

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>WHITE CARRIAGE CORPORATION</b>	:	DECISION
	:	DTA No. 808336
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, 1982 through May 31, 1987.	:	

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Petitioner White Carriage Corporation, 49 Jane Road, Hauppauge, New York 11788-4712, filed an exception to the determination of the Administrative Law Judge issued on January 7, 1993. Petitioner appeared by Matthew Dollinger, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

Petitioner filed a brief in support of its exception, the Division filed a letter in opposition, and petitioner filed a letter in reply. Oral argument was scheduled for June 3, 1993. Petitioner's request for an adjournment of the oral argument was denied. Petitioner was granted until July 2, 1993 to file a supplemental brief, such date starting the six-month time period for issuance of this decision. No supplemental brief was filed by petitioner.

The Tax Appeals Tribunal renders the following decision per curiam.

***ISSUES***

I. Whether the Division of Taxation was authorized to use a test period audit to determine taxes due from petitioner on its purchases.

II. Whether petitioner was denied the opportunity to prove that sales tax assessed against it was paid by another party.

***FINDINGS OF FACT***

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

On March 30, 1989, the Division of Taxation ("Division") issued to petitioner, White Carriage Corporation, three notices of determination and demands for payment of sales and use taxes due. The first notice assessed tax due for the period December 1, 1982 through May 31, 1986 in the amount of \$90,282.81, plus penalty and interest. The second notice assessed tax due for the period June 1, 1986 through May 31, 1987 in the amount of \$13,311.64, plus penalty and interest. The third notice assessed penalty only for the period June 1, 1985 through March 31, 1987 in the amount of \$14,021.89.

White Carriage owned and operated a bus service which provided services to various school districts on Long Island. At the time the audit commenced, White Carriage had been sold. Petitioner claimed that it was sold in May or June 1986. The audit report states that the business was sold on March 31, 1987.<sup>1</sup>

An audit of White Carriage began in July 1987. The auditor placed a telephone call to White Carriage and was told to contact Stanley Hirsch, one of the principals of the corporation. The auditor did so. According to the Tax Field Audit Record (a handwritten log of personal contacts maintained by the auditor), the auditor spoke by telephone with Mr. Hirsch, his secretary or his accountant approximately 11 times over the next 10 months. The auditor testified that Mr. Hirsch and his accountant told the auditor that many of the business' records were misplaced or unavailable. In several conversations with the auditor, Mr. Hirsch indicated that he and his accountant were putting together the documents requested by the auditor. White Carriage's accountants were identified as Aaron Perel and Alan Jacobson.

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<sup>1</sup>The nature of this sales transaction is not described in the record. It is not known whether the business was sold in its entirety or only the tangible assets were sold. Petitioner offered no proof of the date of the sale.

The first field audit appointment was held on June 27, 1988. The auditor transcribed records made available at that meeting and left a list of other records that would be needed for the audit with Mr. Jacobson. Among the items requested were records of sales for the period December 1, 1982 through February 1, 1987; records of cash disbursements for the same period; records of parts purchases and garage purchases for the month of February 1986; invoices and cancelled checks for all assets bought and sold with a value of over \$1,000.00; a copy of the closing statement relating to the sale of White Carriage; and monthly records of sales for the period December 1, 1982 through February 1, 1987. The records made available to the auditor included sales tax returns, Federal income tax returns, a check disbursements journal and a general ledger. White Carriage also produced some purchase invoices. The auditor was told that many of the corporation's records were misplaced or were not available. In an affidavit, Mr. Hirsch indicates that he lost possession of many of the records of White Carriage after its sale.

The auditor compared receipts reported on Federal returns with receipts shown in the general ledger and found no significant discrepancies. Receipts from operating a transportation service such as petitioner's are not subject to sales tax. Consequently, the purpose of the audit was to verify that White Carriage paid sales or use tax on all of its taxable purchases. The auditor decided to conduct a test period audit of expense purchases, selecting February 1986 as the test period. The field audit report states that Alan Jacobson agreed that the period selected was representative of the audit period. The auditor indicated in his testimony that the month of February 1986 was selected, in part, because it was thought that more invoices would be available for that period than for earlier periods.

The auditor reviewed purchases in two accounts: parts and garage purchases. He attempted to verify taxes paid by comparing purchase invoices to entries in White Carriage's cash disbursements journal and general ledger. Purchase invoices were missing for more than half of the entries. The invoices that were provided showed that White Carriage did not pay sales tax on all of its purchases. The auditor treated all purchases shown in either the cash disbursements

journal or general ledger as subject to tax unless an invoice was provided which showed tax paid. Using this method, the auditor estimated that White Carriage failed to substantiate sales tax paid on 60 percent of its parts purchases and 32 percent of its garage purchases for the test period. These percentages were referred to by the auditor as an error rate. The auditor applied the 60 percent error rate to quarterly purchases of parts and the 32 percent error rate to quarterly purchases of garage items as shown in the general ledger or cash disbursements journal. This methodology yielded tax due on expense purchases of \$94,022.12 for the audit period.

The auditor estimated tax due on asset purchases of \$9,572.33. The items in this category were mostly buses and other vehicles. Books and records were reviewed for the entire period and the auditor found that invoices were not available for each purchase. The auditor was provided with Department of Motor Vehicles registration receipts and cancelled checks showing payments made to the "Sales Tax Bureau" which he accepted as proof of tax paid on some purchases. In addition, the auditor was provided with a letter from Motorola Communications and Electronics, Inc., stating that Motorola collected and paid sales tax on all sales to White Carriage. The auditor accepted this letter as proof of tax paid on all White Carriage purchases from Motorola.

During the course of the audit, the auditor was provided with a power of attorney appointing Alan Jacobson of the "Accounting Office of Aaron Perel CPA" to represent White Carriage on audit. The notice of appearance which is found on the same form was signed by Aaron Perel rather than Alan Jacobson.

The Division assessed a penalty of \$10,000.00 against White Carriage for failure to register as a vendor. Pursuant to a Conciliation Order dated April 27, 1990, that penalty was cancelled.

In an affidavit, Mr. Hirsch stated that White Carriage paid all sales taxes billed by its vendors and assumed that the vendors were properly charging all sales tax due.

Prior to the first administrative hearing, White Carriage served the Division with a Judicial Subpoena Duces Tecum signed by the Honorable Harry H. Kutner, Justice of the Supreme Court of Nassau County. The documents sought by this subpoena consisted of all sales tax returns, payment records, and correspondence related to 14 vendors. Apparently these are vendors with whom White Carriage did business.

The hearing which commenced on December 10, 1991 was continued to allow White Carriage an opportunity to enforce the subpoena or seek the documents requested through another avenue.

At the continued hearing, White Carriage's representative stated that he had made a Freedom of Information request for documents subpoenaed and that the request was denied by the Division. The Division's attorney stated that he had instigated a search of the Division's files and was prepared to place in evidence all documents relating to the 14 vendors which were in the Division's possession and deemed by the Administrative Law Judge to be relevant to the proceedings.

After a search of the files, the Division determined that 6 of the 14 vendors for whom records were subpoenaed were never registered with the Division. The Division had no files related to those vendors. The Division located files relating to five of the remaining eight vendors. The administrative law judge ruled that sales tax returns filed by the vendors were not relevant to the proceedings because such returns do not identify the persons to whom sales are made or the amount of sales tax collected from individual customers; therefore, the returns could not be used to establish that White Carriage paid sales tax to the particular vendor. Documents relating to three vendors consisted entirely of sales tax returns and, in one case, documents related to a bulk sale of assets. These were all ruled to be inadmissible on grounds of relevancy. The Division's files contained audit reports and related documents for two vendors. Petitioner's representative was allowed to review these documents to determine whether they contained information relevant to the audit of White Carriage. Inasmuch as his review failed to disclose

any such information, the files of the remaining two vendors were held to be inadmissible on grounds of relevance.

Pursuant to section 306.4 of the State Administrative Procedure Act, official notice is taken of the following facts: New York State sales tax returns do not require a vendor to report the source of his sales; as a consequence, it cannot be determined from reviewing a completed return whether sales tax was collected from any particular customer.

### ***OPINION***

In the determination below the Administrative Law Judge, citing Matter of East End Student Transp. Corp. (Tax Appeals Tribunal, March 26, 1992), held that, pursuant to Tax Law §§ 1133(b) and 1132(c), if a customer fails to pay the required sales tax on a purchase to a vendor, it is the customer's duty to file a return and pay the tax and furthermore, that the burden is on the customer to overcome the presumption that the purchases were taxable and the tax was not paid.

The Administrative Law Judge rejected petitioner's argument that the Division had to either conduct a complete audit of its records, or obtain its consent to conduct a test period audit, because it was not a vendor and not subject to the record keeping requirements of Tax Law § 1135. The Administrative Law Judge opined that:

"Section 1132(c) of the Tax Law creates a presumption that all receipts for the purchase of tangible personal property are subject to tax. Pursuant to that statute, petitioner bore the burden of proof to establish that it paid sales tax on all purchases subject to tax. Without question, petitioner failed to provide the auditor with such proof. The auditor testified that he was told by Mr. Hirsch that many purchase invoices for the audit period were missing or unavailable. Mr. Hirsch's affidavit essentially substantiated that testimony. If, at the time of audit, petitioner had purchase invoices available to substantiate payment of tax on all taxable items as shown in its cash disbursement journal or general ledger, the use of a test period audit would have been arbitrary and capricious. Inasmuch as purchase invoices were not available for the entire audit period, the Division was obliged to devise a reasonable method to determine the tax due (Matter of W.T. Grant v. Joseph, 2 NY2d 196, 159 NYS2d 150, cert denied 355 US 869). It might simply have relied on the presumption of section 1132(c) and

assessed tax on all purchases of property or services taxable under Tax Law § 1105, unless petitioner proved that the tax was paid. Instead, the Division elected to conduct a test period audit. In the absence of complete records, the Division was authorized to use such a methodology (Tax Law § 1138[a][1]). The burden was on petitioner to prove that 'the result of the method used was unreasonably inaccurate or that the amount of tax assessed is erroneous' (Matter of Meskouris v. Chu, 139 AD2d 813, 526 NYS2d 679). Petitioner has not carried its burden of proof.

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"Since petitioner did not have adequate records of purchases available, the Division was not required to obtain petitioner's consent before resorting to a test period audit. Consent is only required where the taxpayer has provided complete and verifiable records (see, Matter of James G. Kennedy & Co. v. Chu, 125 AD2d 773, 509 NYS2d 199)" (Determination, conclusion of law "B").

Finally, with regard to the sales tax returns filed by vendors from whom petitioner made purchases, the Administrative Law Judge held that because sales tax returns set forth total sales, there is no method to determine from the face of a vendor's sales tax return if a particular customer's purchases are included in the totals set forth on the return. This being the case, the sales tax returns of the vendors would not be relevant to the instant proceeding and requiring the production of them would be a violation of the secrecy provisions of Tax Law § 1146.

On exception, petitioner asserts that: the cases relied upon by the Administrative Law Judge in support of the Division utilizing a test period audit on the basis of inadequate records are irrelevant since they deal with vendors, and petitioner is not a vendor subject to the record keeping requirements of Tax Law § 1135; since petitioner was not required to keep records, its consent to the test period audit was required and no valid consent could be given because there was no valid power of attorney; the sales tax returns of the vendors from whom petitioner made the purchases should have been admitted into evidence as proof that petitioner paid taxes on all its purchases; the test period audit was unreasonable because, for example, the auditor did not take into account the percentage of business petitioner did with a particular vendor and/or the

absence of a particular vendor from the test period; and the Tribunal proceedings should be stayed because of the death of an officer of the corporation.

The Division on exception relies on its brief filed with the Administrative Law Judge in which it asserts that: because petitioner did not pay sales tax on all of its taxable purchases during the audit period and because returns were not filed as required by Tax Law § 1133(b), the Division was authorized to estimate tax due based upon petitioners purchase records pursuant to Tax Law § 1138(a)(1), citing Matter of East End Student Transp. Corp. (*supra*); although the Division was not required to obtain the permission of petitioner to conduct a test period audit, the power of attorney on file authorized Mr. Jacobson to act as petitioner's representative during the audit because an executed notice of appearance is not required prior to a proceeding being initiated before Bureau of Conciliation and Mediation Services or the Division of Tax Appeals; sales tax returns filed by vendors with whom petitioner did business contain no information that would assist petitioner in proving that tax had been paid on all of its purchases during the audit period; and with regard to the letter received from Motorola, petitioner was given credit for having paid sales tax on Motorola purchases made during the test period. The additional letter submitted by the Division on exception emphasizes its assertion that the sales tax returns of the vendors from whom petitioner made purchases are not relevant to the instant proceeding because the mere act of the Division accepting the returns for filing does not prove the completeness and accuracy of the returns.

We affirm the determination of the Administrative Law Judge.

Furthermore, since the Administrative Law Judge completely and adequately addressed the issues before her, we sustain for the reasons stated in the determination.

The only issue not before the Administrative Law Judge concerns correspondence received from petitioner requesting an adjournment of the oral argument scheduled for June 3, 1993 before the Tribunal. This correspondence stated that "[A]s a consequence of Mr. Hirsch's death we believe that the Tax Appeals Tribunal is divested of jurisdiction to render a determination



until proper substitution has been made, and that any steps taken without such substitution having been accomplished shall be void. Accordingly, the oral argument currently scheduled herein is stayed as a matter of law" (Petitioner's letter, May 26, 1993). The Division responded by asserting that a corporation's existence survived that of any of its officers and, therefore, there was no reason to grant a stay. Petitioner's request for an adjournment was denied and petitioner was granted time to submit a supplemental brief to include a further discussion of the jurisdictional issue along with any points petitioner had anticipated making at oral argument. Petitioner did not respond. We see no basis in petitioner's correspondence for granting a stay in our proceedings based upon the death of an officer of a corporation when petitioner in the instant case is the corporation, not the officer.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of White Carriage Corporation is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of White Carriage Corporation is denied; and
4. The notices of determination and demands for payment of sales and use taxes due, as modified by the Conciliation Order dated April 27, 1990, are sustained.

DATED: Troy, New York  
January 3, 1994

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

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