

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
IBRAHIM BASIR : DETERMINATION
for Revision of a Determination or for Refund of Sales : DTA NO. 822667
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Period June 1, 2004 through November 30, 2005. :

Petitioner, Ibrahim Basir, 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 November 30, 2005.

A hearing was held before Timothy Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on September 29, 2009 at 10:30 A.M., with all briefs to be submitted by March 8, 2010, 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. (Osborne K. Jack, Esq., of counsel).

ISSUES

I. 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.

II. Whether petitioner was a person responsible for the collection and payment of sales and use taxes on behalf of La Naj Home Furnishings, Inc., within the meaning and intent of Tax Law §§ 1131(1) and 1133(a).

FINDINGS OF FACT

1. Petitioner, Ibrahim Basir, was, at all times relevant herein, president and sole shareholder of La Naj Home Furnishings, Inc. (La Naj), a retail furniture business.¹ Petitioner owned and operated the business for over 21 years.
2. By letter dated January 27, 2008, the Division of Taxation (Division) scheduled an appointment with La Naj to commence a sales and use tax field audit for the period March 1, 2003 through November 30, 2005. The Division's letter requested that all of La Naj's books and records pertaining to its sales and use tax liability for the audit period be available for review. The letter specifically requested, among other records, the general ledger, sales invoices, bank statements, federal income tax returns, and purchase invoices.
3. In response to the Division's written request for records, petitioner, on behalf of La Naj, produced sales invoices, federal income tax returns, an incomplete set of bank statements, some expense invoices and a computer-generated document entitled "Transactions by Account," which listed in detail expenses and purchases under various categories for 2004. The sales invoices that were provided were in boxes organized only by year. Petitioner did not provide any general ledger, sales journal or any other summary of sales.
4. The Division concluded that the records produced by La Naj in response to its request were inadequate for the purpose of verifying its tax liability with respect to both sales and purchases. With respect to sales, the Division found that the lack of a general ledger or any other

¹ Lanaj filed sales tax returns as La Naj Home Furnishings, Inc., and is referred to by that name in the Division's audit report and in the Notice of Determination and Statement of Proposed Audit Changes referenced herein. Federal and New York S corporation returns for the years 2003 and 2004, however, report the corporation's name as Central Convertibles, Inc. d/b/a Lanaj Furniture. In any event, the legal name of the subject corporation is not at issue, and even if it were, any such error under the instant circumstances is properly deemed inconsequential (*see Matter of PepsiCo, Inc. v. Bouchard* 102 AD2d 1000, 477 NYS2d 892 [1984]).

books of original entry precluded the Division from tracing specific transactions back to their original source and also precluded the Division from determining whether a complete set of sales invoices had been provided. The Division deemed the purchase records provided by La Naj incomplete because no invoices were provided with respect to many of the purchases listed on the "Transactions by Account."

5. Having concluded that La Naj failed to maintain or provide adequate books and records of its sales the Division proceeded to estimate La Naj's sales tax liability for the audit period by first reviewing in detail and totaling La Naj's sales as indicated by the approximately 630 sales invoices dated within the test period of March 1, 2004 through May 31, 2004. The total of such invoices was \$1,036,327.52. Next, the Division subtracted \$126,265.63 from this total for undelivered items, returned merchandise, and invoices used for training purposes and thus calculated audited gross sales for the test quarter of \$910,061.89. This subtracted amount was based on a review of the invoices themselves and discussions with petitioner and his representative, but there is no indication in the record as to which specific invoices were included in this amount.

6. La Naj reported gross sales of \$513,608.00 on its sales tax return for the quarter ended May 31, 2004. The Division calculated an error rate by dividing the difference between audited gross sales and reported gross sales for the test quarter by reported gross sales for the test quarter. The Division then multiplied the error rate by reported gross sales for all quarters of the audit period and thereby determined additional gross sales. Next, the Division added additional gross sales to reported gross sales to reach audited gross sales for each of the sales tax quarters of the audit period. A taxable ratio of 84.49 percent for the audit period was determined by calculating the ratio of taxable sales to gross sales as indicated by the sales invoices for the test period. The

Division applied this taxable ratio to audited gross sales, resulting in audited taxable sales, which, after subtracting reported taxable sales, resulted in additional taxable sales. Next, since La Naj made sales in multiple jurisdictions, the Division determined an average sales tax rate by dividing sales tax paid according to La Naj's sales tax return for the quarter ended May 31, 2004 by taxable sales as indicated by the test period invoices. The Division then applied this average tax rate to additional taxable sales for each of the sales tax quarters of the audit period to reach additional sales tax due. As calculated in this manner, the Division asserted \$636,686.89 in additional tax due on sales from La Naj for the period March 1, 2003 through November 30, 2005.

7. With respect to purchases, the Division reviewed in detail La Naj's purchases for 2004 as indicated by the "Transactions by Account" and the expense invoices for 2004 provided on audit. Following such review the Division assessed additional tax on purchases where no invoice was provided or where the improper amount of tax was paid. In total, the Division found \$4,439.73 in additional tax due on expense purchases for the 2004 tax year. The Division then developed an error rate using as a base the total of expenses as indicated by La Naj's 2004 federal return (Form 1120) in those categories in which errors were found on audit. Application of the error rate to base amounts in the selected expense categories for the entire audit period resulted in additional tax due of \$10,984.42 on La Naj's purchases for the audit period.

8. The Division subsequently issued to La Naj a Statement of Proposed Audit Change for Sales and Use Tax dated August 30, 2007, which asserted additional tax due on sales and expenses as noted above and thereby asserted a total of \$647,671.31 in tax due, plus interest, for the period March 1, 2003 through November 30, 2005.

9. On August 31, 2007, petitioner, on behalf of La Naj, executed a consent to the assessment of tax as indicated by the Statement of Proposed Audit Change.

10. On September 27, 2007 the Division issued to petitioner, Ibrahim Basir, a Notice of Determination, which assessed tax due of \$416,996.49, plus interest, for the period June 1, 2004 through November 30, 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 La Naj and therefore personally liable for La Naj's sales and use taxes liability.

11. La Naj had stores in Yonkers, New York (two stores), Rockland, New York, and Paramus, New Jersey, during the period at issue. Customer purchases were frequently ordered from suppliers because La Naj did not stock much inventory and also because La Naj did a lot of custom orders. As a result, the delivery date for merchandise was often several months after the order or invoice date.

12. La Naj's corporate income tax returns indicate that petitioner received compensation from La Naj in the amount of \$102,000.00 in 2003 and \$106,000.00 in 2004.

13. Petitioner did not prepare La Naj's sales tax returns, but he did sign sales tax returns and he did pay sales tax for La Naj.

14. At hearing petitioner offered in evidence a sample of sales invoices more specifically described as follows:

² The September 27, 2007 notice is premised on the audit described herein, but encompasses fewer sales tax periods and is therefore less than the La Naj assessment. As indicated by the Division in its brief, sales tax periods were eliminated from the responsible officer assessment because the date of the statutory notice was beyond the three-year limitations period. It is noted that the audit file contains consents extending the limitations period for assessment with respect to La Naj, but not petitioner.

- a) 23 sales invoices dated within the test period and which indicate a delivery date subsequent to the test period.
- b) Five invoices that showed small or zero deposits. In contrast to the invoices showing a delivery date outside the test period noted above, these five invoices do not contain a signature of the customer indicating receipt.
- c) A few invoices indicating orders which were rewritten and orders with multiple delivery dates outside the test period.
- d) Three invoices that showed merchandise that was returned in whole or part.
- e) One invoice that indicated sales tax paid, but for which the audit workpapers indicate no tax paid and tax due. The audit workpapers did include the amount charged for merchandise on this invoice within taxable sales in the audit calculations.

15. Workpapers from the Division's audit file, which were entered in evidence, indicate that La Naj's sales tax return for the period ended August 31, 2004 was filed on September 22, 2004.

CONCLUSIONS OF LAW

A. Tax Law § 1138(a)(1) provides, in relevant part, that if a sales tax 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].)

B. The Division may estimate tax liability pursuant to Tax Law § 1138(a)(1) only where a taxpayer's records are inadequate. 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]). 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. Sufficiency of records “means the ability to verify taxable sales receipts and conduct a complete audit” (*Matter of Giordano v State Tax Commn.*, 145 AD2d 726, 535 NYS2d 255, 256 [1988]).

C. Here, by its letter dated January 27, 2008 the Division clearly and unequivocally requested La Naj’s records pertaining to its sales and use tax liability for the entire audit period.

D. With respect to sales, the records provided were inadequate for the purpose of conducting an audit to determine the accuracy of La Naj’s sales tax returns as filed (*see Matter of Family Deli of Bellmore, Inc.*, Tax Appeals Tribunal, April 3, 1997). Specifically, the lack of any general ledger or sales journal as well as incomplete bank statements demonstrates a lack of internal control over the invoices and precludes the possibility of verifying the accuracy or completeness of the sales invoices that were made available. Furthermore, no documentation was provided to enable the Division to trace the invoices to the sales tax returns. Accordingly, the records provided were insufficient for the Division to readily and independently verify the basis or accuracy of sales receipts as reported on La Naj’s sales tax returns. Under such circumstances, the Division was authorized to use an estimated audit method, so long as such method was reasonably calculated to reflect the taxes due (*see e.g. Matter of ADGN, Inc.*, Tax Appeals Tribunal, February 2, 1997). The test period is well established as an acceptable audit method (*see e.g. Matter of Continental Arms Corp. v. State Tax Commn.*, 72 NY2d 976, 534 NYS2d 362 [1988]).

E. Where, as in the instant matter, resort to a test period audit is appropriate, the burden of proof lies with the taxpayer 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). It is well established that where, as here, an estimated audit method is authorized, 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).

F. Petitioner contends that the audit is flawed because the Division used the invoice date as the date of sale within the test period and therefore included sales that were delivered to customers after the test period (*see* Finding of Fact 11). According to petitioner this was an error because La Naj computed its sales tax returns based on delivered sales. Hence the Division's use of the invoice date included many sales that were not included in La Naj's sales tax return for the test period. This contention is rejected. First, petitioner has not established the manner or method by which La Naj calculated its gross and taxable sales on its sales tax returns. While petitioner testified that La Naj used delivery dates, he offered no documentation on this point. Furthermore, as he testified, petitioner was not involved in the preparation of sales tax returns. His testimony on the preparation of sales tax returns thus lacks credibility and is properly rejected. Moreover, even if petitioner established that La Naj used delivery dates in preparing its sales tax returns as he claims, such a fact would not render the audit unreasonably inaccurate. A computation of sales based on delivery dates would necessarily include sales invoices dated before the test period but delivered during the test period. The inclusion of such sales would offset the exclusion of sales invoices dated within the test period but delivered after. This offset negates any claim that the audit was unreasonably inaccurate.

G. Petitioner also contends that the audit was in error to the extent that it included non-sales and returned items. The audit did, however, account for such non-sales and returns (*see* Finding of Fact 5). While it is unfortunate that the record does not reflect which invoices were included in the \$126,265.63 adjustment for undelivered items, returned merchandise, and invoices used for training purposes, petitioner has not shown by the invoices submitted that any further adjustment is warranted.

H. As to the invoice showing tax paid but for which the audit workpapers indicate no tax paid and tax due, given the inclusion of this invoice as a taxable sale and given the Division's method of calculating tax due in this matter, this error made no difference in the audit calculations.

I. With respect to the audit of La Naj's purchases, the record is clear that the purchase invoices provided were incomplete (*see* Finding of Fact 4) and that therefore the use of an estimated audit with respect to purchases was proper. Further, the use of La Naj's purchases for 2004 as indicated by the "Transactions by Account" and La Naj's 2004 federal income tax return as the basis of the audit was reasonable (*see* Finding of Fact 7). Petitioner did not contest the Division's use of an estimated methodology with respect to purchases and offered no evidence to contest the reasonableness of the audit method or result with respect to purchases.

J. Turning to the responsible officer issue, Tax Law § 1133(a) imposes personal liability for taxes required to be collected under Articles 28 and 29 of the Tax Law upon a person required to collect such tax. A person required to collect such tax includes "any officer, director, or employee of a corporation . . . who as such officer, director [or] employee . . . is under a duty to act for such corporation . . . in complying with any requirement of [Article 28] . . ." (Tax Law § 1131[1]).

K. Whether an individual is under a duty to act for a corporation with regard to its tax collection responsibilities such that the individual would have personal liability for the taxes not collected or paid depends on the particular facts of the case (*see Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022, 513 NYS2d 564 [1987]). The ultimate question to be resolved in any responsible officer 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 (*Matter of Constantino*, Tax Appeals Tribunal, September 27, 1990).

L. In the present matter, petitioner was president and sole shareholder of La Naj (*see* Finding of Fact 1). He derived substantial income from La Naj (*see* Finding of Fact 12). He signed sales tax returns and paid sales tax on behalf of La Naj (*see* Finding of Fact 13). He also executed a consent fixing La Naj's sales tax liability at the conclusion of the audit at issue (*see* Finding of Fact 9). These facts establish that petitioner was a responsible officer of La Naj pursuant to Tax Law § 1131[1]) and therefore personally liable for tax assessed against La Naj pursuant to Tax Law § 1133(a), notwithstanding his claim at hearing that managers hired and fired employees and his claim made on brief that such managers ran day-to-day operations (*see Matter of Martin v. Commissioner of Taxation & Fin.*, 162 AD2d 890, 558 NYS2d 239 [1990]; *Matter of Vogel v. New York State Dept. of Taxation & Fin.*, 98 Misc 2d 222, 413 NYS2d 862 [1979]).

M. Finally, it is noted that the Division eliminated several sales tax periods of the La Naj audit from the assessment against petitioner because of the three-year limitations on assessment under Tax Law § 1147(b) (*see* Finding of Fact 10, footnote 2). The Division did not, however, eliminate the assessment of tax against petitioner for the quarter ended August 31, 2004. The record shows that the assessment for this period was made beyond the three-year limitations

period. Specifically, the Division's records show that La Naj's return for this period was filed on September 22, 2004, while the statutory notice was issued more than three years later, on September 27, 2007 (*see* Findings of Fact 10 and 15). The record further indicates that the Division did not obtain any consents extending the limitations period for petitioner (*see* Finding of Fact 10, footnote 2). Accordingly, consistent with the Division's action in eliminating periods because of the statute of limitations, the assessment in respect of the quarter ended August 31, 2004 is also properly cancelled.

N. The petition of Ibrahim Basir is granted to the extent indicated in Conclusion of Law M, but is in all other respects denied. The Division of Taxation is directed to modify the Notice of Determination dated September 27, 2007 accordingly, and as so modified the notice is sustained.

DATED: Troy, New York
August 19, 2010

/s/ Timothy Alston
ADMINISTRATIVE LAW JUDGE