

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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|--|---|----------------|
| In the Matter of the Petition                          | : |                |
| of   | : |                |
| <b>RONALD KUZON</b>                                    | : | DETERMINATION  |
|  |   | DTA NO. 821986 |
| 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 June 1, 2004 through May 31, 2005.      | : |                |

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Petitioner, Ronald Kuzon, filed a petition 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 June 1, 2004 through May 31, 2005.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, One Centre Street, New York, New York, on December 4, 2008 at 10:30 A.M., with all briefs to be submitted by March 19, 2009, which date commenced the six-month period for the issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Daniel Smirlock, Esq. (Michael B. Infantino, Esq., of counsel).

***ISSUE***

Whether the audit method employed by the Division of Taxation was reasonable or whether petitioner has shown error in either the audit method or result.

***FINDINGS OF FACT***

1. On September 7, 2006, following an audit, the Division of Taxation (Division) issued to petitioner, Ronald Kuzon, a Notice of Determination which assessed \$30,602.19 in additional

sales and use tax due, plus penalty and interest, for the period June 1, 2004 through May 31, 2005.

2. 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 NAC/Indoor Air Professionals, Inc. (NAC/Indoor Air), and therefore personally liable for the sales and use taxes due from that corporation.

3. Petitioner, who is an attorney, was president of NAC/Indoor Air during the period at issue. He did not contest his status as a responsible person for sales tax purposes.

4. NAC/Indoor Air was in the indoor air quality business. Its services included cleaning air ducts.

5. Prior to May 2004, NAC/Indoor Air was a subsidiary of Nesco Industries, Inc. (Nesco) and its president was Michael Caputo.

6. In May 2004, NAC/Indoor Air and two other Nesco subsidiaries, National Abatement Corporation (an asbestos removal business) and NAC Environmental Services, Inc., were acquired by NAC Calabria Acquisition Corporation (NAC Calabria). Nesco sold these three subsidiaries to NAC Calabria as part of a plan to merge with a corporation called Hydrogel Design Systems, Inc. (Hydrogel). NAC Calabria was created for the specific purpose of acquiring the three Nesco subsidiaries. Petitioner, who had been a consultant for Nesco and who found Hydrogel as a merger partner for Nesco, became president and sole shareholder of NAC Calabria.

7. Petitioner's primary responsibility as president of NAC Calabria was to collect outstanding receivables on behalf of the former Nesco subsidiaries and to wind down operations.

This responsibility included the collection of outstanding receivables on behalf of NAC/Indoor Air.

8. NAC/Indoor Air did not actively engage in business following the transfer from Nesco to NAC Calabria. While it is not clear from the record precisely when NAC/Indoor Air ceased active operations, NAC/Indoor Air did not make any sales or provide any services during the period at issue.

9. Petitioner kept NAC/ Indoor Air's corporate bank account open to collect outstanding receivables.

10. The Division commenced its audit of NAC/Indoor Air with a standard audit appointment letter dated July 13, 2005 addressed to NAC/Indoor Air at 1212 43<sup>rd</sup> Ave., Long Island City, New York. This letter was returned to the Division by the postal service and on July 29, 2005 the Division spoke with Mr. Caputo by telephone advising him of the audit. In response Mr. Caputo sent a letter to the Division dated August 1, 2005 stating that he was no longer an officer of NAC/Indoor Air and that the company had been inactive for more than two years. Mr. Caputo also provided the auditor with contact information for petitioner, NAC/Indoor Air's then-current president.

11. The Division subsequently sent a letter dated August 29, 2005 to petitioner at the address provided by Mr. Caputo requesting that all of NAC/Indoor Air's books and records pertaining to its sales tax liability for the period September 1, 2002 through May 31, 2005 be made available for review.

12. The Division sent additional letters to Mr. Caputo dated September 28, 2005 and October 19, 2005 requesting records pertaining to NAC/Indoor Air's sales tax liability for the audit period and seeking to schedule an appointment.

13. On November 29, 2005 the Division's auditor, Victor Mendoza, met with Mr. Caputo and petitioner. At that meeting Mr. Caputo provided the auditor with copies of certain corporate records, including sales invoices for the period August 2002 through April 2003, cash receipts folders for the period September 2002 through December 2003, federal corporation income tax returns for fiscal years ended April 2003 and April 2004, and bank statements for the period August 2002 through April 2003 and April 2004 through June 2005.

14. In March 2006, in response to a subpoena issued in February 2006, the Division received copies of checks deposited into NAC/Indoor Air's bank account for the period May 2004 through May 2005.

15. On audit, the Division sought to reconcile NAC/Indoor Air's bank deposits with its gross and taxable sales as reported on its sales tax returns. After reviewing the documentation provided and in subsequent meetings with Mr. Caputo, the Division determined that, with respect to the period September 1, 2002 through May 31, 2004, i.e., the period during which Mr. Caputo was president, except for minimal discrepancies, the corporation's bank deposits were substantiated and no additional tax was due.

16. Petitioner did not meet with the auditor at any time following the November 29, 2005 meeting. The auditor made several unsuccessful attempts to contact petitioner by telephone, leaving messages for petitioner to schedule an appointment.

17. The Division issued to NAC/Indoor Air a Statement of Proposed Audit Change dated May 3, 2006 which proposed additional sales tax due of \$36,277.20, plus penalty and interest, for the June 1, 2004 through May 31, 2005 period. Petitioner responded to this proposed liability by letter dated May 27, 2006 asserting that the deposits in the corporate bank account for the period at issue were properly accounted for by the following estimates:

- a) \$37,000.00 from collection of old receivables on which sales tax was previously paid.
  - b) \$90,000.00 from private borrowings.
  - c) \$120,000.00 from consulting fees from Nesco.
  - d) \$153,000.00 from sale of securities.
  - e) \$30,000.00 from personal funds.
- Total: \$420,000.00.

18. The Division responded to petitioner's May 27, 2006 correspondence by letter dated June 1, 2006, indicating that no adjustments would be made because of a lack of substantiation of petitioner's claims. The letter also stated that "you were not able to make any appointments we had scheduled to show me that these items were not sales."

19. The Division subsequently issued the September 7, 2006 Notice of Determination (*see* Finding of Fact 1). The assessment presumes, unless the contrary is shown, that all deposits to the corporate bank account for the period at issue were retail sales receipts of NAC/Indoor Air properly subject to sales tax. Such deposits totaled \$420,605.20 for the June 1, 2004 through May 31, 2005 period. Following a review of the bank statements, the Division made certain adjustments to this total. Specifically, the Division determined that \$52,770.00 in returned checks, categorized as deposits on the bank statements, were properly deemed nonsale items. An October 28, 2004 check payable to a Jillian Kuzon for \$450.29 from State Farm Mutual Automobile Insurance Company was also deemed a nonsale. Additionally, a June 9, 2004 check from the New York Public Library payable to National Abatement Corporation for \$3,793.00 and a December 24, 2004 check payable to NAC/Indoor Air for \$8,784.00 from Westchester Medical Center were deemed nontaxable sales to exempt organizations. These nonsale and exempt sale items were subtracted from total deposits, leaving \$354,808.00 in audited taxable sales for the June 1, 2004 through May 31, 2005 period with \$30,602.18 in sales tax due thereon.

20. A Bureau of Conciliation and Mediation Services conference was held in respect of this matter on April 18, 2007. Following the conference, the conciliation conferee sent petitioner a letter dated May 18, 2007 requesting that he provide “the related invoices and accounts receivables list as discussed at the conference.” Petitioner subsequently transmitted to the conferee a two-page document which was purportedly a list of NAC/Indoor Air’s accounts receivables. By letter dated June 20, 2007, the auditor advised petitioner that the document submitted was illegible and further requested that petitioner substantiate corporate bank deposits during the audit period as either nonsales or exempt sale. Petitioner provided no additional documentation, and by Conciliation Order dated September 7, 2007, the subject Notice of Determination was sustained.

21. A review of the two-page document submitted following the conciliation conference reveals that this document is, in fact, largely illegible.

22. A review of the corporation’s bank statements and the subpoenaed copies of checks deposited into the corporation’s account for the period May 2004 through May 2005 reveals the following:

a) Four checks drawn on the account of Petrocelli Industries and payable to petitioner bearing dates and amounts as follows:

|         |             |
|---------|-------------|
| 1/10/05 | \$12,935.25 |
| 1/27/05 | \$5,000.00  |
| 2/16/05 | \$25,000.00 |
| 2/17/05 | \$53,748.27 |

Petrocelli Industries or a person or persons associated therewith owned or controlled Nesco. The memo on the January 10, 2005 check is illegible. The memo on the January 27,

2005 check indicates “Share of [illegible] profit.” The memo on the February 16, 2005 check is illegible. The memo on the February 17, 2005 check states “Consulting invoice #1.”

b) A check dated July 8, 2004 from the New York State Insurance Fund payable to National Abatement Corporation in the amount of \$2,900.31. A similar check dated April 5, 2004 in the amount of \$20,558.51 was deemed a nonsale item by the auditor with respect to the audit of the period September 1, 2002 through May 31, 2004 (*see* Finding of Fact 15).

c) A check dated January 13, 2005 from Susan Kuzon to petitioner for \$500.00.

d) A check dated June 25, 2004 from Joseph Jingoli & Son, Inc. payable to National Abatement Corporation for \$3,642.40.

e) A check dated July 6, 2004 from Mass Mutual Financial Group to petitioner for \$305.68. The check references a specific policy number.

f) A check dated July 13, 2004 from Mass Mutual Financial Group payable to Franklin Templeton for the benefit of James C. Allen IRA for \$9,228.16. The check references a specific contract number.

g) a check dated January 20, 2005 from Joshua Kuzon payable to NAC/Indoor Air for \$2,400.00.

h) A check dated January 20, 2005 from Marion and Gerald Goldberg for \$6,000.00 payable to petitioner. The memo line on the check contains the word “investment.”

i) Four checks from Nesco payable to NAC/Indoor Air dated and in amounts as follows:

|               |            |
|---------------|------------|
| June 2, 2004  | \$1,800.00 |
| June 7, 2004  | \$1,850.00 |
| June 9, 2004  | \$1,925.00 |
| June 11, 2004 | \$1,472.54 |

The June 11, 2004 check contained the notation “To close acct.”

j) A check dated June 2, 2004 from NAC Environmental Services Corp. to NAC/Indoor Air for \$349.90 also containing the notation "To close acct."

k) Two checks from Hydrogel to petitioner. The first dated November 4, 2004 for \$1,179.24. The second dated January 25, 2005 for \$609.79 with the notation "Exp. Jan 05."

l) A check dated February 8, 2005 from petitioner to NAC/Indoor Air for \$400.00.

m) Numerous wire transfers into the account totaling \$166,650.06.

n) Several "cash deposits" totaling \$12,350.00 and several other "deposits" totaling \$29,043.24.

o) Four entries categorized as deposits were credit card purchase returns as follows:

|                   |          |
|-------------------|----------|
| November 17, 2004 | \$475.80 |
| November 22, 2004 | \$9.78   |
| December 6, 2004  | \$29.99  |
| December 7, 2004  | \$6.38   |
| January 31, 2005  | \$5.00   |

### ***SUMMARY OF PETITIONER'S POSITION***

23. Petitioner testified that he used the corporate account for personal matters unrelated to NAC/Indoor Air and he continued to assert that the deposits to the NAC/Indoor Air's bank account are properly accounted for in the manner set forth in his letter to the Division dated May 27, 2006 (*see* Finding of Fact 17). At the hearing, petitioner claimed that with respect to the private borrowings that were deposited in the account, \$60,000.00 was a loan from a Les Steinmet and \$30,000.00 was a loan from a Heather Rodale. Petitioner asserted that he gave promissory notes in respect of such loans. Petitioner contended that he had a consulting contract with Nesco and that Nesco paid him \$120,000.00 pursuant to such contract, with payments made weekly. Petitioner also testified that the checks from Petrocelli Industries deposited in the account represented petitioner's share of the profit from certain securities transactions in which

he and Petrocelli Industries were involved. Petitioner testified that the wire transfers deposited into the account arose from the sale of securities, and he identified Pershing & Company as a clearing agent in respect of such transfers.

24. Petitioner was granted leave to submit, post-hearing, copies of the aforementioned promissory notes, a copy of the Nesco consulting contract, and documentation regarding the Petrocelli checks and the wire transfers. He submitted no such documentation.

### ***CONCLUSIONS OF LAW***

A. Preliminarily, it is observed that the service of cleaning air ducts may be subject to tax under Tax Law § 1105(c)(5) as maintaining, servicing or repairing real property. Receipts in respect of such services are presumed taxable unless the contrary is shown (Tax Law § 1132[c][1]).

B. Tax Law § 1138(a)(1) provides, in relevant part, that if a sales tax return was not filed, “or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined [by the Division of Taxation] from such information as may be available. If necessary, the tax may be estimated on the basis of external indices . . . .” (Tax Law § 1138[a][1].)

C. The Division may estimate tax liability pursuant to Tax Law § 1138(a)(1) only where a taxpayer’s records are inadequate. Tax Law § 1135(a)(1) requires persons required to collect sales tax to maintain records sufficient to verify all transactions, in a manner suitable to determine the correct amount of tax due. Records are insufficient where it is “virtually impossible [for the Division of Taxation] to verify taxable sales receipts and conduct a complete audit” (*Matter of Chartair, Inc. v. State Tax Commn.*, 65 AD2d 44, 411 NYS2d 41, 43 [1978])

D. To determine the adequacy of a taxpayer’s records, the Division must first request and thoroughly examine the taxpayer’s books and records for the entire period of the proposed

assessment (*Matter of Adamides v. Chu*, 134 AD2d 776, 521 NYS2d 826 [1987], *lv denied* 71 NY2d 806, 530 NYS2d 109 [1988]).

E. Here, the Division made several requests to Mr. Caputo and petitioner for NAC/Indoor Air's books and records for the period September 1, 2002 through May 31, 2005 (*see* Findings of Fact 10-12). With respect to the period remaining at issue in this matter, i.e., June 1, 2004 through May 31, 2005, only bank statements were provided in response to these requests. Considering that the NAC/Indoor Air was no longer making sales or providing services during this period, the Division sought substantiation from petitioner regarding the \$420,605.20 in deposits to NAC/Indoor Air's account during the June 1, 2004 through May 31, 2005 period. Petitioner did not respond to several attempts by the Division to schedule an appointment to review the bank deposits. After the issuance of the May 3, 2006 Statement of Proposed Audit Change, petitioner offered an explanation for the deposits, but no substantiation. Under such circumstances, it is clear that petitioner failed to maintain or produce records to substantiate NAC/Indoor Air's sales (or under the facts of this case, its claimed lack thereof). The Division therefore properly resorted to an estimate of NAC/Indoor Air's sales for the June 1, 2004 through May 31, 2005 period.

F. In so estimating NAC/Indoor Air's sales tax liability, the Division was required to select a method reasonably calculated to reflect the tax due (*see e.g. Matter of ADGN, Inc.*, Tax Appeals Tribunal, February 6, 1997). It is well established that exactness in the audit result is not required, for any imprecision arises from the taxpayer's failure to maintain adequate books and records as required under the Tax Law and thus is properly borne by the taxpayer (*see Matter of Chronos Enterprises*, Tax Appeals Tribunal, December 13, 2007).

G. The use of bank deposits as the basis of estimating sales and use tax liability has been affirmed by the Tax Appeals Tribunal as a reasonable methodology (*Matter of D & V Liquor*, Tax Appeals Tribunal, March 10, 2005). In the present matter, the fact that NAC/Indoor Air was not actively engaged in business during the year at issue (*see* Finding of Fact 8) is obviously a factor in determining the reasonableness of this method. Considering, however, the consistent and significant deposits to NAC/Indoor Air's account throughout the year at issue, the absence of any substantiation from petitioner with respect to such deposits, and petitioner's admission that a portion of the deposits were accounts receivable, the Division's use of bank deposits to estimate NAC/Indoor Air's sales for the year at issue was reasonable.

H. Since the audit method was reasonable, petitioner had the burden of proof to show, by clear and convincing evidence, that the result of the audit was unreasonably inaccurate or that the amount of tax assessed was erroneous (*see Matter of Your Own Choice, Inc.*, Tax Appeals Tribunal, February 20, 2003).

I. Petitioner has failed to meet this burden. Petitioner's testimony regarding the source of the bank deposits (*see* paragraph 23) is unsupported by any documentation corroborating his claims. Although petitioner testified that documentation substantiating his claims existed and although he was granted leave post-hearing to produce such documentation, he failed to do so. Surely if the deposits to the bank account were personal in nature and the Division's audit was as fundamentally erroneous as petitioner claims, then one would expect petitioner to produce some evidence, in addition to his self-serving testimony, to refute it. I take the strongest possible inference from petitioner's failure to produce documentation that would show that the deposits were personal in nature and I conclude that petitioner did not produce such evidence because,

either, contrary to his testimony, it does not exist, or if it exists it would not have supported his position (*see Matter of Zelinsky*, Tax Appeals Tribunal, November 21, 2001).

Petitioner's credibility is further undermined by his claim that included in the bank deposits were loan proceeds of \$60,000 from Les Steinmet and \$30,000 Heather Rodale. The bank records show no checks from either of these individuals and no deposits in either such amount. Petitioner's credibility is also called into question by his claim that he was paid weekly under a consulting contract with Nesco and the fact that there are no checks payable to him from Nesco in the record.

J. Petitioner's failure to meet his burden notwithstanding, a review of the bank statements and the copies of checks deposited into NAC/Indoor Air's account reveals that certain of the deposits determined by the Division to be taxable sales are, on their face, clearly not sales made by NAC/Indoor Air and therefore should not be included in NAC/Indoor Air's audited taxable sales for the period at issue. Such deposits are described in Finding of Fact 23(b), (c), (d), (e), (f), and (o). The basis for these adjustments is further explained as follows:

Finding of Fact 23(b): A similar check was deemed a nonsale in the Division's analysis of the September 1, 2002 through May 31, 2004 period.

Finding of Fact 23(c): This is a check from a relative payable to petitioner and is therefore properly deemed personal in nature.

Finding of Fact 23(d): This check is payable to National Abatement Corporation. Whether or not this check is a payment for services, the assessment at issue is derived from the sales tax liability of NAC/Indoor Air, a separate entity.

Findings of Fact 23(e) and (f): These checks are payments from a financial services company and are therefore properly deemed personal in nature.

Finding of Fact 23(o): These credit card purchase returns are obviously not sales.

K. The petition of Ronald Kuzon is granted to the extent indicated in Conclusion of Law J, but is in all other respects denied. The Division of Taxation is directed to modify the Notice of Determination dated September 7, 2006 in accordance with Conclusion of Law J, and as modified, the notice is sustained.

DATED: Troy, New York  
August 20, 2009

/s/ Timothy J. Alston  
ADMINISTRATIVE LAW JUDGE