

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petitions	:	
of	:	
<b>LA NAJ HOME FURNISHINGS, INC.</b>	:	DECISION
<b>AND IBRAHIM BASIR</b>	:	DTA Nos. 823456
	:	and 823457
for Revision of Determinations or for Refund of	:	
Sales and Use Taxes under Articles 28 and 29 of	:	
the Tax Law for the Period December 1, 2005	:	
through May 31, 2008.	:	

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Petitioners, La Naj Home Furnishings, Inc., and Ibrahim Basir, filed an exception to the determination of the Administrative Law Judge issued on December 29, 2011. Petitioner Ibrahim Basir appeared *pro se* and as president for the corporate petitioner. The Division of Taxation appeared by Amanda Hiller, Esq. (Lori P. Antolick, Esq., of counsel).

Petitioners did not file a brief in support. The Division of Taxation filed a letter brief in lieu of a formal brief in opposition. Petitioners did not file a reply brief. Petitioners' request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

***ISSUES***

I. Whether the audit methodology utilized by the Division of Taxation in its audit of La Naj Home Furnishings, Inc., had a rational basis and was reasonably calculated to reflect the taxes due.

II. Whether petitioners have established that the audit method employed was

unreasonable and whether the amount of tax assessed as the result of the application of the method used in this case was erroneous.

III. Whether Ibrahim Basir was a person responsible for the collection and payment of sales and use taxes on behalf of La Naj Home Furnishings, Inc., within the meaning and intent of Tax Law § 1131(1) and § 1133(a).

### ***FINDINGS OF FACT***

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

During the period at issue, petitioner Ibrahim Basir was the president and sole shareholder of petitioner La Naj Home Furnishings, Inc. (La Naj), a retail furniture business. La Naj had stores in Yonkers, New York (two stores), Rockland County, New York, and Paramus, New Jersey.

On July 23, 2008, the Division of Taxation (Division) sent a letter to La Naj stating that the business's sales and use tax records had been scheduled for a field audit for the period December 1, 2005 through May 31, 2008. The letter stated that "[a]ll books and records pertaining to the sales and use tax liability, for the audit period, must be available on the appointment date." The appointment date indicated on the letter was August 13, 2008. A schedule of books and records to be produced was attached to the letter. The letter specifically requested, among other records, the general ledger, sales invoices, cash register tapes and bank statements for the entire audit period.

On August 13, 2008, the auditor went to the business's location to conduct the audit. Mr. Basir was not present, and an employee telephoned Mr. Basir to advise him to contact the

auditor. On August 15, 2008 and September 8, 2008, the auditor left messages with Mr. Basir to telephone him so that they could arrange a new appointment to begin the audit. These telephone calls were not returned. On September 19, 2008, the Division mailed a second letter to La Naj stating that the business's sales and use tax records had been scheduled for a field audit for the period at issue. This letter was returned to the Division by the United States Postal Service. On October 3, 2008, a field visit indicated that the business was closed.

The Division concluded that in the absence of any records being produced in response to its requests, La Naj's records were inadequate for the purpose of verifying its tax liability with respect to sales. The Division determined that the lack of original source documents detailing La Naj's sales precluded the Division from tracing any transaction back to the initial sale or forward to the amount of sales reported. In the face of a total lack of records, the auditor decided to employ an indirect audit method to calculate the amount of taxable sales. The indirect audit method chosen was to use the results of a prior audit of La Naj that was performed for the period March 1, 2003 through November 30, 2005, the period that directly preceded the current audit period.

In the previous audit, the Division first reviewed in detail and totaled La Naj's sales as indicated by the approximately 630 sales invoices dated within the test period of March 1, 2004 through May 31, 2004. Next, the Division subtracted \$126,265.63, representing undelivered items, returned merchandise and invoices used for training purposes, from the total of \$1,036,327.52 to calculate audited gross sales for the test quarter of \$910,061.89. The Division calculated an error rate by dividing the difference between audited gross sales and reported gross sales of \$513,608.00 for the test quarter by reported gross sales for the test quarter.

The auditor in the present matter totaled gross sales per La Naj's sales tax returns and then multiplied the total by the error rate of the previous audit to arrive at additional gross sales. Additional gross sales were added to gross sales reported to determine audited sales, which were multiplied by the taxable ratio computed during the previous audit to determine audited taxable sales. The taxable ratio of 84.49 percent was determined by calculating the ratio of taxable sales to gross sales as indicated by the sales invoices for the test period of the previous audit. The auditor subtracted reported taxable sales from audited taxable sales to arrive at additional taxable sales. Additional taxable sales were multiplied by an average tax rate to determine additional tax due of \$298,194.41.

On December 15, 2008, petitioners provided to the auditor a computerized sales journal that grouped La Naj's sales according to the town or city where the merchandise was delivered. For each sale, the journal listed an invoice number, invoice date, customer (a five letter identification), sales amount, taxable or nontaxable classification and sales tax amount. The auditor did not use the sales journal in the audit because certain sales had been zeroed out, the invoice numbers were not sequential and La Naj did not have any source documentation to verify the information listed in the journal.

On January 2, 2009, the Division issued to La Naj a Notice of Determination for the period December 1, 2005 through May 31, 2008 assessing tax due of \$298,194.41, plus penalty and interest. On the same date, the Division issued to petitioner Ibrahim Basir a Notice of Determination for the same period, assessing tax due of \$298,194.41, plus penalty and interest. The notice advised petitioner that the Division had determined that he was a corporate officer or a person responsible for the collection and payment of sales and use taxes due from La Naj and,

therefore, personally liable for La Naj's sales and use tax liability.

Mr. Basir did not prepare La Naj's sales tax returns, but he did sign the sales tax returns and pay the sales tax on behalf of La Naj for the entire period at issue.

On August 21, 2008, Mr. Basir, as president of the debtor, La Naj, and the Bank of America, as a secured creditor, agreed to a management company's proposal to conduct a secured party sale of certain collateral in the form of inventory of La Naj, located in Yonkers, New York. On September 5, 2008, attorneys representing the Bank of America informed, among others, La Naj and the Department of Taxation and Finance of the public sale and disposition of collateral to take place on September 9, 2008, at La Naj's business location. The notice of sale indicated that the collateral consisted of "[a]ll business assets of the Debtor," La Naj Home Furnishings, Inc.

#### ***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge summarized the standards for reviewing a sales tax audit based on an indirect audit methodology. After reviewing the record, the Administrative Law Judge found that the Division made a proper records request and that petitioners failed to produce adequate books and records. As such, the Administrative Law Judge determined that the Division was entitled to utilize an indirect audit methodology.

The Administrative Law Judge found that petitioner failed to establish that either the audit methodology was unreasonable or that the amount of the assessment was erroneous. The Administrative Law Judge noted that it was proper for the Division to estimate the liability by utilizing an index generated from a prior audit of La Naj. The Administrative Law Judge found no merit to petitioners' arguments, which alleged that the assessment was unreasonable because

it was imprecise. In so doing, the Administrative Law Judge noted that petitioners must bear the cost of imprecision because petitioners' failure to provide adequate records gave rise to the estimated audit. The Administrative Law Judge further noted that absent clear and convincing evidence, modification to the result would be improper in this matter.

The Administrative Law Judge also found that the Division properly determined that Mr. Basir was a person responsible for collecting and remitting sales tax on behalf of La Naj, pursuant to sections 1131 (1) and 1133 (a) of the Tax Law. The Administrative Law Judge noted that Mr. Basir was the president and sole shareholder of La Naj, and that he signed tax returns and remitted sales tax on behalf of the company. As such, the Administrative Law Judge determined that Mr. Basir was a responsible person.

Accordingly, the Administrative Law Judge sustained the Notices of Determination issued to La Naj and Mr. Basir.

### ***ARGUMENTS ON EXCEPTION***

On exception, petitioners raise arguments that are substantially similar to those raised before the Administrative Law Judge. In particular, petitioners argue that the general ledger print out, alone, meets the books and record requirement. Mr. Basir also argues that he was not a responsible person for La Naj because he hired managers, accountants, and bookkeepers to handle the taxes for the business.

The Division argues that the determination should be affirmed. It notes that petitioners failed to raise any new legal argument that would merit reconsideration of the conclusions reached by the Administrative Law Judge. The Division also notes that the record does not contain clear and convincing evidence supporting petitioners' challenges, either on the audit or

the conclusion that Mr. Basir was a responsible person for La Naj.

### ***OPINION***

We affirm the determination of the Administrative Law Judge.

This Tribunal has often restated the standard for reviewing a sales tax audit based on an estimated methodology. In ***Matter of AGDN, Inc.*** (Tax Appeals Tribunal, February 6, 1997), we stated as follows:

[A] vendor . . . is required to maintain complete, adequate and accurate books and records regarding its sales tax liability and, upon request, to make the same available for audit by the Division (see, Tax Law §§ 1138[a]; 1135; 1142[5]; see, e.g., Matter of Mera Delicatessen, Tax Appeals Tribunal, November 2, 1989). Specifically, such records required to be maintained ‘shall include a true copy of each sales slip, invoice, receipt, statement or memorandum’ (Tax Law § 1135). It is equally well established that where insufficient records are kept and it is not possible to conduct a complete audit, ‘the amount of tax due shall be determined by the commissioner of taxation and finance from such information as may be available. If necessary, the tax may be estimated on the basis of external indices . . .’ (Tax Law § 1138[a]; see, Matter of Chartair, Inc. v. State Tax Commn., 65 AD2d 44, 411 NYS2d 41, 43).

When estimating sales tax due, the Division need only adopt an audit method reasonably calculated to determine the amount of tax due (Matter of Grant Co. v. Joseph, 2 NY2d 196, 159 NYS2d 150, cert denied 355 US 869); exactness is not required (Matter of Meyer v. State Tax Commn., 61 AD2d 223, 402 NYS2d 74, lv denied 44 NY2d 645, 406 NYS2d 1025; Matter of Markowitz v. State Tax Commn., 54 AD2d 1023, 388 NYS2d 176, affd 44 NY2d 684, 405 NYS2d 454). The burden is then on the taxpayer to demonstrate, by clear and convincing evidence, that the audit method employed or the tax assessed was unreasonable (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).

Our review of the record reveals that the Division made a proper written request for all of La Naj’s books and records relating to its sales tax liability for the entire audit period. Specifically, the Division requested, among other items, the following: sales tax returns,

worksheets, cancelled checks, general ledger, closing entries, sales invoices and all exemption documents supporting nontaxable sales, etc.

In response to the Division's request, petitioners provided only a general ledger from the La Naj computer system. This document purportedly summarized the sales activity of the corporate petitioner and organized the transactions by county and customer code, and listed the taxable and nontaxable transactions. The Division found that the ledger was incomplete because it contained anomalies, such as zeroed out transactions and miscellaneous subtractions, which could not be reconciled without the actual source documentation (e.g., sales receipts, invoices, etc.).

We agree with the Administrative Law Judge's conclusion that this general ledger, alone, is insufficient to meet the burden of maintaining "a true copy of each sales slip, invoice, receipt, statement or memorandum" (Tax Law § 1135 [a]). Given the flaws in the ledger, it is impossible to determine the document's accuracy absent source documents supporting the ledger. Herein, the absence of source documentation is fatal because there is no other way to explain the anomalies in the general ledger (*see e.g. K&A Gas & Go Mart*, Tax Appeals Tribunal, December 29, 2011). Due to petitioners' lack of records, we conclude that the Division was entitled to estimate petitioners' tax liability.

Herein, the Division utilized the results of a prior audit of La Naj in order to estimate its sales during this period. Petitioners failed to introduce clear and convincing evidence proving that either the audit methodology was unreasonable or that the assessment amount was clearly erroneous (*see e.g. Matter of 33 Virginia Place*, Tax Appeals Tribunal, December 23, 2009). As petitioners failed to carry their burden, we conclude that the audit results were reasonable.



We also agree with the Administrative Law Judge's determination that petitioner, Mr. Basir, was a responsible officer of La Naj. The record indicates that Mr. Basir signed sales tax returns and was the sole shareholder and president of La Naj. Although Mr. Basir may not have controlled the daily affairs of La Naj, the record clearly indicates that he had sufficient authority and control over the organization to be considered a person responsible for collecting and remitting sales tax (*see e.g. Matter of Constantino*, Tax Appeals Tribunal, September 27, 1990). Furthermore, the existence of others who may also be held as responsible officers is not a defense to personal liability, as Tax Law § 1133 (a) creates joint and several liability for unpaid sales tax (*see e.g. Matter of Milne*, Tax Appeals Tribunal, February 17, 2005).

We have considered petitioners' remaining contentions and find them either without merit or properly resolved by the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of La Naj Home Furnishings, Inc. and Ibrahim Basir is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of La Naj Home Furnishings, Inc. and Ibrahim Basir are denied;
4. The Notices of Determination, dated January 2, 2009, are sustained.

DATED: Albany, New York  
January 31, 2013

/s/ James H. Tully, Jr.  
James H. Tully, Jr.  
President

/s/ Charles H. Nesbitt  
Charles H. Nesbitt  
Commissioner