

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
NEW YORK TRADING CORPORATION,	:	DETERMINATION
NEW YORK TRADING CORPORATION-	:	DTA NOS. 821962, 821963
AMOCO STATION	:	AND 821964
AND MUHAMMAD KAMAL	:	
	:	
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, 2002 through	:	
February 28, 2006.	:	

Petitioners, New York Trading Corporation, New York Trading Corporation-Amoco Station and Muhammad Kamal, filed petitions 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, 2002 through February 28, 2006.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on March 5, 2009 at 10:30 A.M., with all briefs to be submitted by June 26, 2009, which date began the six-month period for the issuance of this determination. Petitioners appeared by Maqsood H. Siddiqui, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Lori P. Antolick, Esq., of counsel).

ISSUES

I. Whether the audit methodologies employed by the Division of Taxation, and the results derived therefrom that petitioners owed additional sales tax, plus interest and penalties, were proper and should be sustained.

II. Whether petitioners have established any basis warranting reduction or elimination of the penalties imposed.

FINDINGS OF FACT

1. Petitioner New York Trading Corporation (the North Bellmore location) is a gasoline service station and convenience store located in North Bellmore, New York. The service station reported sales of regular, mid-grade and premium motor fuels, and its three service bays performed general service, New York State Department of Motor Vehicle inspections and tire changes. The convenience store sold automobile supplies, candy, cigarettes, soda, snack foods, telephone cards and coffee.

2. On August 5, 2005, the Division of Taxation (Division) sent a letter to the New York Trading Corporation and its representative stating that a sales and use tax field audit of the business operation was to be conducted for the period December 1, 2002 through August 31, 2005. The Division's letter requested that all of the business's books and records for the audit period be available for review. Among the records specifically requested were the sales tax returns, cash receipts journal, cash disbursements journal, general ledger, sales invoices, purchase invoices, exemption documents, federal income tax returns, New York State corporation tax returns, cash register tapes, bank statements, and canceled checks.

On August 29, 2006, the Division sent a letter advising the corporation's representative that the audit period was being expanded to include its sales and use tax records for the subsequent period September 1, 2005 through February 28, 2006, and that the amended audit period was now to cover December 1, 2002 through February 28, 2006.

3. On December 6, 2005 and May 8, 2006, the corporation, by its representative, executed two consents extending period of limitations for assessment of sales and use taxes

under Articles 28 and 29 of the Tax Law that collectively extended the period in which to assess sales and use taxes due for the period September 1, 2002 through August 31, 2005 to September 30, 2006.

4. The corporation provided the auditor with bank deposits and purchase invoices for fuel and cigarettes for the entire audit period. The corporation did not provide the auditor with a general ledger, sales invoices, cash register tapes or other source documentation detailing the amount of retail sales of the business operation.

5. The auditor reviewed the fuel purchase invoices and determined audited fuel purchases using the actual amount of fuel delivered to the business location as shown on the purchase invoices. A review of the purchase invoices and tax returns revealed that reported purchases did not include at least one delivery of fuel each month, except for the last two quarters of the audit period, after petitioner had been notified by the Division of the audit. As the corporation did not supply any information as to the price charged for its gasoline sales, the auditor obtained the actual selling price per gallon of regular gasoline from the Oil Pricing Information Service (OPIS), which maintains a database of the actual price of regular gasoline purchased with credit cards at many gasoline stations including the corporation's station. After removing the New York State sales and excise taxes from the OPIS price per gallon, the auditor multiplied the audited gallons purchased by the taxable base price per gallon to compute audited taxable sales. The auditor next applied the applicable sales tax rate to audited taxable sales to arrive at the audited amount of sales tax due. Credit was given by the auditor for sales tax that the corporation had prepaid on its fuel purchases and for sales tax previously remitted, resulting in additional audited sales tax due on motor fuel sales for the North Bellmore location of \$25,852.00.

6. The auditor next determined nonfuel sales, which consisted of sales at both the service repair bays and the convenience store. These sales were calculated by subtracting the audited sales for fuel from the bank deposits to arrive at audited nonfuel gross sales. A taxable ratio of 93.27 percent was established by the auditor based upon a one-week sample of cash register tapes. This taxable ratio was applied to audited gross nonfuel sales to determine audited taxable sales and sales tax due. From this figure, prepaid sales tax on the purchase of cigarettes and sales tax previously remitted were subtracted to arrive at additional sales tax due on nonfuel sales of \$77,500.00.

7. On September 7, 2006, the Division issued to petitioner New York Trading Corporation a Notice of Determination asserting additional sales tax due for the period December 1, 2002 through February 28, 2006 in the amount of \$107,354.00, plus penalty and interest.

8. On September 7, 2007, the Bureau of Conciliation and Mediation Services (BCMS) issued a Conciliation Order to petitioner New York Trading Corporation reducing the amount of sales tax due to \$96,090.00, plus penalty and interest.

9. Petitioner New York Trading Corporation-Amoco Station (the Holtsville location) operates a gasoline station and small convenience store kiosk in Holtsville, New York. The station reported sales of regular, mid-grade and premium motor fuels. The convenience store kiosk sold automobile supplies, candy, cigarettes, soda, snack foods, telephone cards and coffee.

10. On August 5, 2005, the Division sent a letter to the New York Trading Corporation-Amoco Station and its representative stating that a sales and use tax field audit of the business operation was to be conducted for the period December 1, 2002 through August 31, 2005. The Division's letter requested that all of the business's books and records for the audit period be available for review. Among the records specifically requested were the sales tax returns, cash

receipts journal, cash disbursements journal, general ledger, sales invoices, purchase invoices, exemption documents, federal income tax returns, New York State corporation tax returns, cash register tapes, bank statements, and canceled checks.

On August 29, 2006, the Division sent a letter advising the corporation's representative that the audit period was being expanded to include its sales and use tax records for the subsequent period September 1, 2005 through February 28, 2006, and that the amended audit period was now to cover the period December 1, 2002 through February 28, 2006.

11. On November 18, 2005 and April 27, 2006, the corporation, by its representative, executed two consents extending period of limitations for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law that collectively extended the period in which to assess sales and use taxes due for the period September 1, 2002 through August 31, 2005 to September 30, 2006.

12. The corporation provided the auditor with bank deposits and purchase invoices for fuel and cigarettes for the entire audit period. The corporation did not provide the auditor with a general ledger, sales invoices, cash register tapes or other source documentation detailing the amount of retail sales of the business operation.

13. The auditor reviewed the fuel purchase invoices and determined audited fuel purchases by using the actual amount of fuel delivered to the business location as shown on the purchase invoices. A review of the purchase invoices and tax returns revealed that reported purchases did not include at least one delivery of fuel each month, except for the last two quarters of the audit period, following notification by the Division of the audit. As the corporation did not supply any information as to the price charged for its gasoline sales, the auditor obtained the actual selling price per gallon of regular gasoline from OPIS, which

maintains a database of the actual price of regular gasoline purchased with credit cards at many gasoline stations including the corporation's station. After removing the New York State sales and excise taxes from the OPIS price per gallon, the auditor multiplied the audited gallons purchased by the taxable base price per gallon to compute audited taxable sales. The auditor next applied the applicable sales tax rate to audited taxable sales to arrive at the audited amount of sales tax due. Credit was given by the auditor for sales tax that the corporation had prepaid on its fuel purchases and for sales tax previously remitted, resulting in additional audited sales tax due on motor fuel sales for the Holtsville location of \$22,608.00.

14. To determine the amount of nonfuel sales, the auditor examined cash register tapes provided by the corporation for one week in the month of November 2005. These were the only sales documents provided. The auditor initially computed audited packs of cigarettes according to the corporation's invoices and developed an index based upon the cash register tapes that revealed that the business had \$7.91 of taxable sales for every pack of cigarettes sold. The \$7.91 included both the sale of cigarettes and any other nonfuel items sold in the convenience store kiosk as indicated by the cash register tapes for the one week of November 2005. The auditor multiplied the \$7.91 figure by the number of packs of cigarettes purchased by the corporation during the audit period, resulting in audited taxable sales for nonfuel items. The auditor subtracted from audited taxable sales the credit for prepaid sales tax paid to suppliers on the purchase of cigarettes and the amount of sales tax paid with the sales tax returns when filed, resulting in additional sales tax due on nonfuel sales for the audit period of \$35,442.00.

15. On September 5, 2006, the Division of Taxation issued to petitioner New York Trading Corporation-Amoco Station a Notice of Determination asserting additional sales tax due

for the period December 1, 2002 through February 28, 2006 in the amount of \$75,366.00, plus penalty and interest.

16. On September 14, 2007, the BCMS issued a Conciliation Order to petitioner New York Trading Corporation-Amoco Station reducing the amount of sales tax due to \$58,051.00, plus penalty and interest.

17. On September 11, 2006, the Division of Taxation issued to petitioner Muhammad Kamal as an officer or responsible person of New York Trading Corporation, a Notice of Determination asserting additional sales tax due for the period December 1, 2002 through February 28, 2006 in the amount of \$107,354.00, plus penalty and interest. On the same date, the Division issued to Muhammad Kamal, as an officer or responsible person of New York Trading Corporation-Amoco Station, a Notice of Determination asserting additional sales tax due for the period December 1, 2002 through February 28, 2006 in the amount of \$75,366.00, plus penalty and interest. On September 14, 2007, BCMS issued a Conciliation Order to Mr. Kamal reducing the sales tax due for both notices to \$154,141.00, plus penalty and interest.

CONCLUSIONS OF LAW

A. The standard for reviewing a sales tax audit where external indices were employed was set forth in ***Matter of AGDN, Inc.*** (Tax Appeals Tribunal, February 6, 1997), 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).

B. In this case, the record establishes the Division’s clear and unequivocal written request for books and records of the New York Trading Corporation and New York Trading Corporation-Amoco Station sales, as well as the businesses’ failure to produce such books and records for the Division’s review. In turn, the auditor reasonably concluded that the businesses did not maintain books and records that were sufficient to verify their gross and taxable sales for the audit period since there were no source documents, i.e., sales invoices, complete purchase invoices or cash register tapes, submitted by petitioners (*see Matter of Vebol Edibles v. State of New York Tax Appeals Tribunal*, 162 AD2d 765, 557 NYS2d 678 [1990], *lv denied* 77 NY2d803, 567 NYS643 [1991]; *Matter of Club Marakesh v. Tax Commn. Of State of New York*, 151 AD2d 908, 542 NYS2d 881 [1989], *lv denied* 74 NY2d 616, 550 NYS2d 276 [1989]).

Having established the insufficiency of the corporations’ books and records, the Division resorted, in determining their sales of motor fuel, to the use of purchase records supplied by the corporations, together with the actual price of their sales as reported by OPIS. Petitioners, for their part, do not dispute the absence of complete sales records, or dispute the Division’s authority to resort to indirect audit methodologies in this case. In fact, the Division’s authority to do so has been consistently sustained, including specifically its authority to resort to

the use of statewide average selling prices for gasoline (*see Matter of Flanagan*, Tax Appeals Tribunal, June 14, 1990; *Matter of Yel-Bom's Service Center*, Tax Appeals Tribunal, May 10, 1990). Here, the Division used the corporations' own purchases and selling prices to determine the amount of petitioners' sales of motor fuel.

C. In determining nonfuel sales at the North Bellmore location, the auditor relied on audited sales for fuel and New York Trading Corporation's own bank deposits to determine additional sales tax due. In determining the amount of nonfuel sales at the Holtsville location, the auditor used cash register tapes for one week which were provided by New York Trading Corporation-Amoco Station to calculate the amount of taxable sales for each pack of cigarettes sold. Again, having established the unavailability of required books and records, the Division was clearly entitled to resort to the use of indirect audit methods to determine sales and sales tax liability. Accordingly, and in view of the foregoing, the only question presented in this case is whether the corporations have established that the amount of tax assessed as the result of the application of the methods used in this case was erroneous (*Matter of Surface Line Operators Fraternal Organization v. Tully*).

D. Petitioners, in essence, appear to take issue with the Division's audit results because they are imprecise. As a general proposition, any imprecision in the results of an audit arising by reason of a taxpayer's own failure to keep and maintain records of all of its sales as required by Tax Law § 1135(a)(1) must be borne by that taxpayer (*Matter of Markowitz v. State Tax Commission; Matter of Meyer v. State Tax Comm.*). In this instance, petitioners specifically complain that their profit margin was less than that determined on audit and that most of their nonfuel sales were not subject to the imposition of sales tax. It is noted that the auditor used petitioners' own purchases and selling prices to determine the amount of fuel sales, and that

petitioners presented no documentation to establish the amount of reported fuel sales.

Petitioners' claims that their profit margin was less than determined on audit and that their nonfuel sales were nontaxable fall far short of the evidence necessary to support their claims and override the results of the audits. Again, petitioners provided no source documents, i.e., sales invoices, complete purchase invoices or cash register tapes records, either on audit or at hearing, that would establish the actual amount of fuel and nonfuel sales. Ultimately, petitioners' failure to maintain or provide any records of their sales does not provide a basis for changing the Division's audit results.

E. Petitioners have not provided evidence that would support reduction or abatement of the penalties imposed, and they are therefore sustained. In establishing reasonable cause for penalty abatement, the taxpayer faces an onerous task (*Matter of Philip Morris, Inc.*, Tax Appeals Tribunal, April 29, 1993). The Tribunal explained that “[b]y first requiring the imposition of penalties (rather than merely allowing them at the Commissioner’s discretion), the Legislature evidenced its intent that filing returns and paying tax according to a particular timetable be treated as a largely unavoidable obligation [citations omitted]” (*Matter of MCI Telecommunications Corp.*, Tax Appeals Tribunal, January 16, 1992, *confirmed* 193 AD2d 978, 598 NYS2d 360 [1993]). Here, the corporations neither maintained nor produced records as required. Further, purchases were underreported, and there was a discrepancy between reported and audited sales.

F. The petitions of New York Trading Corporation, New York Trading Corporation-Amoco Station and Muhammad Kamal are denied, and the notices of determination dated September 7, 2006 issued to New York Trading Corporation, September 5, 2006 issued to New

York Trading Corporation-Amoco Station and September 11, 2006 issued to Muhammad Kamal as modified by BCMS are sustained.

DATED: Troy, New York
December 23, 2009

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE