

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
CANARIO EXPRESS CORPORATION¹ : DETERMINATION
for Revision of a Determination or for Refund of Sales : DTA NO. 822662
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Period June 1, 2000 through May 31, 2006. :

Petitioner, Canario Express Corporation, 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, 2000 through May 31, 2006.

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on January 14, 2010 at 11:00 A.M., with all briefs to be submitted by July 21, 2010, which date began the six-month period for the issuance of this determination. By a letter dated January 14, 2011, this six-month period was extended for an additional three-months (Tax Law § 2010[3]). Petitioner appeared by S. Buxbaum & Co. (Michael Buxbaum, CPA). The Division of Taxation appeared by Daniel Smirlock, Esq. (Michael Hall).

ISSUE

Whether petitioner has shown reasonable cause for the abatement of penalties.

¹ The petition was filed under the name Canario Express Corporation. The documents in the record indicate that petitioner also used the name Canaro Express Communications & Travel Agency Corp. Since the petition was filed under the name Canario Express Corporation, this name, or Canario, will be used in the determination.

FINDINGS OF FACT

1. On September 6, 2006, the Division of Taxation (Division) conducted a survey of Canario Express Corp. (Canario). Canario provided tax and notary services and operated a small store that sold general merchandise in North Tarrytown, New York. The firm also prepared certain documents for a fee. Items sold by the store included money orders, compact disks, cassettes, phone cards, clothing, sports related items, spices, herbs, newspapers, magazines and candy. During the audit period, Canario was not a registered vendor and did not file sales tax returns. Pedro A. Urgiles was the president of the corporation and owned 100 percent of the outstanding stock. During the audit period, Mr. Urgiles was also involved in a separate landscaping business.

2. On September 6, 2006, the Division of Taxation (Division) delivered an appointment letter to Canario stating that its sales and use tax records had been scheduled for a field audit for the period June 1, 2000 through May 31, 2006. The letter stated that “[a]ll books and records pertaining to the sales and use tax liability, for the audit period, must be available on the appointment date.” A schedule of books and records to be produced was attached to the letter.

3. In response to this request, petitioner provided a day book for 2005, bank statements for a portion of the audit period and federal tax returns for 2000 through 2004. The federal returns were prepared by Mr. Urgiles on the basis of a fiscal year ending January 31. The day book listed only gross sales and did not list or differentiate between taxable and nontaxable sales. Mr. Urgiles did not provide cash register tapes or guest checks.

4. The auditor could not determine from the records provided how much sales tax was paid and how much was due.

5. Since source documents were unavailable, the auditor utilized the gross sales reported on the federal returns to determine taxable sales. Petitioner did not offer the federal returns for 2005 and 2006. Therefore, the gross sales for these years were estimated on the basis of the gross sales reported on the federal returns that were filed prior to 2005. In order to determine audited taxable sales, receipts attributed to wire transfers were subtracted from petitioner's reported sales. On the basis of the foregoing, the Division found audited taxable sales of \$1,096,825.00. By applying the applicable tax rates to the audited taxable sales, it found that additional tax was due in the amount of \$77,077.83. On September 17, 2007, the Division issued a Notice of Determination to petitioner, which assessed sales and use tax in the amount of \$77,077.83, plus interest in the amount of \$62,085.57 and penalty in the amount of \$22,826.57, for a balance due of \$161,989.97. Statutory penalty was assessed pursuant to Tax Law § 1145(a)(1) because the taxpayer did not register as a vendor or file sales tax returns during the audit period.

6. The audit was commenced less than one year after the auditor began his employment with the Division as an auditor. The auditor was supervised during the course of the audit.

7. During the audit, Mr. Urgiles insisted that he did not have to collect tax for phone card sales because it would be unfair to require him to collect the tax while his competitors sold similar items but without collecting sales tax.

8. After the audit was completed, petitioner filed sales tax returns for the audit period.

9. Petitioner filed a request for a conciliation conference, and in an order dated November 21, 2008, the amount of tax assessed was reduced to \$58,910.90 plus penalty and interest. The adjustment was made to reflect the tax paid with the sales tax returns that were filed after the audit and to take into account the sale of nontaxable items such as newspapers.

10. Mr. Urgiles was born in Ecuador and came to the United States in 1981. He attended Mercy College in Dobbs Ferry, New York, where he earned a four-year degree in accounting.

11. Mr. Urgiles's primary language is Spanish. He did not speak Spanish to the auditor because the auditor explained that he did not speak Spanish. It was the auditor's understanding that Mr. Urgiles's comprehension of English was sufficient for the conduct of the audit.

According to the auditor, had he thought that Mr. Urgiles did not understand him, he would have requested the assistance of a Spanish-speaking auditor to communicate with the taxpayer.

12. This was the first sales tax audit in which petitioner was involved.

13. In a letter dated March 11, 2008, the Division advised petitioner, in pertinent part, as follows:

Our records indicate you are eligible to file an annual sales tax return. Therefore, the Tax Department has *changed your filing status from quarterly to annual*. Your first annual return will cover the period from March 1, 2008 through February 28, 2009. We will mail your first annual sales tax return to you at the end of February 2009. . . . Because *your new status does not take effect until March 1, 2008*, you are still responsible to file your quarterly return for the period December 1, 2007, through February 29, 2008 (due March 20, 2008).

* * *

If you owe \$3,000 or less in sales and compensating use tax per year, you can be an annual sales tax filer. As long as you do not owe more than \$3,000 tax in an annual filing period, you can remain an annual sales tax filer. Once you exceed \$3,000 tax due in an annual filing period, you must file quarterly returns, beginning with the period you exceeded the \$3,000 limit. (Emphasis added.)

SUMMARY OF PETITIONER'S POSITION

14. At the hearing, petitioner maintained that he filed to be a registered vendor and received a certificate of authority in 1997. He stated that his certificate of authority was removed by someone who was employed by the State of New York who was engaged in regulating alcohol

and tobacco. Mr. Urgiles also stated that the individual who removed his certificate of authority never returned it.

15. Mr. Urgiles submits that he maintained every purchase invoice, sales journal and cash register tape but that the records were destroyed in a flood. However, some records were not damaged because they were maintained in a different location. According to Mr. Urgiles, most of his income was derived from preparing income tax returns and from services such as filing papers. He maintains that the store did not sell phone cards until 2005 and that prior to this date, the business consisted of selling nontaxable items, such as newspapers, magazines and postage stamps.

16. Mr. Urgiles stated that he believed that Canario was an annual sales tax filer and that he was notified that he was an annual filer in a letter dated March 11, 2008. He notes that this letter stated that his tax liability was less than \$3,000.00 a year. According to Mr. Urgiles, he was told by vendors that sold prepaid phone cards that sales tax was included in the price. Mr. Urgiles submits that he relied on these representations.

17. After the hearing, petitioner's representative submitted a letter brief stating that petitioner reasonably relied upon the letter from the Division, dated March 11, 2008, and that, by virtue of the doctrine of estoppel, the penalty should be abated.

CONCLUSIONS OF LAW

A. Petitioner has only challenged the assessment of penalty. Initially, it is noted that there is no basis for believing that a language barrier had any impact on the assessment. The record shows that petitioner had achieved a sufficient proficiency in English to complete a four-year college degree program in accounting. Clearly, language was not a barrier to Mr. Urgiles's satisfying Canario's sales tax obligations.

B. Petitioner's claim that it was registered as a vendor but that its certificate of registration was removed by agents of the State of New York strains credulity. In this regard, it is noted that petitioner did not offer any documentary evidence to support its argument that it filed for a certificate of registration. Further, this claim is inconsistent with the Division's records, which do not indicate that petitioner was a registered vendor.

C. Petitioner's argument that before 2005 most of his sales were of nontaxable items is rejected. This position is contrary to Tax Law § 1132(c)(1), which creates a presumption that all receipts are subject to tax unless the contrary is established. Petitioner has not presented any evidence to overcome this presumption. Acceptance of this argument would also be inconsistent with the provisions of Tax Law § 1135(a), which require a taxpayer to maintain and make available for audit such records as are sufficient to verify the amount of tax due. In this regard, it is noted that petitioner's claim that he had sufficient records but that they were destroyed by a flood is questionable. The book of daily sales that was presented to the auditor for 2005 did not reveal what items were sold and, as a result, it was impossible for the Division to determine the amount of tax due on the basis of this record. In view of the difficulties with the record of sales for 2005, there is no reason for believing that any of the records for the prior years would have complied with the requirements of the Tax Law.

D. In establishing reasonable cause for the abatement of penalty, the taxpayer faces an onerous task (*Matter of Philip Morris, Inc.*, Tax Appeals Tribunal, April 29, 1993). In *Philip Morris* it was 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 the 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, petitioner failed to register as a vendor, failed to file sales tax returns when due and failed to make adequate books and records available for audit. Under these circumstances, the waiver of penalties would not be justified.

E. Mr. Urgiles argues that he relied upon the March 11, 2008 letter from the Division notifying him that Canario was an annual filer. He maintains that the notice and the results of the audit present opposite information and that the doctrine of estoppel should form a basis for the abatement of penalty.

The Tax Appeals Tribunal has utilized a three-part test in order to determine whether to invoke an estoppel. The test asks if there was a right to rely on the representation, whether there was such reliance and whether the reliance was to the detriment of the party who relied upon the representation (*see Matter of Consolidated Rail Corp.*, Tax Appeals Tribunal, August 24, 1991, *confirmed* 231 AD2d 140, 660 NYS2d 459 [1997], *appeal dismissed* 91 NY2d 848, 667 NYS2d 683 [1997]).

In this case, petitioner has not shown that the Division made any representation that petitioner should have relied upon. First, the letter sent by the Division was dated March 11, 2008, which is well after the audit period. It is a non sequitur that a letter sent well after the audit period influenced petitioner's thinking or conduct during the audit period. Second, the letter states that it was changing petitioner's filing status from quarterly to annual. It follows that the Division considered petitioner a quarterly filer prior to this letter. Lastly, it is obvious that the letter does not lend any support for the proposition that petitioner's sales were less than \$3,000.00 during the audit period. As argued by the Division, this letter was based on the returns that were filed after the audit was completed.

F. The petition of Canario Express Corporation is denied, and the Notice of Determination dated September 17, 2007 is sustained together with such penalties and interest as are lawfully due.

DATED: Troy, New York
February 24, 2011

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE