

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JAMEEL ALSAIDI	:	DECISION
D/B/A HOLLYWOOD GROCERY STORE	:	DTA No. 811867
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, 1987	:	
through February 28, 1991.	:	

Petitioner Jameel Alsaidd d/b/a Hollywood Grocery Store, 120 East Burnside Avenue, Bronx, New York 10453-4138, filed an exception to the determination of the Administrative Law Judge issued on January 19, 1995. Petitioner appeared by Edmund J. Mendrala, Esq. The Division of Taxation appeared by William F. Collins, Esq. (John E. Matthews, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation's letter stating it would not be filing a brief was received on March 23, 1995, which date began the six-month period for the issuance of this decision. Petitioner's request for oral argument was denied.

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

ISSUE

Whether petitioner has proven error in the Division of Taxation's audit method or result where such method consisted of a one-day observation of petitioner's sales.

FINDINGS OF FACT

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

On March 12, 1992, following an audit, the Division of Taxation ("Division") issued to petitioner, Jameel Alsaidi d/b/a Hollywood Grocery Store, a Notice of Determination which assessed \$29,042.48 in additional sales tax due, plus penalty and interest, for the period December 1, 1987 through February 28, 1991.

During the period at issue, petitioner owned, as a sole proprietor, a small store known as Hollywood Grocery Store. Petitioner's store sold groceries, beer, soda and cigarettes. Hollywood Grocery Store was located on East Burnside Avenue in the Bronx, a commercial area beset with crime. The hours of operation of petitioner's store were from 6:00 A.M. to midnight and the store was open seven days a week. A grocery store similar to petitioner's was located across the street. Another similar store was near the end of petitioner's block and a supermarket was located around the corner.

On audit, petitioner's accountant advised the Division that petitioner maintained no books or records for his business, nor did petitioner have a business checking account.

The Division therefore decided to use a one-day observation test to determine petitioner's taxable sales. The date of the observation test was Tuesday, May 7, 1991. The Division's auditors arrived at the store unannounced on that date and observed and recorded all sales in the store from 8:00 A.M. to 8:00 P.M. This total was determined to be the total sales of the store for the day.

The Division observed \$540.05 in total gross sales during the course of the observation test. Of this amount, \$440.54 were taxable sales. After allowing credit for bottle deposits and City cigarette tax and dividing taxable sales by 1.0825 to remove sales tax, the Division determined net daily gross sales of \$481.38 and net daily taxable sales of \$381.87 per the observation test. The Division projected this daily taxable sales amount over the period December 1, 1989 through February 28, 1991. The Division then calculated daily taxable sales figures of \$332.06 for the period December 1, 1988 through November 30, 1989 and \$288.75 for the period December 1, 1987 through November 30, 1988. The reduction in daily taxable

sales for the earlier portions of the audit period were premised on the assumption that the business grew from year to year and were calculated by dividing the daily taxable sales figure for the prior period by 1.15 (i.e., \$381.87 divided by 1.15 = \$332.06 and \$332.06 divided by 1.15 = \$288.75).

The Division also allowed for 11 days closed during the audit period. Specifically, the Division allowed as days closed the Christmas (4) and New Year (4) holidays falling within the audit period and also 3 other days. The Division also made an allowance of 5% for pilferage, spoilage and waste.

Using the methodology described above and after an allowance for taxable sales reported, the Division calculated additional taxable sales for the audit period of \$349,969.98. Applying the prevailing rate of 8.25% to such taxable sales results in additional tax due of \$28,872.52.

The Division also determined that petitioner did not file a sales tax return for the quarter ended November 30, 1990. The Division estimated tax of \$169.95 for that quarter based on returns from prior quarters. Total additional sales tax due for the entire audit period thus amounted to \$29,042.48.

Petitioner was out of the country and was residing in Yemen from June 1989 until September 1990. During his absence, petitioner's brother ran the store. Upon his return, petitioner again ran the store.

Throughout the entire audit period, including when petitioner was overseas, sales tax returns were filed under the name "Alsaidi Jameel/Hollywood Grocery Store" using identification number 13-3433964.

Sales tax returns were prepared and filed throughout the audit period by petitioner's accountant. Petitioner indicated that the accountant prepared such returns from sales information provided by petitioner or, during petitioner's absence, petitioner's brother. Inasmuch as petitioner kept no records whatsoever of his sales, the quarterly information provided to the accountant was based on recollections and estimates.

At hearing, petitioner testified that the weather on the day of the observation test was sunny and warm and that, as a result, his business on that day increased "a little bit" (tr., p. 47).

Petitioner also presented the testimony of his cousin, Jameel Ahmed Alsaïdi, who was present in the store on the day of the observation. Petitioner's cousin testified that the weather on that day was "not bad . . . nice weather" (tr., p. 34) and that it was unusually warm.

The auditor who performed the observation test testified that he did not think the weather on the day of the test was unusually warm.

Petitioner also testified that, on the day of the observation, an ongoing construction project on Burnside Avenue had closed the sidewalk on the opposite side of the street from petitioner's store.

Petitioner's cousin, Jameel Ahmed Alsaïdi, also testified that the sidewalk on the opposite side of the street from petitioner's store was closed on the day of the observation test.

The auditor testified that, while construction work was going on in the street on the day in question, the sidewalks on both sides were open for pedestrians.

Petitioner also testified that his sales on the day of the observation were "almost double [his usual sales] . . . almost \$200.00 and change extra" (tr., p. 67).

OPINION

In the determination below, the Administrative Law Judge held that "[p]etitioner conceded that he failed to maintain any records of his business . . . the Division was authorized to estimate his sales tax liability pursuant to Tax Law § 1138(a)(1)" and "[t]he parameters of such an estimate methodology are well established" (Determination, conclusion of law "A").

The Administrative Law Judge, citing Matter of Club Marakesh v. Tax Commn. of the State of New York (151 AD2d 908, 542 NYS2d 881, 883, lv denied 74 NY2d 616, 550 NYS2d 276), held that the audit method selected must be "reasonably calculated to reflect the taxes due." However, such method need not be immune from attack as imprecise (see, Matter of Meskouris Bros. v. Chu, 139 AD2d 813, 526 NYS2d 679, 681). Further, "where the taxpayer's own failure to maintain proper records prevents exactness in determination of sales tax liability,

exactness is not required' (Meyer v. State Tax Commn., 61 AD2d 223, 228, 402 NYS2d 74, 78, lv denied, 44 NY2d 645, 406 NYS2d 1025)" (Determination, conclusion of law "A").

The Administrative Law Judge, in citing Matter of Sol Wahba, Inc. v. New York State Tax Commn. (127 AD2d 943, 512 NYS2d 542, 543), held that when such an audit method is used by the Division, "the burden is placed on petitioner to establish by clear and convincing evidence that both the method used to arrive at the tax assessment or the assessment itself is erroneous" (Determination, conclusion of law "A").

The Administrative Law Judge, after visiting the above case law as well as a large body of case law upholding observation test audit methods similar to the audit employed herein, then held that in view of petitioner's failure to maintain any sales records for the period at issue, the audit method employed herein, a one-day observation test, must be sustained.

The Administrative Law Judge rejected petitioner's contention relating to the weather being a factor which led to increased sales over normal sales on a typical day holding that the testimony of petitioner and his cousin is outweighed by the absence from the record of any documentation proving that the weather was exceedingly warm on the day of the observation test.

The Administrative Law Judge also rejected petitioner's contention that construction on Burnside Avenue closed the sidewalk on the opposite side of the street on the day of the observation test resulting in more pedestrian traffic by his store and an increase in sales. The Administrative Law Judge held that, since there were no sales records, it is only speculative that the construction resulted in increased sales. Thus, there can be no adjustment to the assessment.

The Administrative Law Judge then pointed out that even if petitioner was correct as to the above two issues (the weather and the sidewalk closing) causing an increase in his sales on the day in question, "there is simply no evidence in the record upon which to make an adjustment to the audit calculations [footnote omitted]. Since petitioner maintained no records of his sales, there is no way to determine petitioner's actual daily sales and thus no basis upon which to modify the assessment" (Determination, conclusion of law "C").

The Administrative Law Judge also: 1) rejected petitioner's argument that during the period his brother managed the store the sales were substantially diminished as well as his argument that he gave the store to his brother prior to leaving the country; 2) held that "it is clear that petitioner retained ownership of his store and continued to be vendor for sales tax purposes during the period he was out of the country"; and 3) determined "[t]he Division's assessment of sales taxes against petitioner during the time he was in Yemen was therefore proper" (Determination, conclusion of law "D").

On exception, petitioner argues that the audit methods were not reasonable because: the balmy weather was uncharacteristic for annualizing sales since his business was in fact seasonal; the street and sidewalk construction caused a doubling of pedestrian traffic in petitioner's store; and petitioner was out of the country during a 14-month portion of the audit period.

Petitioner further argues that he has borne the burden of proving that the audit methodology was unreasonable and "based upon the testimony at hearing, the Division's assumptions were blatantly incorrect, and should be reversed" (Petitioner's brief on exception).

The Division, while not submitting a brief in opposition, relied instead on its post-hearing brief and argues the Administrative Law Judge adequately and correctly addressed all issues presented and for the reasons stated therein, his determination should be affirmed.

We affirm the determination of the Administrative Law Judge.

Petitioner has not raised any issues on exception that were not raised before the Administrative Law Judge. The Administrative Law Judge correctly analyzed and weighed all the evidence presented in this case and correctly decided the issues. We uphold the determination of the Administrative Law Judge for the reasons stated therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Jameel Alsaidi d/b/a Hollywood Grocery Store is denied;

2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Jameel Alsaïdi d/b/a Hollywood Grocery Store is denied; and
4. The Notice of Determination dated March 12, 1992 is sustained.

DATED: Troy, New York
August 3, 1995

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

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

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner