STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
HARMUKH, INC.	:	DETERMINATION
AND	:	DTA NOS. 822281 AND
SUKHWANT SINGH	:	822282
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 2005 through February 28, 2007.	:	

Petitioners, Harmukh, Inc., and Sukhwant Singh, 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 March 1, 2005 through February 28, 2007.

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 May 8, 2009 at 10:30 A.M., with all briefs to be submitted by August 14, 2009, which date began the six-month period for the issuance of this determination. Petitioners appeared by Hector M. Roman, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Osborne K. Jack, 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 penalty and interest, 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 Harmukh, Inc., is a nonbrand gasoline service station located in Jamaica, New York. The service station reported sales of regular, premium and diesel motor fuels. The service station's supplier for unleaded regular and premium gasoline was Pallvi Fuel Oil, Inc., and its supplier for diesel motor fuel was OK Petroleum International. Petitioner Sukhwant Singh was the president and 50 percent shareholder of Harmukh, Inc. The other 50 percent of the shares of the corporation were owned by Mr. Singh's brother.

2. On October 19, 2007, the Division of Taxation (Division) sent a letter to Harmukh, Inc., stating that a sales and use tax field audit of the business operation was to be conducted for the period December 1, 2004 through February 28, 2007. 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, inventory records, purchase invoices, exemption documents, federal income tax returns, New York State corporation tax returns, cash register tapes, bank statements, service station records, pump meter readings, and canceled checks.

The corporation did not provide the auditor with any business records, including source documentation detailing the amount of retail sales of the business operation.

3. The auditor accepted the amount of gallons of fuel sold as reported by the corporation. Petitioner did not supply any information as to the price charged for its gasoline sales. Therefore, for each tax quarter of the audit period, the auditor used an average price per gallon for regular

gasoline for petitioners' zip code as obtained 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. Selling prices for premium gasoline and diesel motor fuel were based upon the difference between regular, premium and diesel motor fuel prices for a nearby nonbrand service station as reported in a Motor Trend Magazine administered web-site dated January 12, 2008. The auditor multiplied the gallons purchased by the taxable base price per gallon for each grade of motor fuel 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 previously remitted, resulting in additional audited sales tax due on motor fuel sales of $244,677.68 for the period March 1, 2005 through February 28, 2007. No credit was given for prepaid sales tax on the purchases of motor fuel, as no records were provided to substantiate the claim that such payments were made.

4. Petitioner Sukhwant Singh, as president, signed, on May 30, 2002, and filed on behalf of Harmukh, Inc., an Application for Registration as a Sales Tax Vendor, Form DTF-17. All New York State and local quarterly sales and use tax returns filed by Harmukh during the period of the audit, except the final quarter, were signed by Sukhwant Singh. Mr. Singh also signed the checks on behalf of Harmukh in payment of the sales and use tax due which accompanied the returns filed for the entire audit period.

5. Sukhwant Singh, along with his wife, was responsible for the daily operations of the service station, including the pricing of the fuel sold, comparing the actual amount of fuel delivered to the amount indicated on the purchase invoices and ordering the motor fuel as needed. Mr. Singh was the only person authorized to sign checks on behalf of the corporation.

Mr. Singh and his wife recorded the amount of gallons purchased and the purchase price per gallon paid for the fuel deliveries in a book, which served as the official record of the business operation. Mr. Singh and his wife did not record any information in the book regarding prepaid sales tax on purchases or the sales price of the motor fuel.

6. The accounting firm that prepared the corporation's sales and use tax returns was not provided with the purchase invoices from the suppliers but only the amount of gallons purchased and the purchase price paid per gallon as recorded in the book. These were the only two figures used by the accounting firm in its computations on the sales and use tax returns as to the amount of sales tax due on the corporation's sales of motor fuel and the amount of credit claimed for prepaid sales tax on the purchases of the motor fuel.

7. On April 28, 2008, the Division of Taxation issued to petitioner Harmukh, Inc., a Notice of Determination asserting additional sales tax due for the period March 1, 2005 through February 28, 2007 in the amount of $244,677.68, plus penalty and interest.

On May 1, 2008, the Division of Taxation issued to petitioner Sukhwant Singh, as an officer or responsible person of Harmukh, Inc., a Notice of Determination asserting additional sales tax due for the period March 1, 2005 through February 28, 2007 in the amount of $244,677.68, plus penalty and interest.

8. During the course of the hearing, petitioners' representative requested additional time to submit certain documentation, including purchase invoices of the corporation's suppliers. Petitioners were granted until June 5, 2009 to submit such documentation, after which the record in these matters was closed. Following the hearing, and prior to June 5, 2009, petitioners produced 40 purchase invoices from OK Petroleum International for purchases of diesel motor fuel during the audit period. In addition, petitioners produced documents entitled New York

Sales Tax Reports from FLEETCOR. The Division of Taxation concedes that based upon its review of the purchase invoices from OK Petroleum International, petitioners are entitled to a prepaid sales tax credit of $7,040.34 for the audit period, reducing the amount of sales tax due on audit to $237,637.34. The revised amount of tax due per quarter is as follows:

QUARTER ENDED	REVISED TAX DUE
5/31/05	$27,676.14
8/31/05	$30,563.17
11/30/05	$33,807.25
2/28/06	$37,189.23
5/31/06	$34,457.52
8/31/06	$27,392.93
11/30/06	$28,040.07
2/28/07	$18,511.03
TOTAL	**$237,637.34**

9. Attached to petitioners' reply brief, mailed on August 22, 2009, were purchase invoices alleged to be from Pallvi Fuel Oil, Inc. Petitioner's representative had not requested any additional time past June 5, 2009 to submit additional evidence. Accordingly, no part thereof has been considered for purposes of this determination.

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 Harmukh's sales, as well as the business's failure to produce such books and records for the Division's review. In turn, the auditor reasonably concluded that the business did not maintain books and records that were sufficient to verify its 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 NYS2d 643[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]).

C. Having established the insufficiency of the corporation's books and records, the Division resorted, in determining the amount of sales of motor fuel, to the use of purchases reported by the corporation, together with the selling price of regular gasoline as reported by OPIS for the corporation's location and a comparison of a similar service station's prices for premium gasoline and diesel motor fuel. 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 corporation's own purchases and selling prices of service stations in the same area to determine the amount and price of the corporation's sales of motor fuel.

D. Petitioners, in essence, appear to take issue with the Division's audit results because they are imprecise and do not include prepaid sales tax. 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***). In this instance, petitioners specifically complain that prepaid sales tax was not credited by the auditor in the calculation of the amount of sales tax due. It is noted that the auditor used the corporation's own purchases and local selling prices to determine the amount of fuel sales and that petitioners presented no documentation to establish the actual sales prices. In addition, the corporation failed to maintain or present any records which would establish the amount of prepaid sales tax, except the purchase invoices from OK Petroleum International. In addition to the invoices from OK Petroleum International, petitioners produced New York Sales Tax Reports from FLEETCOR "The Fleet Card Company" indicating that FLEETCOR claimed prepaid sales tax credits for gasoline and diesel purchased from Harmukh. Without an explanation of the nature of FLEETCOR and its relationship to Harmukh, as well as the lack of purchase invoices or other documents establishing that the credits claimed by FLEETCOR were actually paid by Harmukh

on its purchases, no additional credit can be made for claimed prepaid sales tax. Ultimately, petitioners' failure to maintain or provide any records of their sales does not provide a basis for changing the Division's audit results, as modified (***see*** Finding of Fact 8).

E. Tax Law § 1133(a) imposes upon any person required to collect the tax imposed by Article 28 of the Tax Law personal liability for the tax imposed, collected or required to be collected. A person required to collect tax is defined to include, among others, corporate officers and employees who are under a duty to act for such corporation in complying with the requirements of Article 28 (Tax Law § 1131[1]).

F. The mere holding of corporate office does not, per se, impose tax liability upon an office holder (***see Vogel v. New York State Dept. of Taxation & Fin.,*** 98 Misc 2d 222, 413 NYS2d 862 [1979]; ***Chevlowe v. Koerner***, 95 Misc 2d 388, 407 NYS2d 427 [1978]; ***Matter of Unger***, Tax Appeals Tribunal, March 24, 1994, ***confirmed*** 214 AD2d 857, 625 NYS2d 343 [1995], ***lv denied*** 86 NY2d 705, 632 NYS2d 498 [1995]). Rather, whether a person is an officer or employee liable for tax must be determined upon the particular facts of each case (***Matter of Cohen v. State Tax Commn***., 128 AD2d 1022, 513 NYS2d 564 [1987]; ***Matter of Hall,*** Tax Appeals Tribunal, March 22, 1990***, confirmed*** 176 AD2d 1006, 574 NYS2d 862 [1991]; ***Matter of Martin,*** Tax Appeals Tribunal, July 20, 1989*, **confirmed*** 162 AD2d 890, 558 NYS2d 239 [1990]; ***Matter of Autex Corp.***, Tax Appeals Tribunal, November 23, 1988). Factors to be considered, as set forth in the Commissioner's regulations, include whether a person is authorized to sign the corporation's tax returns, was responsible for managing or maintaining the corporate books or was permitted to generally manage the corporation (20 NYCRR 526.11[b][2]). As summarized in ***Matter of Constantino*** (Tax Appeals Tribunal, September 27, 1990):

> [t]he question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and the decisions of this Tribunal have identified a variety of factors as indicia of responsibility: the individual's status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual's knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; the individual's economic interest in the corporation (***Cohen v. State Tax Commn***, ***supra***, 513 NYS2d 565; ***Blodnick v. State Tax Commn***., 124 AD2d 437, 507 NYS2d 536, 538, ***appeal dismissed*** 69 NY2d 822, 513 NYS2d 1027; ***Vogel v. New York State Dept. of Taxation & Fin***., ***supra***, 413 NYS2d at 865; ***Chevlowe v. Koerner***, ***supra***, 407 NYS2d at 429; ***Matter of William Barton***, [Tax Appeals Tribunal, July 20, 1989]; ***Matter of William F. Martin***, ***supra***; ***Matter of Autex***, ***supra***).

Summarized in terms of a general proposition, the issue to be resolved is whether petitioner had, or could have had, sufficient authority and control over the affairs of the corporation to be considered a person under a duty to collect and remit the unpaid taxes in question (***Matter of Constantino***; ***Matter of Chin***, Tax Appeals Tribunal, December 20, 1990). In order to prevail, petitioner Sukhwant Singh "was required to establish by clear and convincing evidence that he was not an officer having a duty to act on behalf of the corporation, i.e., that he lacked the necessary authority or he had the necessary authority, but was thwarted by others in carrying out his corporate duties through no fault of his own (citations omitted)" (***Matter of Goodfriend***, Tax Appeals Tribunal, January 15, 1998).

G. Petitioner Sukhwant Singh was president and owned 50 percent of the shares of stock of Harmukh, Inc. for the period at issue. Mr. Singh was responsible for the daily operations of the business, including ordering the supply of gasoline and setting selling prices. He was the only individual with check signing authority for the corporation and had the authority to manage the business with knowledge and control over its financial affairs. In addition, Mr. Singh was the person who signed the sales tax returns and the checks for payment of the tax due. All of the

quarterly New York State and local sales and use tax returns for the period at issue, except the last period, and the checks remitting the sales tax shown to be due on the returns were signed by Mr. Singh on behalf of Harmukh, Inc. The foregoing facts indicate that Mr. Singh had broad authority with respect to the management of the corporation and thus indicate responsible officer status. Accordingly, petitioner is a person responsible for the collection and payment of sales tax pursuant to Tax Law §§ 1131 and 1133 and is personally liable for the sales taxes due on behalf of Harmukh, Inc. for the period March 1, 2005 through February 28, 2007.

H. The Division asserted penalty herein pursuant to Tax Law § 1145(a)(1)(i) and (vi). Tax Law § 1145(a)(1)(i) states that any person failing to file a return or pay over any sales or use tax "shall" be subject to a penalty. This penalty may be canceled if the failure was "due to reasonable cause and not due to willful neglect" (Tax Law § 1145[a][1][iii]). Consistent with this statute, the Division's regulations provide that penalty imposed under Tax Law § 1145(a)(1)(i) "must be imposed unless it is shown that such failure was due to reasonable cause and not due to willful neglect" (20 NYCRR 2392.1[a][1]).

Tax Law § 1145(a)(1)(vi) states that any person who omits from the total amount of tax required to be shown on a sales tax return an amount which is in excess of 25 percent of such total amount "shall be subject to a penalty equal to ten percent of the amount of such omission." Like the penalties imposed under Tax Law § 1145(a)(1)(i), penalties imposed under section 1145(a)(1)(vi) must be sustained unless the failure was due to reasonable cause and not due to willful neglect.

I. Petitioners have not provided evidence or arguments sufficient to constitute reasonable cause or support abatement or cancellation of penalties. In establishing reasonable cause for penalty abatement, the taxpayer faces an onerous task (***Matter of Philip Morris, Inc.***, Tax

Appeals Tribunal, April 29, 1993). Referring to the mandatory language of Tax Law § 1145 (a)(1)(i), the Tribunal stated that "the Legislature evidenced its intent that filing returns and paying tax according to a particular timetable be treated as a largely unavoidable obligation" (***Matter of MCI Communications Corp.***, Tax Appeals Tribunal, January 16, 1992). In this case, petitioners neither maintained nor produced records as required, and those records petitioners did keep were without any source documentation to establish the veracity of the information set forth thereon. Furthermore, sales as determined on audit were far in excess of taxable sales reported. Under these circumstances, penalties must be sustained.

J. The Tax Appeals Tribunal has established a firm policy of not allowing the submission of evidence after the record is closed. In ***Matter of Saddlemire*** (Tax Appeals Tribunal, June 14, 2001), the Tribunal stated:

> [w]e have held that in order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing. Further, the submission of evidence after the closing of the record denies the adversary the right to question the evidence on the record (***Matter of Emerson***, Tax Appeals Tribunal, May 10, 2001; ***Matter of Schoonover***, Tax Appeals Tribunal, August 15, 1991).

As previously noted, petitioners did not ask for nor were they granted additional time for the submission of evidence after June 5, 2009 and the closing of the record.

K. The petitions of Harmukh, Inc. and Sukhwant Singh are granted to the extent indicated in Finding of Fact 8; the Division of Taxation is hereby directed to modify the notices of determination issued to petitioner Harmukh, Inc. on April 28, 2008 and to petitioner Sukhwant

Singh on May 1, 2008 accordingly; and, except as so granted, the petitions are in all other respects denied.

DATED: Troy, New York
February 11, 2010

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE