

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition

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of

:

**IFTZKHAR AHMED**

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DETERMINATION  
DTA NO. 822391

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, 2003 through August 31, 2006. :

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Petitioner, Iftzkhar Ahmed, 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 December 1, 2003 through August 31, 2006.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on February 18, 2009 at 10:30 A.M., with all briefs submitted by July 6, 2009, which date began the six-month period for the issuance of this determination. Petitioner appeared by Jay Oher, CPA. The Division of Taxation appeared by Daniel Smirlock, Esq. (Robert A. Maslyn, Esq., of counsel).

***ISSUES***

I. Whether the Division of Taxation properly determined additional sales and use taxes due from Shair Deli and Grocery, Inc., for the period December 1, 2003 through August 31, 2006.

II. Whether the Division of Taxation's resort to an estimated audit methodology was justified under the circumstances presented and whether the methodology chosen was reasonably calculated to reflect taxes due.

III. Whether petitioner was a person responsible for the collection and payment of sales and use taxes on behalf of Shair Deli and Grocery, Inc., during the audit period.

***FINDINGS OF FACT***

1. Shair Deli and Grocery, Inc., (Shair) operated a convenience store in Maspeth, New York, during the audit period, making sales of beer, soda, cigarettes, telephone calling cards, other taxable sales including snack items and a limited offering of food items like milk and eggs.

2. The Division of Taxation (Division) mailed an audit appointment letter, dated September 26, 2006, to Shair, informing it of its selection for a field audit for the period December 1, 2003 through August 31, 2006. The letter proposed a field visit to the business on October 10, 2006 and requested that specific records pertinent to the audit period be made available at that time, including: sales tax returns; federal income tax returns; New York State corporation tax returns; the general ledger; general journal and closing entries; sales invoices; all exemption documentation to support nontaxable sales; chart of accounts; expense purchase invoices; merchandise purchase invoices; bank statements and canceled checks and deposit slips for all accounts maintained by Shair; cash receipts journal; cash disbursement journal; State Liquor Authority license in effect for the audit period; guest checks and cash register tapes.

3. The sole field audit visit ultimately took place on December 7, 2006 at the office of petitioner, Iftzkhar Ahmed's, representative, Mr. Jay Oher, where the auditor was presented with some cash register tapes, Shair's federal corporation income tax returns for two years, some purchase invoices, and some bank statements. Although Mr. Oher testified that bank statements for the entire audit period (less the period December 2003 through May 2004), a general ledger, a cash disbursements journal and a cash receipts journal were left for the auditor to review, the auditor's log and her recounting of the visit reveal that the only records she was presented with

were those set forth above. Since this meeting on December 7, 2006, the auditor received no further records requested in the appointment letter. In addition, when asked by the auditor to provide information for completing a responsible person questionnaire and an explanation of the methodology used in preparing petitioner's sales tax returns, Mr. Oher failed to respond.

4. Shair's cash register tapes, which it conceded were not a reliable source document for determining sales tax due, were produced by one register at the store and were not adequate to determine sales for purposes of a sales tax audit because they did not identify items purchased and whether the items were taxable. This was so even though the operator of the register manually entered the taxability of the item. Beer and soda sales were always listed with tax included and could not be identified independently from the tapes.

5. The auditor reviewed the federal income tax returns for the years 2004 and 2005 and noted the gross sales amounts and the cost of goods sold for each year. This information indicated a rough markup percentage for all items sold of approximately 21 percent for 2004 and 18 percent for 2005, which appeared to the auditor to be low for a convenience store selling primarily beer, soda, cigarettes and calling cards.

6. In reviewing the bank statements from Chase Bank for the period June 2004 through December 2005, the auditor found the deposits to be consistent with the gross sales stated on the federal income tax returns and the sales tax returns. However, the statements did not provide any new information which would aid her in determining Shair's tax liability for the audit period.

7. The auditor reviewed a sampling of the cash register tapes that were provided, but immediately determined their inadequacy for audit purposes. Since the tapes failed to identify items sold and did not separately state tax charged on beer and soda, they were useless for sales tax audit purposes. In fact, the manager's testimony revealed that a tax key was manually

punched after a taxable item had been entered, which was then reported in a taxable sales summary at the end of the tape that could cover one or two days. Beer and soda sales were recorded as a price inclusive of tax and were not entered on the register as taxable items and could not be traced as such from these records. The tapes also made it impossible to determine a taxable ratio. The auditor concluded that these shortcomings combined with the absence of a general ledger and cash disbursements journal made it impossible to perform a detailed audit.

8. After determining the absence of an audit trail and the inability to calculate a taxable ratio, the auditor inquired of petitioner's representative as to how sales tax returns were prepared. This request was of particular interest because Shair's sales and use tax returns for the audit period revealed taxable ratios that fluctuated between 26 or 27 percent and 60 percent. Despite the inquiry, the auditor was never provided with the methodology used to prepare the returns or the basis of the taxable ratios.

9. Based on the auditor's experience in auditing similar stores with the same products, the auditor chose not to tax all sales because she knew that Shair made sales of nontaxable food items and to do so would be inaccurate and unfair. However, given the inadequacy of the records provided at the December 7, 2006 meeting, the auditor determined that an estimated audit methodology would have to be employed to determine petitioner's tax liability.

10. Relying on information the Division had in its file for Shair, audit experience, a survey visit to the store and third-party invoices that had been provided by Shair, it was decided to perform a third-party verification of purchases. Letters were sent to several vendors<sup>1</sup> asking for purchase information relating to Shair during the audit period. Of the letters sent, the Division

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<sup>1</sup>Although the requests for information sent to third parties clearly indicated Shair's name and address, it also referenced a "DBA" of "B&M Food Mart." The auditor did not recall why this was stated on the requests or where it originated. However, the responses received clearly referred to Shair.

received complete and usable information in responses only from Anheuser Busch and S.K.I. Beer Corp. for beer purchases and Atlas Phone Cards for phone card purchases. The Division received no information on soda purchases.

11. Beer purchases from Anheuser Busch were \$61,910.17 and purchases from S.K.I. were \$3,748.41, for total beer purchases of \$65,658.58. From this amount the auditor made a 5 percent allowance for pilferage and spoilage in the sum of \$3,282.93. To the remaining purchases a markup of 25 percent was applied which was determined from the circumstances of the case and the auditor's experience with beer markups in approximately 35 audits of similar stores. As noted above, Shair's federal income tax return for 2004 and 2005 indicated a rough markup on cost of 18 to 21 percent. Because the auditor knew that the markups calculated from the federal returns included items with very low markups like phone cards and cigarettes, it was assumed that the markup on beer was higher than the composite markup gleaned from the federal returns. Hence, the 25 percent markup, grounded in the auditor's experience with similar stores and products and Shair's own records, was considered a fair estimate of the markup on beer. After applying the markup to beer purchases, it was determined that taxable beer sales were \$81,252.49 for the audit period.

12. Since no third-party information was available for soda purchases, the auditor made the estimate that soda purchases were 40 percent of beer purchases based on her survey of Shair's store and the ratio of soda shelf space to beer shelf space. This was a methodology that the auditor had gained from experience with similar audits. It yielded \$32,501.00 in audited soda sales.

13. Cigarette sales were calculated using Shair's statement of prepaid sales tax on cigarettes set forth on its quarterly sales tax returns for the audit period and pricing information

set forth in the Division's Publication 510, Minimum Retail Cigarette Prices. This methodology resulted in taxable cigarette sales of \$389,470.69 for the audit period, the single greatest component of Shair's audited taxable sales.

14. In reviewing the invoices produced, the auditor noted one from a vendor of telephone calling cards and sent the vendor a request for purchase information with respect to Shair for the audit period. The response from Atlas Phone Cards indicated \$25,877.61 in purchases from Shair. The auditor added a markup to this figure of five percent to arrive at calling card sales of \$27,171.49. The auditor chose five percent because, in the Division's experience, calling cards had a very low markup.

15. Finally, because the auditor's survey visit to the store revealed the sale of other items like candy, coffee, cleaning supplies and imported beer, it was decided to add to taxable sales a category called "Other Miscellaneous Taxable Sales," estimated to be \$50.00 a day, based on the Division's experience. The Division applied this amount to each day in the audit period to arrive at Other Miscellaneous Sales of \$50,050.00.

16. Adding all the sales determined by the Division resulted in audited taxable sales of \$580,445.67, which exceeded reported taxable sales of \$426,856.00, yielding \$153,589.67 in additional taxable sales. When the additional taxable sales were divided by the reported taxable sales, the result was an error ratio of 35.982 percent which was then applied to each quarter's reported taxable sales, yielding quarterly audited taxable sales. Subtracting reported from audited taxable sales left additional taxable sales on which tax was computed for each quarter. After allowing for tax paid per quarter, additional tax due remained. For all quarters in the audit period, the additional tax determined to be due was \$13,092.74.

17. With time to issue a notice of determination running out for the first quarter of the audit, March 20, 2007, the Division prepared a Consent Extending the Period of Limitations on Assessment which provided that the Division would be permitted until September 20, 2007 to determine sales and use taxes due from Shair for the audit period. The auditor forwarded it to Shair's representative, Mr. Jay Oher, on or about January 22, 2007 and attempted to contact him several times thereafter with regard to its execution. However, when the representative was finally contacted, he refused to sign the consent.

18. The Division prepared a Statement of Proposed Audit Change for Sales and Use Tax, addressed to Shair and dated February 6, 2007, indicating additional tax due of \$13,092.74, penalty of \$4,753.37 and interest of \$3,917.48, determined in accordance with the audit.

19. The Division issued to petitioner, Iftzkhar Ahmed, a Notice of Determination, dated February 20, 2007, which explained that petitioner was issued the notice because he was deemed to be a responsible officer or person of Shair. The notice asserted tax due of \$13,092.74 plus penalty and interest.

20. In an attempt to determine who was responsible for the collection and payment of sales tax on behalf of Shair, the auditor asked Mr. Oher at the December 7, 2006 meeting for information on a responsible person but was told that a responsible person questionnaire would not be completed and provided. No information was ever provided with regard to any responsible person or persons.

21. In the absence of any information with regard to a responsible person, the Division used records in its possession to determine the identification of such person or persons.

Petitioner signed the power of attorney on behalf of Shair, appointing Mr. Oher the attorney in

fact for the corporation. The power was signed within the audit period by petitioner on August 29, 2006 in his capacity as president of the corporation. This same signature appears on the power of attorney in this matter, executed by petitioner on the same date, August 29, 2006.

In addition, the Voluntary Compliance Worksheet for Shair, dated September 19, 2006, a Division record which contains information for taxpayers including returns filed and other corporate data, indicated that Shair was an S corporation which had last filed a CT-3S return on August 28, 2006 for the calendar year 2005. It also indicated that a CT-34-SH, an S corporation shareholder information schedule, had been filed by Shair on June 3, 2004 indicating that petitioner was the sole shareholder of Shair.

Finally, petitioner's signature on the power of attorney submitted to the Division on audit, and also submitted to the Division of Tax Appeals with his petition in this matter, appears on Shair's checks issued on a Chase checking account, statements for which were submitted in evidence by petitioner at hearing. The checks, payable to "NYS Sales Tax," were signed during the audit period and delivered to the Division with Shair's sales and use tax returns.

22. After a conference in the Bureau of Conciliation and Mediation Services (BCMS), the additional tax determined to be due was reduced to \$7,699.84 and penalties were canceled. The adjustment in tax was based on an allowance for bottle deposits; a modification in the percentage of beer sales attributed to soda (25 rather than 40 percent); and the elimination of the \$50.00 per day miscellaneous taxable sales component.

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

23. Petitioner contends that all records were made available for the auditor at the December 7, 2006 meeting in Mr. Oher's office.



24. Petitioner argues that the third-party verification used as an indirect audit methodology was flawed because the letters sent to suppliers included the business name “B & M Food Mart” beneath Shair’s name and address and the responses did not indicate to whom the sales figures pertained.

25. Petitioner noted that the Division’s ascription of the moniker “deli-grocery” store to Shair was in error and that it knew it was a convenience store, requiring a different set of markup percentages. Further, petitioner believes that the auditor’s lack of knowledge of convenience stores prevented her from performing a valid audit of Shair.

26. With respect to the issue of petitioner’s responsibility for the collection and payment of the sales tax on behalf of Shair, petitioner argues that the auditor’s lack of independent knowledge of petitioner’s relationship to Shair undermined her ability to establish that he was a person responsible for the collection and payment of sales tax for the corporation. Petitioner argues that the copies of Shair’s tax returns for the audit period and the checks written to pay the taxes stated thereon were examined “post audit” and are therefore “irrelevant” to the issue of petitioner’s liability as asserted on the notice issued to him.

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

A. Tax Law § 1105(a) imposes a sales tax on the receipts from every “retail sale” of tangible personal property except as otherwise provided in Article 28 of the Tax Law. A “retail sale” is “a sale of tangible personal property to any person for any purpose, other than . . . for resale as such . . .” (Tax Law § 1101[b][4][i]). Tax Law § 1138(a)(1) provides, in relevant part, that if a sales tax return was not filed, “or if a return when filed was 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].) When acting pursuant to section 1138(a)(1), the Division is required to select a method reasonably calculated to reflect the tax due. The burden then rests upon the taxpayer to demonstrate that the method of audit or the amount of the assessment was erroneous (see *Matter of Your Own Choice, Inc.*, Tax Appeals Tribunal, February 20, 2003).

B. The standard for reviewing a sales tax audit where external indices were employed was set forth in *Matter of Your Own Choice, Inc.* (Tax Appeals Tribunal, February 20, 2003), as follows:

To determine the adequacy of a taxpayer's records, the Division must first request (*Matter of Christ Cella, Inc. v. State Tax Commn.*, [102 AD2d 352, 477 NYS2d 858] *supra*) and thoroughly examine (*Matter of King Crab Rest. v. Chu*, 134 AD2d 51, 522 NYS2d 978) 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, *lv denied* 71 NY2d 806, 530 NYS2d 109). The purpose of the examination is to determine, through verification drawn independently from within these records (*Matter of Giordano v. State Tax Commn.*, 145 AD2d 726, 535 NYS2d 255; *Matter of Urban Liqs. v. State Tax Commn.*, 90 AD2d 576, 456 NYS2d 138; *Matter of Meyer v. State Tax Commn.*, 61 AD2d 223, 402 NYS2d 74, *lv denied* 44 NY2d 645, 406 NYS2d 1025; *see also, Matter of Hennekens v. State Tax Commn.*, 114 AD2d 599, 494 NYS2d 208), that they are, in fact, so insufficient that 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; *Matter of Christ Cella, Inc. v. State Tax Commn.*, *supra*), "from which the exact amount of tax due can be determined" (*Matter of Mohawk Airlines v. Tully*, 75 AD2d 249, 429 NYS2d 759, 760).

Where the Division follows this procedure, thereby demonstrating that the records are incomplete or inaccurate, the Division may resort to external indices to estimate tax (*Matter of Urban Liqs. v. State Tax Commn.*, *supra*). The estimate methodology utilized must be reasonably calculated to reflect taxes due (*Matter of W.T. Grant Co. v. Joseph*, 2 NY2d 196, 159 NYS2d 150, *cert denied* 355 US 869, 2 L Ed 2d 75), but exactness in the outcome of the audit method is not required (*Matter of Markowitz v. State Tax Commn.*, 54 AD2d 1023, 388 NYS2d 176, *affd* 44 NY2d 684, 405 NYS2d 454; *Matter of Cinelli*, Tax Appeals Tribunal, September 14, 1989). The taxpayer bears the burden of proving with clear and convincing evidence that the assessment is erroneous (*Matter of Scarpulla v. State Tax Commn.*, 120 AD2d 842, 502 NYS2d 113) or that the audit methodology is unreasonable (*Matter of Surface Line Operators Fraternal Org. v. Tully*, 85 AD2d 858, 446 NYS2d 451; *Matter of Cousins Serv. Station*,

Tax Appeals Tribunal, August 11, 1988). In addition, "[c]onsiderable latitude is given an auditor's method of estimating sales under such circumstances as exist in [each] case" (*Matter of Grecian Sq. v. New York State Tax Commn.*, 119 AD2d 948, 501 NYS2d 219, 221).

C. In this matter, the Division made a proper request for Shair's books and records by its letter, dated September 26, 2006. Although petitioner suggested some impropriety with the issuance of the letter due to the fact that the auditor was listed as telecommuting on that day, petitioner did not deny that the letter was received and even called the auditor three days later to inform the Division that the business would be represented by Mr. Oher.

The conference between the auditor and Mr. Oher was conducted at the latter's office on December 7, 2006, where the only books and records with which the auditor was presented were the federal income tax returns for Shair; tabulated bank statements for a portion of the audit period; a box of cash register tapes; and purchase invoices. Petitioner was unable or chose not to produce a general ledger, cash receipts journal, bank statements for the full audit period or cash register tapes that accurately indicated taxable sales. Canceled checks, deposit slips, sales and use tax returns and related worksheets, New York corporation tax returns for the audit period, exemption documentation and a cash disbursement journal were also not produced at the December 7, 2006 meeting. When the auditor asked how the returns were prepared, she received no explanation. Since the taxable ratio indicated on the sales tax returns filed by Shair for each of the quarters in the audit period ranged between 26 or 27 and 60 percent it was incumbent upon petitioner to explain how he determined these percentages and produce adequate records to substantiate them. Nothing petitioner produced at the December 7, 2006 meeting or since substantiated the taxable ratios indicated on the sales and use tax returns filed for the quarters of the audit period.

At hearing, petitioner produced bank statements for its Chase checking account for the months of January 2006 through August 2006, which the auditor had found missing on audit. The corresponding checks and deposit slips were not produced. In addition, petitioner produced at hearing a general ledger, a detailed general ledger, a cash receipts journal and a cash disbursements journal for the entire audit period. However, these documents do not reflect payments to suppliers and do not elaborate on or explain the taxable ratios set forth on the sales and use tax returns. Without any source or other documentation to substantiate the disparate taxable ratios presented on the returns, the auditor was justified in resorting to an estimated audit methodology to determine petitioner's tax liability for the audit period. (*Matter of Urban Liqs. v. State Tax Commn.*)

It is important to note that petitioner's representative, who testified under oath, claims to have "left" all requested books and records for the auditor to review on her visit to his office on December 7, 2006. However, his testimony fell short of declaring that he actually gave her the documents personally or that she received them, even pointing out the fact that he was in another suite of offices during her visit. Given all the circumstances surrounding the production of records on December 7, 2006, it is concluded that the auditor's recollection and log entry were more credible than Mr. Oher's recounting, and petitioner's inability to explain how returns were prepared or substantiate the taxable ratios claimed on the returns suggests that adequate records never existed. Further, Mr. Oher's failure to cooperate with the auditor's requests for information concerning taxable ratio, the preparation of the sales tax returns and petitioner's involvement with Shair eroded his credibility and served to strengthen the auditor's testimony and audit.

D. Since the cash register tapes that were maintained by Shair did not identify specific sales and did not separately state tax for beer and soda, they had little value as source

documentation for sales and were of no help in deciphering the taxable ratios claimed by Shair on its tax returns. The auditor realized this as soon as she inspected a sample of those presented to her and understood they would be of no assistance in establishing the accuracy of Shair's sales tax returns. Petitioner's criticism of her inspection of the tapes was baseless, especially in light of the manager's concession that the beer and soda sales were recorded as nontaxable. Since the tapes failed to account for a substantial component of taxable sales and identify the items purchased, the auditor was justified in dismissing them.

E. Based on information the auditor received at the meeting with Mr. Oher, a third-party verification audit methodology was chosen. As noted above, the estimate methodology utilized must be reasonably calculated to reflect taxes due (*Matter of W.T. Grant Co. v. Joseph*) and third-party verification audits have been upheld as legitimate and reasonable methods of estimating a taxpayer's tax liability where records were demonstrated to be inadequate. (*Matter of Sona Appliances, Inc.*, Tax Appeals Tribunal, March 16, 2000.)

Although petitioner objected to the form of the requests for sales information from suppliers, he did not offer any evidence that the information received was inaccurate. Further, the only third-party information received was from beer suppliers, since no soda suppliers responded with usable information. Therefore, for soda, a shelf space percentage of beer was used based upon the observations of the auditor at her survey visit. It was not unreasonable to conclude that the amount of shelf space allocated to types of items was a reflection of the relative percentage of items sold. While petitioner may dispute the accuracy of such an estimate, he did not provide any specific information concerning sales of soda, despite the fact that he could have easily provided invoices from Shair's suppliers. Therefore, 40 percent of beer sales was utilized to estimate soda sales in the absence of any contradictory evidence.

For beer sales, the auditor allowed an unsubstantiated allowance for pilferage and spoilage and then applied a markup of 25% based on the circumstances of this case, noted above in Finding of Fact 10, and her own experience in auditing approximately 35 other deli-grocery stores. Such experience has been upheld as rational in the absence of reliable records. (*Matter of Oak Beach Inn Corp. v. Wexler*, 158 AD2d 785, 551 NYS2d 375 [1990]; *Matter of Ronnie's Suburban Inn, Inc.*, Tax Appeals Tribunal, May 11, 1989.)

Cigarette sales were calculated from Shair's own record of prepaid tax and published pricing information found in the Division's Publication 510, and petitioner offered no argument in opposition to that component of the additional sales calculated. The calling card purchases were provided by Atlas Phone Cards and the auditor simply added a low, five percent markup based upon office experience and the fact that the markup on calling cards was traditionally very low. As in the case of each of the other categories of sales, petitioner offered no evidence to contradict the Division's estimates.

Finally, the auditor's estimate of \$50.00 per day for miscellaneous taxable sales, based on her survey of the store, was based on the auditor's observation of sales of taxable items which were not accounted for in the other categories. Although petitioner failed to submit evidence to establish the nonexistence of or a different amount of miscellaneous sales, this component of the assessment was canceled at the BCMS conference.

F. In light of the circumstances of this case, the Division was warranted in resorting to an estimated methodology and that methodology was reasonable. Although most likely not precise, that is not a reason to dismiss it. (*Matter of Markowitz v. State Tax Commn.*) Petitioner has not produced any evidence to demonstrate that the Division's assessment was erroneous and has therefore not met his burden of proof. (*Matter of Scarpulla v. State Tax Commn.*)

Further, the parts of the audit which are still in issue, the third-party verification of purchases and markups for beer, soda and calling cards were all performed within the parameters established in Tax Law § 1138 and the case law recited above. Petitioner has cited *Matter of Abbasi* (Tax Appeals Tribunal, June 12, 2008), in support of his position that the Division's methodology was somehow secretive and lacked fairness. However, this is unfounded. Use of third-party purchase information has long been recognized as a sound estimated audit methodology which utilized Shair's own records. (*See Matter of Sona Appliances, Inc.*) The markups used were very reasonable and differences from the rough estimates taken from Shair's federal returns were explained by the variation among products with which the auditor had prior experience, the use of which has been held to be valid. (*See Matter of Hanratty's/732 Amsterdam Tavern v. New York State Tax Commn.*, 88 AD2d 1028, 451 NYS2d 900 *appeal dismissed* 57 NY2d 954, 457 NYS2d 1028.) All information used by the Division was available to petitioner, who chose instead to do nothing to demonstrate that the methodology was unreasonable or significantly inaccurate. Since the Division is permitted significant latitude in estimating the taxes due where few records are produced by a taxpayer on audit, petitioner's choice was very unwise. (*Matter of Grecian Sq. v. New York State Tax Commn.*)

G. 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]).

Generally, the resolution of whether a person is responsible to collect and remit sales tax for a corporation so that the person would have personal liability for the taxes not collected or

paid depends on the facts of each case (*Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022, 513 NYS2d 564; *Stacy v. State Tax Commn.*, 82 Misc 2d 181, 183, 368 NYS2d 448).

In this matter, petitioner has gone to great lengths to disguise and hide his involvement with Shair, of which he was both president and sole shareholder during the audit period. Beginning at the conference held at Mr. Oher's office, the auditor was informed that she would not be provided with the answers to a responsible person questionnaire. Petitioner refused to submit any documentation to her which may have indicated petitioner's involvement with Shair, including but not limited to canceled checks, sales tax returns and New York State corporation tax returns for the audit period, all of which were properly requested in the appointment letter. In addition, the failure to appear at the hearing, although not mandatory, certainly continues petitioner's pattern of conduct to keep any information about himself from the Division. (*See Matter of Meixsell v. Commissioner of Taxation*, 240 AD2d 860, 659 NYS2d 325 [1997], *lv denied* 91 NY2d 811, 671 NYS2d 714 [1998].)

Of course, petitioner's strategy was a dangerous one. Having signed the power of attorney in his capacity as president of Shair during the last quarter of the audit period, he admitted that he held the highest corporate office and was authorized to act on behalf of the corporation. In addition, the Division's Voluntary Compliance Worksheet indicated that a form CT-34-SH, attached to one of Shair's corporate income tax returns filed during the audit period, contained shareholder information filed by Shair on June 3, 2004, which indicated that petitioner was the sole shareholder. By definition, as the sole shareholder, petitioner was responsible for electing officers and, either personally or through his delegates, was under a duty to act for the corporation in complying with the requirements of Article 28 (Tax Law § 1131[1]). This evidence alone was enough to substantiate the Division's assessment. The burden of proof was



upon petitioner to show that it was erroneous and he failed to meet his burden. (20 NYCRR 3000.15[d][5].)

In addition, this same signature appears on the checks issued on Shair's Chase checking account, statements for which were submitted in evidence by petitioner at hearing. The checks, payable to "NYS Sales Tax," were signed by petitioner during the audit period and delivered to the Division with Shair's sales and use tax returns.

Although petitioner protests the use of what he terms "post assessment information," his basis for objection is in error. The case he cites in support of this proposition prohibits post assessment proof in support of the notice only where the assessment was issued without information available at the time of issuance. (*Matter of Roncone*, State Tax Commission, March 11, 1986 [TSB-H-86(83)S].) That was not the case here, where, as stated above, the Division had a power of attorney signed by petitioner as president of Shair and evidence that corporate returns had been filed by Shair indicating that petitioner was the sole shareholder. The checks which accompanied the sales and use tax returns filed by Shair for each of the quarters in issue bore petitioner's signature. Petitioner should have produced these when requested (prior to assessment), but chose not to. Petitioner conveniently submitted the bank statements, but no checks. For petitioner to first refuse to cooperate with the Division in producing books and records requested and then argue that the Division is prohibited from using Shair's tax returns and checks submitted with those returns, signed by petitioner, is disingenuous. The timing of the Division's submission was directly related to petitioner's refusal to produce records he should have produced on December 7, 2006. To reward such behavior would make a mockery of the Tax Law's requirement that taxpayers maintain books and records and have them available for

inspection when requested. (Tax Law § 1135 [a][1]; [g].) It is concluded that this was not the intent of the Tax Commission in *Matter of Roncone*.

Petitioner's reliance on *Matter of Sergold* (Tax Appeals Tribunal, May 23, 1991) and *Matter of Petak* (Tax Appeals Tribunal, September 9, 1993) was also mistaken. In *Sergold* the issue of post assessment proof was mooted by the Tribunal which found that the notices in issue had been canceled at hearing by the Division of Taxation. In *Petak*, the focus was on the validity of the original audit, not an observation test performed at BCMS which established a lower markup percentage. The facts in *Petak* are nothing like those presented here and, other than the citation of *Roncone*, have no relevance.

H. Petitioner was in possession and control of critical information on the issue of his responsibility for the collection and payment of sales and use taxes for Shair, yet he chose to withhold that information and submit no documentation or his own sworn testimony. In *Matter of Meixsell v. Commissioner of Taxation*, the Court stated:

Further, petitioners were knowledgeable parties and, like missing witnesses, it may reasonably be inferred that their testimony on such omitted data also would not be favorable to their claims (659 NYS2d 325, 327).

This forum adopts that view and finds that petitioner was liable as a responsible person for Shair, who believed that by withholding information from the Division on audit he could absolve himself of his burden of proof to show otherwise. Obfuscation, refusal to submit books and records of the corporation and refusing to answer any questions<sup>2</sup> with respect to his involvement

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<sup>2</sup>Mr. Oher never attempted to address or deny the auditor's sworn testimony that he refused to give her information on petitioner vis-a-vis his status as a responsible person for Shair. Other than to dispute the veracity of the Division's information as gleaned from Shair's own filings with the Division, petitioner offered absolutely no evidence that anyone other than himself was a person responsible for the collection and payment of tax on behalf of Shair.

with Shair did not assist petitioner in meeting his burden of proof, and the Division's assessment is sustained.

I. The petition of Iftzkhar Ahmed is denied, and the Notice of Determination, dated, February 20, 2007, as modified by the Conciliation Order, dated April 4, 2008, is sustained.

DATED: Troy, New York  
December 17, 2009

/s/ Joseph W. Pinto, Jr.  
ADMINISTRATIVE LAW JUDGE