

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petitions	:	
of	:	
<b>AMJAK CONSTRUCTION COMPANY</b>	:	DECISION AND
<b>TIBOR ROSENWASSER AND</b>	:	DTA Nos. 808112
<b>ZOLTON ROSENWASSER, AS OFFICERS</b>	:	and 808113
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, 1976	:	
through February 29, 1988.	:	

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Petitioners Amjak Construction Company and Tibor Rosenwasser and Zolton Rosenwasser, as officers, 8 Filmore Court, Monroe, New York 10950, filed an exception to the determination of the Administrative Law Judge issued on March 11, 1993. Petitioners appeared by Isaac Sternheim, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Irwin A. Levy, Esq., of counsel).

Neither petitioners nor the Division of Taxation filed briefs. Oral argument was not requested. The six-month period to issue this decision began on June 11, 1993, the date by which the Division of Taxation could have filed a brief.

Commissioner Jones delivered the decision of the Tax Appeals Tribunal. Commissioners Dugan and Koenig concur.

***ISSUES***

I. Whether the Division of Taxation properly requested and examined books and records for the entire audit period.

II. Whether petitioners satisfied their burden of establishing that certain purchases were made on behalf of tax-exempt organizations and were therefore not subject to sales tax.

III. Whether petitioners received credit for taxes paid on purchases.

***FINDINGS OF FACT***

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

On April 18, 1989, the Division of Taxation ("Division") issued four notices of determination and demands for payment of sales and use taxes duespanning the period June 1, 1976 through February 29, 1988 to petitioner Amjak Construction Company ("Amjak") assessing sales and use tax due in the amount of \$516,131.48, plus penalty (Tax Law § 1145[a][1][i]) and interest. On the same date, the Division issued a notice of determination for the period June 1, 1985 through February 29, 1988 to Amjak assessing a penalty of \$20,843.82 pursuant to Tax Law § 1145(a)(1)(vi). Subsequently, on June 23, 1989, the Division issued a notice of determination for the quarter ended November 30, 1985 to Amjak assessing a penalty of \$10,000.00 pursuant to Tax Law § 1145(a)(3)(i). On the same dates, the Division issued identical notices of determination and demands for payment of sales and use taxes due spanning the same periods and assessing the same amounts as above to petitioners Tibor Rosenwasser and Zolton Rosenwasser, as officers of Amjak. The notices indicated that they were personally liable as officers of Amjak for taxes determined to be due from the corporation. The notices were based upon the results of a field audit of the business operations of Amjak as described hereinafter.

On September 28, 1987, the Division sent a letter to Amjak advising that the corporation's sales tax returns were scheduled for field audit. The period under audit was stated in the letter to be from the "date business began" to the "present". The letter requested that all books and records pertaining to the sales tax liability for the period under audit be made available. The books and records to be provided included journals, ledgers, sales invoices, purchase invoices, cash register tapes, exemption certificates and all sales tax records. On November 20, 1987, the Division sent an identical letter to Amjak requesting that its books and records be made available for audit. This letter, however, did not indicate the audit period. On

the same date, a second letter was sent by the Division to Amjak's representative, Mr. Isaac Sternheim, requesting that a power of attorney be completed by the date that the audit was to commence. The letter further stated that "[a]s of this date, the audit period has not yet been determined."

At a meeting held on December 21, 1987 with the auditors, Amjak's representative agreed that the audit period would be July 1, 1976 through February 29, 1988. This period was placed upon the power of attorney in which Amjak appointed Mr. Sternheim to represent it in this matter. At the meeting, the auditor requested all of Amjak's records for the entire audit period. As so few records were provided, the auditor requested that the following records be made available for review in order to continue the current audit:

- |  |                   |
|--|-------------------|
| 1. sales invoices  | 4/1/85 - 3/31/86  |
| 2. purchase invoices for:<br>material purchases<br>subcontractor purchases<br>job expenses | 4/1/85 - 3/31/86  |
| 3. purchase invoices for:<br>advertising expenses<br>delivery expenses                     | 10/1/85 - 3/31/86 |
| 4. fixed asset invoices  | 6/1/79 - 11/30/87 |
| 5. sales journal   | 4/1/85 - 3/31/86  |
| 6. cash disbursements journal  | 4/1/85 - 3/31/86  |
| 7. supporting documentation for claimed<br>nontaxable sales                                |                   |
| 8. contracts applicable to sales invoices  | 4/1/85 - 3/31/86  |

On January 5, 1988, the auditor sent a letter to Amjak's representative requesting that the same books and records for the same periods be made available for review. In response, Amjak provided the auditor with its U.S. corporation income tax returns, Form 1120, for the fiscal years ended March 31, 1982, 1983, 1984 and 1985. Its representative explained to the auditor that all of the sales of Amjak were capital improvements and most of the materials were purchased for the building of a synagogue.

On March 22, 1988, the auditor left for Mr. Sternheim a request for the following information "to continue with the current audit of your client":

1. sales invoices	4/1/85 - 3/31/86
2. supporting documentation to support nontaxable sales	
3. contracts applicable to sales invoices	4/1/85 - 3/31/86
4. purchase invoices	
subcontractor purchases	4/1/85 - 3/31/86
job expenses	4/1/85 - 3/31/86
5. the 35 remaining material suppliers to be reviewed	
6. purchase invoices	
advertising expenses	10/1/85 - 3/31/86
delivery and trucking expenses	10/1/85 - 3/31/86
7. fixed asset invoices for all purchases	6/1/79 - 11/30/87
8. sales journal	4/1/85 - 3/31/86
9. Federal tax return - FYE 3/31/87	
10. general ledger	
sales and material purchases	4/1/84 - 3/31/85 2/1/87 - 3/31/87

Amjak is in the construction business and is located in the Hasidic community of "Kiryas Joel", in Monroe, New York. During the years at issue, Tibor Rosenwasser was the president of Amjak and Zoltan Rosenwasser was its secretary. There are several references in the audit report which indicate that the business began operating on July 1, 1979. In addition, Mr. Tibor Rosenwasser testified at the hearing that the business began "in the late 1970's". Amjak was not registered as a New York State vendor for sales tax purposes until July 1987. Although requested to do so, Amjak did not provide its sales journal, cash receipts journal, purchases journal, sales invoices and contracts relating to its construction business to the auditor. On at least three separate occasions, Amjak was requested to provide exemption certificates relating to the building of the synagogue; however, one was not provided during the period that the audit was being conducted.

The purchase invoices, sales invoices, sales and construction contracts and documents that identified construction jobs were either missing or unavailable. The books and records did not allow for an opportunity to trace any transaction back to the original source because insufficient books and records were made available. In addition, the auditor determined that gross sales per the records available for the fiscal year ended March 31, 1986 were not in substantial agreement with the sales reported on the Federal income tax return and the sales and use tax returns for the same period. It was also determined by the auditor that purchases per the records available for

the same fiscal year were not in substantial agreement with purchases reported on the Federal income tax return covering the same period.

The auditor reviewed Amjak's asset account and assessed assets in the amount of \$137,618.00, resulting in tax due of \$9,633.26. The auditor assessed Amjak's asset acquisitions because no bills or invoices for any of the asset acquisitions for the audit period were made available for review.

In order to test purchases during the audit period, the auditor reviewed the cash disbursements journal and the purchase invoices for the period April 1, 1985 through March 31, 1986. The auditor began by transcribing the material purchase transactions for the fiscal year ended March 31, 1986 from Amjak's cash disbursements journal. The auditor then reviewed the entire year's purchase invoices to determine if sales tax had been paid. This test included a total of 136 transactions involving 43 suppliers and \$492,444.00 in purchases. Only the purchase invoices of two of the 43 suppliers had the sales tax added to the purchase amount. The review of the purchase invoices resulted in an error rate of 90.025 percent which was applied to Amjak's purchases for the fiscal years ended March 31, 1982, 1983, 1984 and 1985 as indicated on Amjak's U.S. corporation income tax returns. The last year's purchases were obtained from the general ledger. To obtain the purchase amounts for the other years of the audit, the average from these 5 years was used. The application of the error rate to purchases resulted in additional use tax due of \$506,498.22.

For the entire audit period, the auditor imposed upon Amjak a penalty for failure to file and pay over the sales and use taxes due. For the period June 1, 1985 through February 29, 1988, the auditor imposed upon Amjak a penalty for omitting in excess of 25 percent of the amount of the taxes required to be shown on the sales and use tax returns. Finally, penalty was imposed upon Amjak for its failure to obtain a certificate of authority.

Amjak's position is that the material it purchased was used in the construction of a synagogue and associated housing on behalf of an exempt organization, Congregation Yetev Lev D'Satmar, Kiryas Joel, Monroe, New York. It is undisputed that the Congregation was an

exempt organization under the Tax Law during the years at issue. Amjak submitted into the record of this matter various documents in support of its position:

- (a) contractor exempt purchaser certificate of Monfield Homes, Inc., dated June 5, 1981, showing Amjak as the vendor and Congregation Yetev Lev as the project.
- (b) exempt organization certification of Congregation Yetev Lev D'Satmar, dated June 4, 1981, showing Amjak as the vendor;
- (c) letter dated March 8, 1983 from Congregation Yetev Lev stating that the houses being built by Amjak in the village of Kiryas Joel were being built for the Congregation;
- (d) letters from various suppliers which stated that Amjak had not been charged sales tax because the materials had been delivered to and used at the property of the Congregation and a tax-exempt organization certificate had been received;
- (e) purchase invoices from various suppliers to Amjak which indicated delivery was for the Congregation Yetev Lev job;
- (f) purchase invoices to Amjak with no indication as to the destination of the supplies purchased;
- (g) purchase invoices to Amjak indicating delivery of the materials purchased to Kiryas Joel or a lot designation;
- (h) numerous checks written to Amjak by both the Congregation Yetev Lev and Monfield Homes, Inc.; and
- (i) a standard form small construction contract dated in 1981 between Monfield Homes, Inc. and Amjak to build three buildings consisting of four residential units per building. The buildings were to be constructed in the Forest Acres Subdivision, Village of Kiryas Joel, Orange County, New York.

Amjak introduced into the record of this matter purchase invoices which it claims relate to the fixed asset purchases reviewed and assessed upon audit. According to Amjak, the cost of the fixed assets was reduced by three percent prior to being posted in the general ledger in order to account for accelerated depreciation. Applying this reduction to the invoices supplied, it is

determined that Amjak has presented invoices showing tax paid relating to the following fixed assets assessed by the auditor:

<u>Description</u>	<u>Date Placed In Service</u>	<u>Cost</u>	<u>Use Tax Assessed</u>	<u>Sales Tax Paid</u>
Furniture & Fixtures	7/15/79	\$ 2,214.00	\$ 154.98	\$ 87.78
Delivery Equipment	7/6/84	15,496.00	1,084.72	931.25
Delivery Equipment	4/1/84	11,561.00	809.27	706.32
Delivery Equipment	1/11/85	9,491.00	664.37	609.38
Fixtures	5/15/83	3,202.00	224.14	165.01
Furniture & Fixtures	12/10/85	996.00	69.72	60.40
Office Equipment	12/10/85	950.00	66.50	57.61
Office Equipment	10/15/85	1,856.00	129.92	112.55
Furniture & Fixtures	11/15/85	3,753.00	262.71	227.59
Office Equipment	11/15/85	23,750.00	1,662.50	1,440.27
Office Equipment	11/15/85	1,943.00	136.01	<u>117.83</u>
				\$4,515.99

The remaining invoices presented by Amjak do not correlate to any of the fixed assets assessed through the audit.

### ***OPINION***

The Administrative Law Judge found the beginning of the audit period to be July 1, 1979, and cancelled the amounts assessed for periods prior to that date. The Administrative Law Judge based this conclusion on the references in the audit report to July 1, 1979 as the date the business began and on the Division's apparent acceptance of this date, evidenced by its request for records on fixed asset purchases beginning with the sales tax quarter covering this date.

The Administrative Law Judge found that the Division had not made an adequate request for petitioners' books and records for the quarters ending November 30, 1987 and February 29, 1988, and cancelled the amounts assessed for these quarters.

The Administrative Law Judge found the notices to be valid based upon the Tribunal's decisions in Matter of Jericho Delicatessen (Tax Appeals Tribunal, July 23, 1992) and Matter of Negat, Inc. (Tax Appeals Tribunal, April 9, 1992) where notices which failed to indicate that the assessment was estimated were upheld. The Administrative Law Judge noted that, like the petitioners in the above referenced cases, petitioners were aware that the amount of the assessment had been estimated.

The Administrative Law Judge found the test period audit to be justified because of the inadequacy of Amjak's books and records, particularly, the lack of invoices and the absence of records necessary to connect the purchases of tangible personal property with specific construction projects on behalf of an exempt organization.

The Administrative Law Judge held that petitioners had failed to meet their burden to demonstrate by clear and convincing evidence that the method of audit or the amount of the tax assessed was erroneous. The Administrative Law Judge found the documentation presented by petitioners insufficient to establish a connection between the materials purchased and the incorporation of those materials into a building or structure owned by an exempt organization. In particular, the Administrative Law Judge found that petitioners never proved that Amjak was constructing a synagogue or related housing for Congregation Yetev Lev, as no contracts between Amjak and the Congregation were submitted, and in addition, that the relationship, if any, between the Congregation and Monfield Homes, Inc. was never explained or substantiated. Thus, the Administrative Law Judge determined that petitioners did not establish that any construction Amjak did for Monfield Homes was for an exempt organization. In addition, the Administrative Law Judge found it could not be determined from Amjak's records or the documentation presented at the hearing which purchases were for which projects and/or for which organizations.

The Administrative Law Judge held that the purchase invoices submitted by petitioners supported a partial reduction in the assessment for fixed asset purchases; however, he also found that invoices which did not correspond to fixed assets assessed in the audit did not provide a basis for further adjustment.

The Administrative Law Judge upheld the penalties under Tax Law § 1145(a)(1)(vi) because petitioners did not prove any facts establishing reasonable cause for Amjak's failure to accurately report its tax.

In their exception, petitioners request three conclusions of law which appear to reflect petitioners' disagreements with the Administrative Law Judge's determination:

(1) "[t]hat Petitioner's [Amjak] sales were primarily to exempt organizations or to contractors performing work for exempt organizations";

(2) "[t]he only serious request for records was for the period 4/1/85 - 3/31/86. Tax due for all other periods must be cancelled regardless of how the period 4/1/85 - 3/31/86 is treated";

(3) "[i]f tax is deemed to be due for the period 4/1/85 - 3/31/86, credit must be allowed for tax paid on numerous invoices (e.g. R & R Lumber, etc. Exhibit 6)" (Petitioners' exception, p. 2).

The Division's position is unknown as nothing was filed in response to petitioners' exception.

We uphold the determination of the Administrative Law Judge.

We have focused in this decision on each of the conclusions of law requested by petitioners and on such information in the exception which can be related to this conclusion of law. We are, of course, hampered in our evaluation of petitioners' claims by the lack of detail in the exception and the failure to file a brief.

First, petitioners ask that we hold that Amjak's sales were primarily to exempt organizations or to contractors performing work for exempt organizations. We agree with the Administrative Law Judge that petitioners have not provided the substantiation necessary to establish the required connection between the individual purchases and specific projects for exempt organizations (Matter of On the Rox Ligs. v. State Tax Commn., 124 AD2d 402, 507 NYS2d 503, lv denied 69 NY2d 603, 512 NYS2d 1026).

Petitioners assert in their exception that the checks submitted at the hearing and examined by the auditor "clearly indicate that nearly all the work" was performed for exempt organizations (Petitioners' exception, p. 1). However, petitioners have not explained and we cannot independently determine, how the mere existence of checks to Amjak from an exempt organization establish that particular purchases on which use tax was assessed were for a specific project or projects on behalf of an exempt organization. In the case of Congregation Yetev Lev, for example, while Amjak received checks from this exempt organization, no

contract between Amjak and Congregation Yetev Lev was introduced into the record (cf., Matter of Perlstein Bldrs. v. New York State Tax Commn., 87 AD2d 906, 449 NYS2d 355 [refund of sales taxes paid on materials used in construction of a building for an exempt organization permitted, where petitioner established it had entered into a construction contract for the building with the exempt organization]). Even the testimony of petitioner Tibor Rosenwasser, a principal and officer of Amjak, does not contain any details of what was built, or what work Amjak performed on behalf of Congregation Yetev Lev. Petitioners' evidence relating to other organizations for which petitioners claim Amjak worked during the audit period suffers from the same flaws.

Petitioners assert in their exception that the relationship between Monfield Homes (for which an unsigned contract with Amjak was submitted at the hearing) and Congregation Yetev Lev was explained at the hearing (apparently referring to petitioner Tibor Rosenwasser's testimony). This assertion is unsupported by the record. It is clear from the testimony that Mr. Rosenwasser did not know what the relationship between the two entities was, but rather, that it was his feeling that he was working for Congregation Yetev Lev.

Further questions concerning Monfield Homes, Inc. are raised by the documents submitted at the hearing. For example, the unsigned contract between Amjak and Monfield Homes lists one of the contract documents as "Specifications for town houses at Monroe, New York Village of Kiryas Joel, Sponsor 57 Acres Realty Corp" (Exhibit "7," emphasis added). The relationship, if any, between 57 Acres Realty Corp. and Congregation Yetev Lev is never described. Exhibit "10," submitted by petitioners and described by petitioners' representative as showing the later transfer of projects initially constructed by Amjak for Congregation Yetev Lev for use as staff housing, is a deed recorded in 1991 transferring certain property from Congregation Yetev D'Satmar, Inc. to a group of individuals. The last page of this document contains an agreement between Monfield Homes and one of the individuals named in the deed which states that the "parties entered into a contract for construction of a certain five family dwelling." The agreement then goes on to set a final purchase price, dividing it between the

price for the land and the price for construction, and is signed by Monfield Homes and one of the individuals named in the deed. This agreement appears to contradict petitioners' unsupported assertion that this housing was constructed for the Congregation to house its staff. While these documents could perhaps be explained, they have not been.

In their second proposed conclusion of law, petitioners urge us to find that the Division's only adequate request for books and records was for the period April 1, 1985 through March 31, 1986, the period for which there is a written request for records. We cannot agree. The Administrative Law Judge found that the Division had made an adequate request for books and records covering the period July 1, 1979 through August 31, 1987. We find no reason to alter this finding, and petitioners have not provided one.<sup>1</sup>

Lastly, petitioners request that they be given credit for tax "paid on numerous invoices." One example, R & R Lumber, is given. We cannot determine how the evidence in this example supports petitioners' position, as it consists primarily of a letter from R & R Lumber stating that it charged tax "in error" during a particular period; no invoices are attached. Petitioners additionally request a finding of fact that: "[t]axpayer submitted many invoices reflecting tax paid on various purchases made in the test period." However, nothing in the record is cited to support this statement. Nor are we able to fathom what specific modification of the notices at issue here we are being asked to make by these statements. Petitioners have not explained how the auditor's calculations failed to take these invoices into account as the error rate of less than 100% reflects that the auditor gave petitioners credit for some taxes paid. If petitioners' position is that the Administrative Law Judge, in his review of the invoices submitted by petitioners, failed to account for an item for which petitioners should receive credit, it was incumbent on petitioners to specifically point to the document which supports their position.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

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<sup>1</sup>As the Division has not filed an exception, we decline to exercise our discretion to review whether the Administrative Law Judge's cancellation of parts of the assessment for periods at the beginning and end of the audit period was correct (see, 20 NYCRR 3000.11[e]).

1. The exception of Amjak Construction Company and Tibor Rosenwasser and Zolton Rosenwasser, as officers, is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Amjak Construction Company and Tibor Rosenwasser and Zolton Rosenwasser, as officers, is denied; and

4. The notices of determination and demands for payment of sales and use taxes due dated April 18, 1989, as modified by the Administrative Law Judge's determination, are sustained.

DATED: Troy, New York  
August 19, 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