

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

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| In the Matter of the Petition | : | |
| of | : | |
| MARVIN HAMMERMAN, OFFICER OF | : | DECISION |
| WCD, INC./WOODEX DESIGNS | : | DTA No. 812210 |
| | : | |
| 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 November 30, 1990. | : | |

Petitioner Marvin Hammerman, officer of WCD, Inc./Woodex Designs, 111 East 30th Street, New York, New York 10016 filed an exception to the determination of the Administrative Law Judge issued on December 15, 1994. Petitioner appeared by Uncyk, Borenkind and Nadler (Norman R. Berkowitz, Esq., of counsel). 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 filed a letter stating it would not file a brief in opposition, but would rely on its brief below. This letter was received on March 3, 1995, which date began the six-month period for the issuance of this decision. Petitioner's request for oral argument was denied.

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

ISSUES

I. Whether a rational basis existed for the Division of Taxation to estimate the sales and use tax due on material purchases.

II. Whether, under the facts and circumstances herein, the Division of Taxation properly asserted personal liability against petitioner, Marvin Hammerman, pursuant to Tax Law §§ 1131(1) and 1133(a).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "15" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

On January 28, 1991, following an audit, the Division of Taxation ("Division") issued to petitioner, Marvin Hammerman, individually and as officer of WCD, Inc./Woodex Designs, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due which assessed \$112,625.77, plus penalty and interest, for the period December 1, 1987 through November 30, 1990.

Also on January 28, 1991, the Division issued to petitioner a second statutory notice which assessed \$11,262.58 in penalties under Tax Law § 1145(a)(1)(vi) for the same period.

The audit which resulted in the issuance of the above-noted assessments was commenced by the Division's mailing of an audit appointment letter dated December 28, 1990 to: "WCD, Inc./Woodex Designs, 1206 Second Avenue, New York, NY 10021." Said letter set an appointment date of January 17, 1990 at the taxpayer's place of business; indicated an audit period of December 1, 1987 through November 30, 1990; requested that all books and records of the business for the audit period be made available at that time; and further requested that the taxpayer contact the Division to confirm the appointment.

On December 28, 1990, the Division's auditor visited 1206 Second Avenue and determined that the store which apparently had been operating at that location was empty and that no business had been conducted from that location for some time.

The Division subsequently sought to locate the vendor/taxpayer using the telephone directory. This effort revealed that the business telephone number had been disconnected and that no forwarding information was available.

The Division then discovered that petitioner, Marvin Hammerman, was an officer of WCD, Inc. and mailed an audit appointment letter dated January 16, 1991 to WCD,

Inc./Woodex Designs, care of Marvin Hammerman at his home address, 111 East 30th Street, New York, New York. Said letter was identical in content to the previous audit appointment letter except that it set an appointment date of January 28, 1991 at the Division's offices.

The Division received no response to either the December 28, 1990 or January 16, 1991 letters.

The tax assessed in the January 28, 1991 statutory notice for the period December 1, 1987 through February 28, 1990 was based upon gross sales figures as reported on sales tax returns filed for the same period by WCD, Inc./Woodex Designs. The Division determined that such gross sales constituted taxable sales and computed the tax due accordingly. In other words, the Division disallowed all sales claimed as exempt by WCD, Inc./Woodex Designs for the period December 1, 1987 through February 28, 1990.

Prior to the issuance of the statutory notices, no sales tax returns were filed by WCD, Inc./Woodex Designs for the period March 1, 1990 through November 30, 1990. The Division estimated a tax liability of \$10,366.53 for each of the three sales tax quarters comprising this portion of the audit period. The basis for this estimate is not contained in the record.

Subsequent to the issuance of the statutory notices and following a Bureau of Conciliation and Mediation Services ("BCMS") conference on January 10, 1992, the Division reviewed certain information made available by petitioner's accountant. Such information included sales invoices and the partnership returns of Woodex Designs. From the record, it appears that the Division received certain information in September 1992 and that an informal conference among the auditors and petitioner's accountant was held at the Division's offices in November 1992. The Division's review of such documents resulted in a revision of the assessment herein as follows:

| | <u>Tax Due</u> |
|---|----------------|
| Additional Tax Due on Disallowed Exempt Sales | \$14,951.89 |
| Difference of Sales Tax per Invoices and Amounts Paid per Returns | 10,456.72 |

| | |
|--|------------------|
| Tax Reported on Final Return (Pd. Ended 8/31/90) - Not Paid | 747.65 |
| Tax Due on Purchases | <u>10,675.50</u> |
| Total Tax Due | \$36,831.76 |

Following a second BCMS conference on April 28, 1993, other adjustments were made resulting in a further revision of the assessment to \$34,483.61. A Conciliation Order was issued on June 25, 1993 which revised the statutory notices in accordance with this adjustment.

The assessment herein revised pursuant to the Conciliation Order asserts tax due for the final three sales tax quarters of the audit period as follows:

| <u>Period Ended</u> | <u>Revised Tax Due</u> |
|---------------------|------------------------|
| 5/31/90 | \$2,513.22 |
| 8/31/90 | 1,183.28 |
| 11/30/90 | -0- |

Petitioner presented no evidence at hearing to refute the Division's audit computations.

The tax due on the purchases component of the adjusted assessment results from the Division's review of records of capital improvements purchases. Such records provided no breakdown as to what portion of such purchases constituted materials purchases. The Division estimated that 30% of the total of the capital improvements purchases constituted purchases of materials and assessed tax on this 30%. This 30% materials estimate was based on the auditor's experience. Except for this tax assessed with respect to purchases, the other components of the revised assessment are based upon a review of records provided by petitioner and are not estimated.

We modify finding of fact "15" of the Administrative Law Judge's determination to read as follows:

The business which had been located at 1206 Second Avenue, New York, New York (see, above) was involved in the sale of furniture. This business also may have manufactured furniture. There is some disagreement among the parties and confusion in the record regarding the name and form of the entity which conducted this furniture business. The

Division's records indicate there was a sales tax vendor named "WCD, Inc./Woodex Designs" at the 1206 Second Avenue address with a Federal employer identification number of 13-3354277. At least one sales tax return was filed under this name and this employer identification number during the period at issue.¹

Petitioner introduced into the record the 1987 and 1988 New York S corporation information reports (Form CT-3S) of "WCD, Inc.", a New York corporation. These reports indicated an employer identification number of 13-3354277 and a date of commencing business in New York of July 9, 1986. The reports further indicate WCD, Inc.'s principal business activity as "investment" and that WCD had no income for either 1987 or 1988. The reports also indicated that Marvin Hammerman was the president and sole shareholder of WCD, Inc.

Petitioner also entered into the record a copy of a partnership agreement dated July 9, 1986 pursuant to which WCD, Inc. and Rachid Chamoun agreed to conduct business as a partnership under the name "Woodex Designs". The agreement indicated as the purpose of the partnership "to own and operate a store for the sale at retail of fine furniture" The partnership agreement further provided that net profits and losses would be divided 60% to WCD, Inc. and 40% to Rachid Chamoun.

The partnership, Woodex Designs, filed a Business Certificate for Partners in the County of New York on July 10, 1986.

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The Administrative Law Judge's finding of fact "15" read as follows:

"The business which had been located at 1206 Second Avenue, New York, New York (see, finding of fact "4") was involved in the sale of furniture. This business also may have manufactured furniture. There is some disagreement among the parties and confusion in the record regarding the name and form of the entity which conducted this furniture business. The Division's records indicate a sales tax vendor registration in the name of 'WCD, Inc./Woodex Designs' at the 1206 Second Avenue address with a Federal employer identification number of 13-3354277. Sales tax returns were filed under this name and this employer identification number during the period at issue."

We modified this fact to more accurately reflect the record.

Petitioner also submitted into evidence the 1986 and 1988 U.S. partnership returns of "Woodex Custom Design" (Form 1065). These returns indicated that the partnership started business on July 9, 1986 and that its principal business activity was furniture sales. These returns list an employer identification number of 13-3377916. The returns further indicate partnership interests of 60% to WCD, Inc. and 40% to Rachid Chamoun. The 1988 return indicates gross sales of \$643,746.00.

Petitioner also introduced into the record WCD, Inc.'s 1987 Schedule K-1 filed in respect of WCD's partnership interest in Woodex Custom Designs. This Schedule K-1 indicated a 60% partnership interest for WCD, Inc. and also indicated that WCD, Inc. materially participated in the business activity of the partnership. The K-1 further listed employer identifying numbers of 13-3354277 for WCD, Inc. and 13-3377916 for Woodex Custom Designs.

The Division introduced into the record the sales and use tax return (Form ST-102) for the period December 1, 1989 through February 28, 1990 filed by "WCD, Inc./Woodex Designs". The return bore a pre-addressed label listing an address of "WCD, Inc./Woodex Designs, 1206 2nd Ave., New York, New York 10021" and a preprinted identification number of 13-3354277. On the return, this identification number has been lined out in blue ink and above it has been written, also in blue ink, the number 13-3377916. Below the mailing label has been written in green ink 13-3354277. The blue ink used to make the noted changes in the preprinted information is clearly the same hand and ink used to write the various sales information listed on the return. The return is dated March 20, 1990 and is signed by Marvin Hammerman, as president.

The partnership agreement of Woodex Designs provided, in part, the following with respect to the control and operation of the partnership:

"(a) Chamoun shall have control and management of the day-to-day operation of the Store, provided, however, that until the payment of the Inventory Purchase Price,² he shall be subject in all respects to the authority of WCD.

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The inventory purchase price is defined in the partnership agreement as the price paid for the initial inventory of the store. The agreement sets the due date for the payment of this purchase price as the third anniversary of the

"(b) Except for the day-to-day operation of the Store, the Partners shall have equal voice in the operation of the Partnership and neither Partner shall act without the approval of the other in any material matter, provided, however that until the Inventory Purchase Price shall be fully paid, WCD shall have final authority on all Partnership matters.

"(c) The Partners shall have the specific rights and powers required for or appropriate for the supervision of the business of the Partnership. Such rights and powers shall include, but not be limited to, the following:

"(1) To employ persons in the operation and management of the Partnership business;

"(2) To place title to or the right to use Partnership assets in the name of the Partnership or a nominee;

"(3) To borrow money . . . on such terms and in such amounts as the Partners shall deem in their absolute discretion to be in the best interest of the Partnership;

"(4) To purchase . . . or sell all or part of the Partnership assets at such price . . . and upon such terms as the Partners in their absolute discretion shall deem to be in the best interest of the Partnership;

"(5) To negotiate and execute leases . . . upon such terms as the Partners in their absolute discretion shall deem to be in the best interests of the Partnership; and

"(6) To develop additional or replacement lines of business for the Partnership."

Petitioner, Marvin Hammerman, did not personally appear at the hearing. An affidavit of Mr. Hammerman was submitted in the record and stated, in relevant part:

"2. I have no knowledge of any business entity known as 'WCD, Inc./Woodex Designs."

"3. I am not now nor have I ever been either a partner or an employee of WCD, Inc./Woodex Designs.

"4. I am not now nor have I ever been either a partner or an employee of Woodex Designs."

There is no evidence in the record that any sales tax returns were filed during the period at issue under the name Woodex Designs (or Woodex Custom Designs) or using the Federal identification number 13-3377916.

opening of the store. The record herein provides no evidence of payment of the inventory purchase price.

There is no evidence in the record that, prior to the hearing in this matter, the Division was ever notified by Form DTF-95, Change of Business Information for Employers/Vendors, or by any other means that the name WCD, Inc./Woodex Designs and the identification number 13-3354277 were in any way inaccurate or erroneous.

OPINION

The Administrative Law Judge determined that the Division made a clear and unequivocal request for the books and records of WCD, Inc./Woodex Designs by its audit appointment letters dated December 28, 1990 and January 16, 1991. Since WCD, Inc./Woodex Designs failed to respond to this request, the Division was authorized to estimate the tax liability of WCD, Inc./Woodex Designs by a method reasonably calculated to reflect tax due. The Administrative Law Judge determined that the Division's initial audit method for the period December 1, 1987 through February 28, 1990, which amounted to a disallowance of all claimed exempt sales, was proper. Petitioner did not take exception to this portion of the determination.

Following a conference with the Bureau of Conciliation and Mediation Services ("Conciliation Conference"), the Division reviewed information made available by petitioner and revised the assessments it had issued. These revised assessments, as further modified by the Order of the Conciliation Conferee, were upheld by the Administrative Law Judge.

Petitioner argues in his brief (at page 8) that, since part of the Division's revised assessment was based on a lack of documentation as to non-taxable sales, the Division was required to allow petitioner additional time to obtain such information pursuant to 20 NYCRR 532.4(b)(4)(ii). Section 532.4(b)(4)(ii) provides that if the vendor timely received exemption certificates or documents which were deficient in their completion, the vendor would be allowed a reasonable period of time prior to the completion of the audit to obtain the necessary information to correct the deficiency. This issue was first raised by petitioner in his post-hearing brief. Although a party may raise a new legal issue on exception (see, Matter of Small, Tax Appeals Tribunal, August 11, 1988), a party may not raise factual issues on exception which were not addressed at the hearing (see, Matter of Clark, Tax Appeals Tribunal,

September 14, 1992; see, also, Matter of Consolidated Edison Co. of New York, Tax Appeals Tribunal, May 28, 1992). There is no evidence in the hearing record concerning the timely receipt of defective exemption certificates by the vendor which were disallowed by the Division on audit. Therefore, we decline to consider petitioner's argument on this issue.

As part of its revised assessment, the Division also calculated tax due on capital improvements purchases by estimating "that 30% of the total of the capital improvements purchases constituted purchases of materials and assessed tax on this 30%." This estimate was based solely on the "auditor's experience" (see, Determination, finding of fact "14").

Petitioner argues, on exception, that the estimate of tax due on purchases of materials was improper because this component of the revised assessment lacks a rational basis. Petitioner argues that there is no evidence as to whose experience the estimate was based on, what that experience consisted of or whether such experience had any relationship to this particular vendor.

The Administrative Law Judge concluded that:

"[t]he records reviewed by the Division with respect to the capital improvements purchases provided no breakdown as to what portion of such purchases constituted purchases of materials used in such capital improvements. Furthermore, petitioner presented no proof at hearing to show that this estimate was improper. It is concluded, therefore, that the Division's estimate was reasonable" (Determination, conclusion of law "E").

We affirm the determination of the Administrative Law Judge on this point. In Matter of Grecian Sq. v. New York State Tax Commn. (119 AD2d 948, 501 NYS2d 219), the Appellate Division noted that considerable latitude is given to an auditor to estimate sales where the taxpayer lacks books and records. However, there must be sufficient evidence in the record to allow the trier of fact to determine whether the audit had a rational basis.

In Matter of Atlantic & Hudson Limited Partnership (Tax Appeals Tribunal, January 30, 1992), this Tribunal stated that:

"[a]lthough a determination of tax must have a rational basis in order to be sustained upon review . . . presumption of correctness raised by the issuance of the assessment, in itself, provides the rational basis, so long as no evidence is introduced challenging the assessment [W]here, as here, petitioner has failed to make any inquiry into the audit method or

calculation, the presumption of correctness raised by the issuance of the assessment provides the rational basis for the assessment. To hold otherwise would be in irreconcilable conflict with the principles that the Division does not have the burden to demonstrate the propriety of its assessment [citations omitted]" (Matter of Atlantic & Hudson Ltd. Partnership, supra).

In the present case, petitioner did not meet his burden to overcome the presumption of correctness that there was a rational basis for the assessment.

This case is distinguishable from Matter of Shop Rite Wines & Liquors (Tax Appeals Tribunal, February 22, 1991). There, the Tribunal concluded that there was no rational basis for the auditor to use a two percent figure for theft and breakage where the petitioners introduced evidence at the hearing that two percent was too low a percentage and the Division failed to introduce any evidence to support the two percent allowance. In the present case, petitioner provided no evidence to overcome the presumption of correctness surrounding the Division's estimate that 30 percent of the total of petitioner's capital improvements purchases were taxable purchases of materials.

This case is also distinguishable from Matter of Basileo (Tax Appeals Tribunal, May 9, 1991), where the Tribunal concluded that, in order to establish a rational basis for the audit methodology, the record must contain information identifying the external index used by the Division and the Division must, through witnesses or documents, "be able to respond meaningfully to inquiries regarding the nature of the audit performed" (Matter of Basileo, supra). In the present case, the Division produced a witness who testified that the 30 percent rate of taxable purchases was based on his 23 years of experience as an auditor (Transcript, pp. 30-31). Petitioner's representative had every opportunity to cross-examine the Division's witness on the origin of this factor and its application to petitioner's business but he chose not to do so. There is no indication in the record that the Division's witness was unwilling or unable to answer questions about the nature of the audit performed.

Petitioner argues that the Administrative Law Judge was in error when he determined that: "[t]he Division's records indicate a sales tax vendor registration in the name of 'WCD, Inc./Woodex Designs' at the 1206 Second Avenue address with a Federal Employer

Identification No. of 13-3354277" (Determination, finding of fact "15"). We agree and have modified finding of fact "15" to reflect this. There is no evidence in the record of the sales tax registration of the vendor at issue. Neither the Division's witness nor petitioner's witness testified as to the name in which the registration was issued. No Certificate of Authority to collect sales and use tax was introduced nor was an application therefor produced.

Relying on his finding of fact that "WCD, Inc./Woodex Designs" had registered as a vendor with the Division, the Administrative Law Judge concluded that WCD, Inc., as a vendor, assumed the responsibility to collect sales tax on behalf of Woodex Designs. Petitioner, a responsible officer of the vendor, was personally liable for the sales tax liability of Woodex Designs. As noted above, we have modified finding of fact "15" because there is no evidence in the record of a sales tax registration in the name of WCD, Inc./Woodex Designs. Therefore, the Administrative Law Judge was incorrect in relying on the registration of WCD, Inc./Woodex Designs as a vendor as the basis for petitioner's liability.

However, in conclusion of law "J," the Administrative Law Judge correctly concluded that petitioner is a person required to collect tax as the sole shareholder and president of WCD, Inc., a partner in Woodex Designs. Based on the Administrative Law Judge's analysis, we affirm the determination of the Administrative Law Judge in conclusion of law "J" that petitioner is personally liable for the tax liability of Woodex Designs.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Marvin Hammerman, Officer of WCD, Inc./Woodex Designs is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Marvin Hammerman, Officer of WCD, Inc./Woodex Designs is denied; and

4. The notices of determination issued on January 28, 1991, as modified (see, Determination, conclusion of law "B"), are sustained.

DATED: Troy, New York
August 17, 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