

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
4 U CONVENIENCE, INC.	:	DECISION
AND AHMED ESSANI	:	DTA NOS. 824971
	:	AND 824972
for Revision of Determinations or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax	:	
Law for the Period December 1, 2006 through	:	
August 31, 2009.	:	

Petitioners, 4 U Convenience, Inc. and Ahmed Essani, filed an exception to the determination of the Administrative Law Judge issued on April 10, 2014. Petitioners appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (David Gannon, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a letter brief in opposition. Petitioners filed a letter brief in reply. Oral argument was heard in New York, New York on August 13, 2015, which date began the six-month period for the issuance of this decision.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the Division of Taxation properly disallowed a portion of the prepaid sales tax credits claimed by 4 U Convenience, Inc., for the period December 1, 2006 through August 31, 2009.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts appear below.

1. Petitioner, 4 U Convenience, Inc., operated a convenience store selling taxable and non-taxable items, including cigarettes. Petitioner, Ahmed Essani, was the president of the corporation.

2. An audit appointment letter, dated October 19, 2009, was mailed by the Division of Taxation (Division) to the corporation to review the corporation's sales and use tax records for the period December 1, 2006 through August 31, 2009. The appointment was scheduled for November 11, 2009 and the letter 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; all exemption documentation to support nontaxable sales; chart of accounts; fixed asset purchase and sales invoices for the audit period; expense purchases; merchandise purchases; bank statements, canceled checks and deposit slips for all bank accounts maintained by the corporation; cash receipts journal; cash disbursement journal; the corporate book; depreciation schedules for the audit period; State Liquor Authority license in effect for the audit period; utility bills; guest checks; and cash register tapes for the audit period.

3. The corporation failed to provide to the auditor detailed cash register tapes, a day book, bank statements, federal income tax returns and any record of check disbursements. Although some invoices of cigarette purchases were provided, they were insufficient to substantiate the prepaid sales tax credits claimed. As a result, the auditor concluded that the

records maintained were inadequate to accurately determine the corporation's sales and tax liability for the audit period.

4. In order to verify the amount of prepaid sales tax claimed by the corporation on its purchases of cigarettes, the auditor wrote the corporation's suppliers to obtain the amounts of cigarettes sold to the corporation. Using the corporation's cigarette purchase invoices and the information obtained from the third-party suppliers, the auditor determined total audited cigarette purchases (cartons). Total cartons purchased was multiplied by the appropriate tax rate to arrive at audited prepaid sales tax on cigarette purchases. This amount was subtracted from the prepaid sales tax claimed on the corporation's tax returns for the audit period to determine the amount of disallowed prepaid sales tax claimed. The corporation had claimed \$30,963.00 in prepaid sales tax credits for the audit period, but at the time of the audit, only \$21,689.62 could be substantiated as having been actually paid to the third-party vendors. As a result, \$9,273.38 was initially disallowed and determined to be due.

5. In preparation for the hearing, the Division's witness noticed some mathematical errors in the workpapers and made adjustments and corrections that resulted in lowering the tax due. The witness's computations were done in detail and resulted in a greater allowance of prepaid sales tax paid to Coremark Midcontinent, Inc., one of the corporation's cigarette suppliers. Originally, the amount paid to Coremark was computed to be \$15,494.32. However, after reviewing the original workpapers, it was determined that prepaid sales tax to Coremark should be increased to \$16,148.22, resulting in a decrease to \$8,619.48 of the amount of sales tax due. Statutory penalty was imposed due to the corporation's inadequate records and underreporting and underpayment of tax due.

6. Petitioners did not produce any source documentation, such as cigarette purchase invoices, that would establish or support the amount of prepaid sales tax on cigarette purchases claimed on the corporation's sales tax returns.

7. On February 15, 2011, as a result of the field audit performed, the Division issued to petitioner 4 U Convenience, Inc., a notice of determination (assessment number L-035416436), asserting additional sales tax due of \$25,573.45, plus penalty and interest, for the period December 1, 2006 through August 31, 2009. On February 16, 2011, the Division issued to petitioner Ahmed Essani, as a responsible officer of 4 U Convenience, Inc., a notice of determination (assessment number L-035420249), asserting additional sales tax due of \$25,573.45, plus penalty and interest, for the period December 1, 2006 through August 31, 2009.

At the hearing, the Division conceded that the amounts assessed in the notices of determination are each to be reduced to \$8,619.48.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge found that the Division made a proper records request and reasonably concluded that the required books and records were unavailable. The Administrative Law Judge determined that, accordingly, the Division was entitled to estimate the sales tax due, which included an attempt to verify the amount of prepaid sales tax claimed by petitioners by contacting the corporate petitioners' cigarette suppliers. The documentation, received from the corporate petitioner and its suppliers, substantiated only a portion of such claimed prepaid sales tax. However, the supervising auditor who testified recomputed the allowance of prepaid sales tax, reducing the assessment to \$8,619.48. The Administrative Law Judge found that petitioners were not entitled to any additional adjustments absent clear and convincing records of such tax payments on purchases (*Matter of 88-02 Deli Grocery Corp.*, Tax Appeals Tribunal, September

13, 2012). The Administrative Law Judge also concluded that petitioners failed to establish grounds for modifying the penalties imposed in the statutory notices.

ARGUMENTS ON EXCEPTION

Petitioners contend that they should have been allowed a larger credit for the store's prepaid cigarette tax. They contend that the documents provided to the original auditor would have substantiated the store's claim for a larger credit. Additionally, petitioners argue that they were prejudiced because the Division did not produce either the original auditor at the hearing or the documents petitioners originally provided. In connection with these complaints, petitioners assert that they have made FOIL requests to the Division and that the Division has not complied with such requests. Accordingly, they request that the determination of the Administrative Law Judge and the notices be modified so that they receive a larger credit for the store's prepaid cigarette tax.

The Division argues that the Administrative Law Judge properly resolved this matter. Responding to petitioners' arguments, the Division contends that the auditor who testified at the hearing reviewed the audit record, discovered arithmetical errors, and made the proper adjustments, thereby reducing the assessment. The Division also notes that the Administrative Law Judge left the record open after the hearing for petitioners to produce additional invoices, but they did not do so. As such, the Division argues that the Administrative Law Judge properly resolved this case and that the determination should be affirmed in all respects.

OPINION

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 § 1135 (a) (1) provides that “[e]very person required to collect tax shall keep records of every sale . . . and of all amounts paid, charged or due thereon and of the tax payable thereon, in such form as the commissioner of taxation and finance may by regulation require.” Every person selling or possessing large quantities of cigarettes is required to keep records for such periods. Such records shall show the number of cigarettes purchased, the price paid therefor, the person from whom such cigarettes were purchased and the amount of tax paid pursuant to Tax Law § 1103 (Tax Law § 1135 [e]). Tax Law § 1103 requires the prepayment of sales tax on cigarettes.

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

In this case, the record establishes the Division’s clear and unequivocal written request for books and records of the corporation’s purchases, as well as the corporation’s failure to produce such books and records. The record further shows that the corporation failed to provide a complete set of cigarette purchase invoices or other source documentation to substantiate the amount of prepaid sales tax claimed on its sales tax returns for the period at issue. The Division thus reasonably concluded that the corporation did not maintain or have available books and

records that were sufficient to verify the amount of prepaid sales tax claimed for the audit period, including any cigarette purchase invoices.

Having established the unavailability of required books and records, the Division was clearly entitled to attempt to verify the amount of prepaid sales tax claimed by contacting the corporation's cigarette suppliers. The documentation received from the suppliers, in addition to that provided by the corporation, established only a portion of such claimed amount. Petitioners were assessed the amount of prepaid sales tax claimed but not substantiated.

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 purchases as required by Tax Law § 1135 (e) must be borne by that taxpayer (*see e.g. Matter of 88-02 Deli Grocery Corp.*). Specifically, petitioners submit that the amount of prepaid sales tax claimed is correct, and that cigarette purchase invoices had been provided to the auditor. However, petitioners failed to produce any source documentation, such as those purchase invoices, either on audit, at the hearing or following the hearing, that would establish the actual amount of cigarette purchases during the audit period.

Given the absence of any records, petitioners' arguments must fail because they provided no grounds for modifying the audit results. As there are simply no clear and convincing records of purchases, petitioners are not entitled to an additional adjustment (*Matter of 88-02 Deli Grocery Corp.*). Therefore, it must be concluded that the notices of determination were properly sustained because petitioners failed to prove that the audit was unreasonably inaccurate or clearly erroneous (*see Matter of Cook v Tax Appeals Trib. of State of New York*, 222 AD2d 962 [1995]).

In establishing reasonable cause for the abatement of penalty, the taxpayer faces an onerous task:

“[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 tax according to a particular timetable be treated as a largely unavoidable obligation [citations omitted]” (*Matter of MCI Telecom. Corp.*, Tax Appeals Tribunal, January 16, 1992, *confirmed* 193 AD2d 978 [1993]).

Herein, we agree with the Administrative Law Judge’s conclusion that petitioners failed to produce any grounds for the abatement or modification of the imposed penalties.

Regarding petitioners’ protest that the original auditor was not present at the hearing, it is well established that, absent the issuance of a subpoena (and none was issued here), the Division is not obligated to have the original auditor present at the hearing (*see Matter of Anray Service*, Tax Appeals Tribunal, December 1, 1988). Furthermore, it is noted that the Division did provide a witness at the hearing to explain the audit. As to petitioners’ complaint regarding the asserted failure of the Division to comply with their FOIL requests, petitioners’ remedy lies elsewhere (*see* Public Officers Law § 89; 20 NYCRR 2370.8; *Matter of Markowitz*, Tax Appeals Tribunal, February 27, 1997). Finally, the implication that petitioners would have us draw from these two arguments is that additional evidence exists that might support their position. However, petitioners admit that they did not retain copies of the documents that they allege to have previously provided to the Division and the Division denies that it has in its possession any evidence other than that which it has already made available to petitioners (Transcript of Oral Argument, pp 8 and 9, 12-14). Under these circumstances, petitioners have failed to meet their burden of proof in this matter (*Matter of Mira Oil Co. v Chu*, 114 AD2d 619 [1985], *lv denied* 68 NY2d 602 [1986]).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of 4 U Convenience, Inc. and Ahmed Essani is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of 4 U Convenience, Inc. and Ahmed Essani is denied; and
4. The notices of determination, dated February 15, 2011 and February 16, 2011,

respectively, modified as indicated in finding of fact 7, are sustained.

DATED: Albany, New York
February 12, 2016

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner

/s/ James H. Tully, Jr
James H. Tully, Jr.
Commissioner