without merit, for the estimate methodology utilized by the Division need only be reasonably calculated to reflect the taxes due, and exactness is not required (Matter of Grant Co. v. Joseph, 2 NY2d 196, 159 NYS2d 150, 157, cert denied 355 US 869; Matter of Markowitz v. State Tax Commn., 54 AD2d 1023, 388 NYS2d 176, 177, affd 44 NY2d 684, 405 NYS2d 454). Indeed, "considerable latitude" is given to the auditor's chosen methodology, (see, Matter of Grecian Sq. v. New York State Tax Commn., 119 AD2d 948, 501 NYS2d 219, 221), for where the taxpayer's own failure to maintain records is what prevents the precise assessment of taxes in the first place, "fair and reasonable approximations" are permitted (see, Matter of Grant Co. v. Joseph, supra, 159 NYS2d 150, 157; Matter of Markowitz v. State Tax Commn., supra).

In all cases, it is the taxpayer who carries the burden of proving by clear and convincing evidence that the audit methodology employed was unreasonable, or that the resulting assessment was erroneous (see, Matter of Meskouris Bros. v. Chu, 139 AD2d 813, 526 NYS2d 679; Matter of Surface Line Operators Fraternal Org. v. Tully, 85 AD2d 858, 446 NYS2d 451).

In this case, petitioners have raised no legitimate question as to the methodology of the Division, nor submitted any form of evidence sufficient to shift the burden of persuasion onto the

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[6]For example, at one point, the Administrative Law Judge asked Mr. Colonna, "by any chance do you have any documents to show what portions of th[e] sales were made for orthopedic shoes that were permitted?" (Tr., p. 66). At another point, after Mr. Colonna testified that petitioners could produce duplicates of the necessary records, the Administrative Law Judge inquired, "[y]ou don't have any of those records today though?" (Tr., pp. 57-58).

Division to defend the rationality of the audit method. We conclude that there is sufficient evidence in the record for this Tribunal to determine that the auditor's reliance on the memorandum containing information from the Form 1099 (Exhibit "N") and the two sales tax returns filed (Exhibit "L") was rational.

Namely, we find that the auditor was able to describe the sources and methodology she used to calculate the assessment (cf., Matter of Basileo, Tax Appeals Tribunal, May 9, 1991 [audit deemed irrational as auditor was unable to respond meaningfully at hearing to inquiries regarding the nature of the audit performed]). Petitioners argue that as the auditor never saw the actual Form 1099 and was not even sure what it represented, she "displayed a lack of effort and understanding in assessing the situation," i.e., her reliance upon the Form cannot be deemed rational (Petitioners' brief on exception, p. 10). We disagree. First, the record indicates -- and petitioners offer no evidence to refute it -- that the Form 1099 in question discloses how much Social Services reimbursed petitioners for the distribution of prescription shoes (see, Exhibits "I", "N"). Second, petitioners have not presented this Tribunal with any reason why reliance on the Division memorandum for the Form 1099 information should be disallowed in favor of locating the actual Form 1099 itself (cf., Matter of Mobley v. Tax Appeals Tribunal, 177 AD2d 797, 576 NYS2d 412; appeal dismissed 79 NY2d 978, 583 NYS2d 195 [where the court found that the taxpayer had established that the information utilized by the Division to estimate the tax was unreliable]). Furthermore, it has been held that third party information supplying evidence (in this case, the Form 1099) can be used to estimate tax due when a taxpayer's records are insufficient (see, Matter of Flanagan v. New York State Tax Commn., 154 AD2d 758, 546 NYS2d 205).

In sum, in the absence of any evidence to the contrary, we agree with the Administrative Law Judge that it was rational for the Division to assume that: (1) the reimbursed funds shown on the Form 1099 represent petitioners' gross sales and (2) all of these sales are taxable, pursuant to Tax Law § 1132(c).

In so holding, we have rejected petitioners' argument that reliance on the Form 1099 was misplaced, as the amount listed thereon did not indicate receipts, but, rather, collectible and uncollected receivables. Tax Law § 1101(b)(3) defines "receipt," in pertinent part, as "[t]he amount of the sale price." No mention is made of the amount actually received. Tax Law § 1132(e) provides, in pertinent part, that the Division may provide by regulation for the exclusion of uncollectible receipts from taxable receipts. At 20 NYCRR 534.7(b), the Division has so provided, however, in order to avail oneself of the exclusion, the taxpayer must first be able to substantiate that the receipt(s) was/were in fact uncollectible. Because petitioners have not provided any evidence of this kind, we cannot accept this argument.

As for petitioners' argument to the effect that the Administrative Law Judge deprived petitioners of legal counsel, as discussed above, petitioners had legal counsel throughout these tax proceedings in the form of Daniel Martin, Esq. Moreover, as the Division noted, petitioners were represented at the hearing by Mr. Colonna, a qualified person of Mr. Longmate's choice (Division's letter brief, p. 1, citing, Tax Law § 2014[1] [which permits petitioners to be represented by a C.P.A. if licensed in New York State]; Exhibit "B" [petitioners' filed Power of Attorney form]).

Finally, we reject petitioners' claim that Mr. Longmate was not active in the management of the corporation's business but held the title of corporate president as a matter of convenience to the parties involved. We affirm, based on his determination, the holding of the Administrative Law Judge that petitioner Robin Longmate is a responsible officer of Sole to Sole, Inc., with the commensurate duties to collect and remit taxes due by the corporation, pursuant to Tax Law §§ 1131(1) and 1133(a).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioners Sole to Sole, Inc. and Robin Longmate, as officer, is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Sole to Sole, Inc. and Robin Longmate, as officer is denied; and

4. The notices of determination and demand for payment of sales and use taxes due dated March 4, 1988 are sustained.

DATED: Troy, New York
July 1, 1993

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

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