STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ZOHIR LAHAM	:	
for Revision of Determinations or Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 2004 through February 28, 2007.	:	DECISION DTA NO. 825802

Petitioner, Zohir Laham,[1] filed an exception to the determination of the Administrative Law Judge issued on December 3, 2015. Petitioner appeared pro se and by his wife Vitalina Kostiuk. The Division of Taxation appeared by Amanda Hiller, Esq. (Robert Maslyn, Esq., of counsel).

Petitioner did not file a brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a letter brief in reply. Oral argument was not requested. The six-month period for issuance of this decision began on April 27, 2016, the date that petitioner's letter brief in reply was received.

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

ISSUE

Whether the Division of Taxation properly denied petitioner's application for refund or credit of sales and use taxes, penalties and interest.

[1] Although the Bureau of Conciliation Mediation Services issued its order in this matter under the case name "V & Z Deli, Inc.," the application for refund was made in the name of Zohir Laham, individually, and as a responsible person of V & Z Deli, Inc., and the only payment for which a refund was requested was made by Zohir Laham. Therefore, the matter should have been captioned under Mr. Laham's name alone.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

1. V & Z, Deli Inc. (V & Z), was a New York corporation whose principal place of business from June 1, 2004 through February 28, 2007 (audit period) was located at 859 Lexington Avenue, New York, New York, where V & Z operated as a vendor of food and drink. On its federal income tax returns, V & Z described its business as "food store" and "groc/deli," a description in which the auditor concurred. Pictures of the business indicated a typical grocery store with racks of dry goods, coolers for refrigerated drinks and other products and a deli counter.

2. At all times relevant herein, petitioner, Zohir Laham, was a person responsible for the collection and payment of sales and use taxes on behalf of V & Z. [2]

3. The audit began in April 2007 when the Audit Division (Division), Queens District Office, sent V & Z the first of four appointment letters, seeking to set an appointment at which the Division could review all books and records pertaining to V & Z's sales and use tax liability. Among the documents requested for review were sales tax returns, federal income tax returns, a general ledger, sales invoices, fixed asset and expense purchases, bank statements, canceled checks, deposit slips, a cash receipts journal, a cash disbursements journal and any exemption documents.

4. The Division received no response to this request and made three subsequent requests for books and records to be made available on June 29, 2007, August 3, 2007 and October 3,

[2] Since officer liability was not challenged, further references to petitioner and V & Z may be interchanged vis-a-vis the audit.

2007. In addition, the Division requested a consent to extend the period of limitations on assessment because the period of limitations for asserting additional sales and use taxes for the first quarter in the audit period was expiring. Petitioner did not make any records available in response to any of the requests or execute and return the consents.

5. When petitioner failed to return an executed consent to extend the period of limitations on assessment, the Division was forced to estimate the sales and use taxes due for the first quarter of the audit period in order to issue a timely notice of determination.

6. For the first quarter of the audit period, June 1, 2004 through August 31, 2004, the Division employed an estimated audit methodology in the absence of any records provided by petitioner. The Division utilized the 2006 edition of the Almanac of Business and Financial Ratios to estimate gross sales using a rent factor. Petitioner's rent of $116,400.00 was determined from information obtained from petitioner's federal income tax return for the year 2004. The rent factor applicable to food and beverage stores, a category the Division believed was consistent with business activity code 455115 (not the code used by petitioner on its federal returns, which described its business as a food store selling deli and grocery items) was based on the auditor's observation of the business on April 13, 2007. The auditor also made a visit to the business on June 27, 2007 to hand deliver the second request for an audit appointment and production of sales tax books and records.

7. The Division selected a rent factor from the 2006 Almanac of Business and Financial Ratios of 19.6%, representing rent as a percentage of gross sales. The Division used the "zero assets" column to arrive at a gross sales figure it believed was fair to petitioner. When the rent factor was applied to the rent claimed in 2004, it yielded gross sales of $593,878.00. This amount was divided by 4 to determine gross sales for a quarter of $148,469.00.

8. The Division had no records to determine how many of these sales were taxable and based its estimate of a taxable sales ratio of 65% on the auditor's survey of the business on April 13, 2007 and "auditor's experience." The latter basis was said to be the product of "the taxable ratio found on audits of similar type businesses." In the audit report, authored by Ms. Haydee Velez and dated February 2, 2008, she noted the following about her survey: "Based on a survey done the deli is a very busy store selling prepared food, beer, soda, cigarettes, candy, other taxable items, and non taxable food and grocery items." There was no other entry by her concerning the survey in the record, other than a notation in the audit report that a survey had been conducted. Ms. Velez did not testify at the hearing, and her supervisor, Daniel O'Sullivan, who did testify, relied on conversations with Ms. Velez and her statement in the audit report concerning the survey. He never visited the business location but believed that because it sold nontaxable and taxable items, it would not be fair to find all sales taxable. Therefore, they chose to rely on office experience with similar businesses to arrive at a taxable ratio of 65%.

9. When the taxable ratio was applied to the audited quarterly sales (65% x $148,469.00), taxable sales per quarter were determined to be $96,505.00.

10. Since the period of limitation on assessment was expiring for the quarter ended August 31, 2004 and no waiver was forthcoming from petitioner, the Division utilized its estimated audit methodology set forth above to determine taxable sales of $96,505.00. It then subtracted taxable sales reported of $26,622.00 to arrive at additional taxable sales of $69,883.00, which yielded additional sales and use tax due of $6,027.42 for the quarter. Notices of determination were issued to petitioner and V & Z, dated September 4, 2007, which asserted additional tax due of $6,027.42 plus penalty and interest for the quarter ended August 31, 2004.

11. When no further books and records were received, the same estimated audit

methodology was utilized for the remainder of the audit period, September 1, 2004 through February 28, 2007. It yielded total audited gross sales of $1,504,630.00. The only figure that changed in the formula was the actual rent paid, which was increased to $119,330.00 per the 2005 federal income tax return filed for V & Z. After applying the 65% taxable ratio, the Division determined audited taxable sales to be $978,009.00. After crediting petitioner $254,049.00 in reported taxable sales, additional taxable sales were calculated to be $723,960.00 yielding $62,441.59 in additional sales and use taxes due.

12. The Division issued to petitioner and V & Z notices of determination, dated December 6, 2007 and November 30, 2007, respectively, which asserted additional sales and use tax of $62,441.59 plus penalty and interest.

13. Following the issuance of the notices, petitioner and V & Z failed to timely protest the notices and they became fixed and final assessments. The matters were petitioned, but the Tax Appeals Tribunal denied the petitions and found that neither petitioner had filed timely protests (***see Matter of V & Z Deli, Inc.***, Tax Appeals Tribunal, March 18, 2010; ***Matter of Laham***, Tax Appeals Tribunal, July 1, 2010).

14. On or about March 20, 2008, petitioner requested a courtesy conference with the Division to discuss the audit results. The request was granted and a conference was held on April 2, 2008. Mr. Laham met with the auditor and Daniel O'Sullivan, and produced two boxes of loose purchase invoices, cash register tapes, checks, bank statements and daybooks. Mr. Laham told the auditors that the business kept no formal books and records. The register tapes did not itemize sales, making it impossible to discern a taxable ratio or tie the amounts into the daybooks. In sum, the records were not in auditable condition and were deemed inadequate and unreliable. Mr. Laham could not explain to the auditors how tax had been reported on the sales

tax returns filed for V & Z during the audit period. As a result, the audit results were not adjusted following the courtesy conference.

15. Warrants were filed in New York and Kings Counties for the current amounts due on both assessments in March and July 2008. The warrants were satisfied in full in March 2012.

16. On May 9, 2012, petitioner filed a claim for refund, claiming $77,000.00 due as a refund of sales and use taxes for the period March 1, 2004 through February 28, 2007. The stated basis of the claim was "excessive sales tax assessment, unjust penalty, interest. Respectfully request abatement of penalty and other assessments levied from bank account, not included in the warrant levied for $175,000." Petitioner provided no additional information or documentation to substantiate the claim at that time or thereafter.

17. The Division sent petitioner an appointment letter with a request for documentation on May 24, 2012. The appointment took place at petitioner's representative's office on July 5, 2012. Petitioner explained that his refund claim was based on reasonable cause for the abatement of penalty due to his ill health and problems running the business. Following the conference, the Division denied the refund claim by letter, dated August 6, 2012.

18. The lease in effect for the business at 859 Lexington Avenue indicated a yearly rent of $161,448.00 for the year 2004-2005, $130,008.00 for the year 2005-2006, and $140,412.00 for the year 2006-2008. These rent figures were much higher than the amounts claimed on V & Z's federal income tax returns and the amounts used by the Division in its estimated audit methodology. In addition, in the addenda to the lease, there was a clause prohibiting petitioner from creating noxious odors from cooking and noting the provision of ventilation equipment in place for the removal of such odors, thus contemplating cooking by petitioner.

19. V & Z did not have sophisticated cash registers and was only able to record taxable

and nontaxable sales, with no ability to differentiate between items sold. Further, items such as coffee and water were sold with tax included and would never be traceable on the summary tapes (Z tapes) generated by the registers. Some Z tapes were produced at the courtesy conference to show a very rough and incomplete estimate of the taxable ratio, but were not considered reliable by the Division's auditors.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge determined that the Division made several requests for petitioner's books and records and that petitioner failed to provide adequate records in response to such requests. Consequently, the Administrative Law Judge found that the Division was entitled to resort to an indirect audit methodology using external indices; that the particular external index employed here, a rent factor, is specifically provided for in the Tax Law; and that the report and classification code used to determine the specific rent factor employed here was appropriate. The Administrative Law Judge thus sustained the Division's calculation of audited gross sales. The Administrative Law Judge also sustained the taxable sales ratio used by the Division to determine audited taxable sales, which was based on the auditor's experience and the survey performed on April 13, 2007. The Administrative Law Judge rejected petitioner's claim that such taxable sales ratio was overstated because petitioner provided insufficient records to show what the taxable ratio actually was.

The Administrative Law Judge rejected petitioner's request for abatement of penalties, pointing out that petitioner bears the burden of proving that penalties were improperly assessed. In sustaining penalties, the Administrative Law Judge noted that the record established that V & Z never maintained books and records as required by law and that the evidence offered by petitioner to refute the audit results was of little probative value. The Administrative Law Judge

also rejected petitioner's arguments that ill health and poor business acumen justified abatement of penalties.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner's exception states that his protest of the denial of his refund claim and the determination is limited to penalties and interest paid in connection with the satisfaction of the warrants.

Petitioner's first argument for abatement of penalties and interest, however, is an argument that the audit result is in error. Specifically, petitioner contends that the assessments at issue overstate his sales tax liability for the audit period because the 65% taxable sales ratio applied to audited gross sales was excessive. In support of this contention, petitioner asserts that the auditor was in the store only twice and that the lease indicates that the premises were to be used as a retail food market. Additionally, petitioner asserts that a previous audit of his business estimated and applied a taxable sales ratio of 30% and asserts that this estimate should be used instead. Petitioner offered documents with his exception that were not included in the record before the Administrative Law Judge. Such documents purport to show that the previous audit used a 30% taxable ratio.

More directly related to the issue of penalties, petitioner contends that his difficulty with the English language; certain health problems that he experienced; his lack of education and lack of business acumen contributed to his failure to meet his sales tax obligations during the period at issue and that these factors support a finding of reasonable cause for abatement of penalties and interest imposed.

The Division argues that petitioner was concededly a responsible officer of V & Z Deli, Inc.; that the Administrative Law Judge properly determined that, as the corporation failed to

provide adequate books and records as requested on audit, the Division was entitled to perform a reasonable estimated audit; that the rent factor audit method was reasonable; and that petitioner failed to meet his burden to show that the audit method was unreasonable or the results erroneous. The Division asserts that the Administrative Law Judge properly determined that petitioner's allegations concerning ill health and lack of business skills were insufficient to constitute a basis for abatement of penalties.

The Division also argues that the documents offered by petitioner with his exception should not be received in evidence by this Tribunal and therefore should not be considered in our decision herein.

OPINION

We first address petitioner's contention that the taxable sales ratio as determined on audit was excessive and that, consequently, the audit result was in error.[3]

Tax Law § 1132 (c) (1) creates a presumption that all sales of tangible personal property are subject to sales tax until the contrary is established and that the burden of proving otherwise is on the person required to collect the tax or the customer.

With respect to records to be maintained by persons required to collect tax, Tax Law § 1135 (a) (1) provides, in relevant part:

> "Every 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. Such records shall include a copy of each sales slip, invoice, receipt, statement or memorandum upon which [Tax Law § 1132 (a)] requires that the tax be stated separately."

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[3] The taxable sales ratio is the only aspect of the audit to which petitioner objects on exception. Petitioner does not contest the Division's right to estimate the store's sales tax liability and does not contest the Division's use of the rent factor employed to determine audited gross sales. We note our affirmance of the Administrative Law Judge's conclusions on these points for the reasons stated in the determination.

It is well established that 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 (***see e.g. Matter of Ahmed,*** Tax Appeals Tribunal, April 14, 2011).

Pursuant to the foregoing principles, and considering the absence of records provided on audit (***see*** findings of fact 4 and 11); the inadequate records subsequently provided (***see*** findings of fact 14 and 19); and the fact that the taxable sales ratio was based on the auditor's observation of items on display in the store and her experience with similar establishments (***see*** finding of fact 8), we conclude that such estimated taxable sales ratio was reasonable (***see Matter of 751 Bergen Dely, Inc.***, Tax Appeals Tribunal, July 23, 2009 [estimated taxable ratio based on investigator's observation of items on display in a store deemed reasonable]; ***Matter of Your Own Choice, Inc.***, Tax Appeals Tribunal, February 20, 2003 [estimated taxable ratio based on office experience deemed reasonable]). We note our agreement with the Administrative Law Judge's conclusion that petitioner did not provide any specific information concerning sales of taxable and nontaxable items. We note also that the record indicates that the cash register tapes and Z tapes were insufficient to establish a reliable taxable ratio (***see*** findings of fact 14 and 19). Accordingly, although the Division's estimated taxable ratio is obviously imprecise, the lack of evidence of petitioner's actual taxable sales ratio requires that we sustain the audit result.

As noted, petitioner submitted documents with his exception purporting to show that a previous audit by the Division estimated a taxable ratio of 30% on the store's sales. Such documents were not included in the record before the Administrative Law Judge. Our position on the submission of evidence on exception may be summarized as follows:

"'We have held that a fair and efficient hearing process must be defined and final,

> and that the acceptance of evidence after the record is closed is not conducive to that end and does not provide an opportunity for the adversary to question the evidence on the record [citations omitted]' (***Matter of Ippolito***, Tax Appeals Tribunal, August 23, 2012, ***affd sub nom Matter of Ippolito v Commissioner of N.Y. State Dept. of Taxation and Fin.***, 116 AD3d 1176 [2014]). Accordingly, we reaffirm our longstanding policy against considering evidence that was not made part of the record below (***see Matter of Schoonover***, Tax Appeals Tribunal, August 15, 1991)" (***Matter of Shi Ying Tan***, Tax Appeals Tribunal, October 16, 2014).

We thus do not accept into the record herein the documents submitted for the first time with petitioner's exception and have not considered such documents in the rendering of this decision.

Turning now to the issue of penalty and interest abatement, the Division asserted penalties and interest herein pursuant to Tax Law § 1145 (a) (1) (i), (ii) and (vi). Subparagraph (i) requires a penalty for the failure to timely file a return or timely pay sales and use tax. Subparagraph (ii) requires the imposition of interest at a late-payment (or penalty) rate. Subparagraph (vi) requires a penalty for the failure to report and pay an amount in excess of 25% of the amount required to be shown on a return. Such penalties may be abated upon a showing of reasonable cause and an absence of willful neglect (Tax Law § 1145 [a] [1] [iii] and [vi]). Interest exceeding that imposed at the underpayment interest rate set by the Commissioner of Taxation under Tax Law § 1142 (9) may be abated on the same basis (Tax Law § 1145 [a] [1] [iii]). Interest imposed at the underpayment rate pursuant to Tax Law § 1142 (9) generally may not be canceled (***cf.*** Tax Law § 3008).

Petitioner bears the burden of establishing reasonable cause as well as the absence of willful neglect (***Matter of Philip Morris, Inc.***, Tax Appeals Tribunal, April 29, 1993). This is a difficult task because '[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 [citation omitted]" (***Matter of MCI Telecommunications, Corp.***, Tax Appeals Tribunal, January 16, 1992).

We agree with the Administrative Law Judge that petitioner has not established reasonable cause for abatement of penalties and penalty interest in the present matter. Petitioner's clear failure to maintain records as required by Tax Law § 1135 (a) (1) is indicative of willful neglect and thus supports the imposition of penalties (***see Matter of Lima Florists***, Tax Appeals Tribunal, December 15, 1988). Additionally, although the hearing transcript shows that petitioner does, in fact, have difficulty with the English language, petitioner has not shown how such a problem prevented or impeded him from maintaining adequate business records. Similarly, petitioner has not shown how his asserted lack of education or business know-how thwarted him in maintaining records. We note also that petitioner's contentions regarding ill health are unsubstantiated; no proof, such as doctors' statements or medical records, was introduced. The Division's regulations (pertaining to Tax Law § 1145 [a] [1] [vi]) provide that "[i]n determining whether reasonable cause and good faith exist, the most important factor to be considered is the extent of taxpayer's efforts to ascertain the proper tax liability" (20 NYCRR 2392.1 [g] [2]). As his lack of record keeping indicates, petitioner made little effort to determine his proper tax liability during the audit period. Penalties and interest imposed pursuant to Tax Law § 1145 (a) (1) (i), (ii) and (vi) are thus properly sustained.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Zohir Laham is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Zohir Laham is denied; and

4. The denial of petitioner's claim for refund, dated August 6, 2012, is sustained.

DATED: Albany, New York
October 27, 2016

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner