

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
HOTEL DEPOT, INC. : DECISION
for Revision of a Determination or for Refund of Sales : DTA NOS. 827555
and Use Taxes under Articles 28 and 29 of the Tax Law : AND 827556
for the Period June 1, 2005 through February 28, 2011. :

In the Matter of the Petition :
of :
DIPESH PARIKH :
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, 2005 through February 28, 2011. :

Petitioners Hotel Depot, Inc., and Dipesh Parikh filed an exception to the determination of the Administrative Law Judge issued on January 3, 2019. Petitioners appeared by Buxbaum Sales Tax Consulting, LLC (Michael Buxbaum, CPA). The Division of Taxation appeared by Amanda Hiller, Esq. (M. Greg Jones, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a brief in opposition. Petitioners filed a reply brief. Oral argument was heard in Albany, New York, on July 25, 2019, which date began the six-month period for issuance of this decision.

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

ISSUES

- I. Whether a rational basis existed for the issuance of the notices of determination at issue.
- II. Whether, if so, petitioners have sustained their burden to prove the audit methodology used by the Division of Taxation was not reasonably calculated to reflect the tax due.¹

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except for finding of fact 3, which has been modified to more fully reflect the record. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

1. During the period at issue, petitioner Hotel Depot, Inc.,² sold hotel furnishings, such as beds, draperies, and electronics, with installation if necessary. Its headquarters was in South Plainfield, New Jersey. Petitioner filed a form DTF-17, Application to Register for a Certificate of Authority, dated March 30, 2011. The application listed Dipesh Parikh as a "Responsible Person" for the corporation and showed his title as "President."

2. The Division of Taxation (Division) opened a sales and use tax audit of petitioner's business in July 2011 for the period June 1, 2005 through May 31, 2011. The audit was commenced by Jaclyn Bettiol of the Division's Westchester District Office, and was completed by Kwaku Fordjour, who testified at hearing. Ms. Bettiol commenced the audit by mailing an audit appointment letter, dated July 29, 2011, to petitioner, which enclosed a page listing the books and records that needed to be provided for the whole audit period, including sales

¹ As petitioner Dipesh Parikh did not except to the Administrative Law Judge's conclusion that he was a person required to collect sales tax on behalf of petitioner Hotel Depot, Inc., that issue is not discussed further in this decision.

² "Petitioner" as used below shall refer exclusively to petitioner Hotel Depot, Inc. Petitioner Dipesh Parikh will be referred to as "Mr. Parikh."

invoices, the general ledger, and general journal and closing entries. In response, petitioner's representative, Mr. Stewart Buxbaum, phoned the auditor and contended that petitioner did not have nexus with New York State until the company hired a salesman to seek additional sales in the State, and for that reason had filed the form DTF-17.

3. By a letter to Stewart Buxbaum, dated March 6, 2012, the auditor enclosed documentation, with certain information redacted, regarding a 2006 sale by petitioner to a New York hotel and three other such sales in 2009. The letter stated that the documentation showed that petitioner was performing installation and measurement services in New York, and asked petitioner to review that documentation. Attached to the letter was an information document request (IDR) asking petitioner to supply invoices for specified quarters in the audit period and to fill out the Division's "Responsible Person Questionnaire." By a letter to the auditor, dated March 19, 2012, Mr. Buxbaum provided petitioner's unredacted records with regard to those three sales, which included (i) an invoice, dated November 20, 2006, for window treatment items, with a separate charge for installation, along with petitioner's purchase order to the manufacturer that was going to fulfill the order; (ii) an invoice, dated January 16, 2009, also for window treatment items, with installation included on the same invoice line, and a separate line for freight charges; and (iii) a credit memo, dated December 31, 2008, for the third transaction, which had been canceled. Each of the invoices included a "Bill To" box and a "Ship To" box, the latter box listing the name of a hotel and its address in New York City. Toward the bottom of each was the following preprinted language: "All taxes and freight will be paid by the customer or the owner to the appropriate authority." Underneath the "Subtotal" box for the two invoices is a box for "Sales Tax (0.0%)," which shows no sales tax being charged. The audit file contains many more copies of invoices issued by petitioner, which have the same basic

format as the November 20, 2006 and January 16, 2009 invoices described above, including the same language regarding the handling of taxes and freight charges. The completed responsible person questionnaire, dated July 18, 2012, lists Mr. Parikh as the responsible person for the corporation with the title of president.

4. The auditor replied to Mr. Buxbaum's March 19, 2012 letter with a letter, dated April 19, 2012, stating that, upon review of the records from petitioner, the Division had concluded that petitioner did have nexus with New York State prior to its application for a sales tax certificate of authority. The letter enclosed another IDR, which requested, among other things, invoices for certain quarters in the audit period and "[p]ayments made for freight bills and delivery charges for the entire audit period." The IDR has a column on which the auditor can check and date to indicate when the requested item was received by the auditor. The box in that column for the entry seeking the invoices was checked and dated May 30, 2012, but the box for the payments made for freight bills and delivery charges was not checked.

5. After the issuance of further IDRs, the auditor eventually determined that petitioner's sales records were an adequate basis on which to perform an audit. The auditor reviewed petitioner's invoices in detail with the help of the Division's Technology Assist Audit Unit, ultimately concluding that 1,675 of petitioner's invoices during the audit period were taxable. All sales invoices showing a New York address in the "Ship-To" box were initially deemed taxable prior to some being excluded as discussed below.

6. To apply the Division's overlapping audit policy, the auditor analyzed petitioner's transactions and identified those sales for which petitioner's New York customer paid sales tax to the Division on audit and gave petitioner credit for the sales tax paid by the customer. The auditor also treated as nontaxable those sales in which petitioner's customer was a seller in a

bulk sale and the purchaser in the bulk sale paid sales tax to the customer as part of that bulk sale. Finally, the auditor gave petitioner credit for any sales tax it paid on its purchases of hotel room furnishings from its suppliers on the ground that such purchases should have been treated as purchases excluded from tax as sales for resale.

7. As a result of the audit, the Division issued to petitioner notice of determination number L-043675981, dated September 18, 2015, asserting additional sales tax due in the amount of \$2,356,443.87, plus interest, for the audit period, and notice of determination number L-043692953, dated September 21, 2015, to Mr. Parikh, as a person responsible to collect, account for and remit sales and use taxes on behalf of petitioner, asserting tax and interest for the same periods and in the same amounts as the notice issued to petitioner. Both notices indicate, erroneously, that the tax amounts asserted due by the notices were “estimated.”

8. Petitioner and Mr. Parikh filed separate requests for conciliation with the Division’s Bureau of Conciliation and Mediation Services (BCMS), which, after holding a conciliation conference, issued conciliation orders sustaining the respective notices of determination issued to petitioners.

9. In response to the conciliation orders, petitioners filed separate petitions with the Division of Tax Appeals and this consolidated proceeding ensued.

10. At hearing, Mr. Fordjour testified that the Division’s audit was not an estimated audit, as petitioner’s invoices were analyzed in detail, but provided no explanation as to why the notices issued to petitioners indicate that the audit was an estimated one. Consistent with Mr. Fordjour’s testimony, the audit file’s field audit report states that “[s]ales records were reviewed in detail.”

11. On cross examination, Mr. Fordjour testified that, “as far as he knew,” the prior

auditor had not requested any freight records from petitioner. This is incorrect, as IDR number 3, dated April 19, 2012, asked for freight records (*see* finding of fact 4). The audit file's "Tax Field Audit Record" (DO-220.5) states, in an entry dated July 11, 2012, that Ms. Bettiol noted that she discussed with her section head "additional information" provided by the taxpayer, which included "some freight bills and charges." That documentation is not further described in that entry or elsewhere in the DO-220.5 and does not appear to be mentioned anywhere else in the audit file.

12. As evidenced by Mr. Fordjour's testimony and the audit file, petitioner did not provide the general ledger requested by the first IDR to the auditor.

13. The audit file includes many of petitioner's sales invoices, all of which appear to have the language noted in finding of fact 3 that "[a]ll Taxes & Freight will be paid by the customer or the owner to the appropriate authority." None show any sales tax being charged by petitioner, but a few list sales tax paid by petitioner as a charge for which petitioner seeks compensation from the customer. Included in the audit file is a 17-page bid for a contract to provide furnishings for 70 rooms in a hotel on Fifth Avenue in Manhattan. Page five of the bid package is a document with petitioner's name at the top and that is entitled "Terms and Conditions of Sales and Security Agreement," which, among other things, states: "Shipments: All shipments are by common carrier in accordance with the freight terms set forth on page 3." Page three of the package, in turn, shows that the shipping address is the Fifth Avenue address of the hotel, and lists a charge for freight. Based on their placement in the audit file, these same terms and conditions appear to have been appended to many, if not all, of petitioner's bids for large contracts with hotels.

14. Review of the 14-page DO-220.5 reveals more than 20 entries that describe

telephone calls between the auditor (or the auditor's team leader or section head) and petitioner's representatives, with a short description of the substance of the subject conversation. While two entries show a discussion of petitioner's nexus status and at least four show discussions of the overlapping audit adjustment issue, not a single one of the entries reveals a discussion about any contention on petitioner's part that the hotel room furnishings it sold to its New York customers were not delivered to those customers in New York.

15. Petitioner did not present any witnesses or exhibits at hearing.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began his determination with a review of the regulations and Tax Law provisions relating to the imposition of sales tax on the receipts on retail sales of tangible personal property and the installation of tangible personal property. The Administrative Law Judge observed that a sale takes place where delivery occurs. He determined that, in the absence of evidence to the contrary, it was not irrational for the Division to treat as taxable, sales on invoices that listed a "ship to" address in New York.

The Administrative Law Judge next determined that the presence of the language "[a]ll taxes and freight will be paid by the customer or the owner to the appropriate authority" on petitioner's invoices further indicates that petitioner's sales involved delivery to customers and not customer pick-ups. Additionally, he found that petitioner Hotel Depot's "terms and conditions" for bids for large contracts with New York hotels included terms indicating that the hotel room furnishings sold by Hotel Depot were to be transported by Hotel Depot to the New York hotel in question.

The Administrative Law Judge determined that, even without the evidence in the audit file indicating that sales involved New York deliveries and thus occurred in New York, the

conclusion on audit that Hotel Depot's sales were taxable would nevertheless have a rational basis, as petitioner bears the burden of proof on the issue of where delivery occurred and petitioner failed to produce evidence demonstrating that the delivery of its sales occurred outside of New York.

The Administrative Law Judge next reviewed the Tax Law provisions pertaining to the issue of whether Mr. Parikh was a responsible person required to collect tax and is thus liable for the tax due from petitioner. He determined that Mr. Parikh was a corporate officer who introduced no evidence to establish that he was not a person required to collect tax on behalf of the corporation. The Administrative Law Judge, therefore, found that Mr. Parikh failed to meet his burden of proof on that issue.

ARGUMENTS ON EXCEPTION

On exception, petitioners argue that the assessment lacked a rational basis because the Division failed to show that the transactions on which tax was imposed occurred in New York. Petitioners contend that the transfer of title and transfer of possession of the goods sold occurred outside the state. Petitioners assert that the New York Uniform Commercial Code ("UCC") provisions regarding transfer of title should control here. Petitioners also contend that Hotel Depot was just a dealer that collected money from third party vendors who manufactured, shipped and installed the tangible personal property in New York hotels. Petitioners assert that the Division provided no evidence to demonstrate that Hotel Depot paid for, or was responsible for, shipping and thus it must be held that the shipping company was acting as agent of the purchaser. Petitioners reason, therefore, that any tax due was owed by its customers and should have been collected by the Division as a use tax. Petitioners argue that the Division relied on a

flawed audit methodology and the assessment is arbitrary and capricious without shipping documentation.

The Division contends that the Administrative Law Judge properly sustained the notices of determination in the proceeding below. The Division argues that the corporation made sales of hotel furnishings and installation services in New York and that the receipts from those sales were properly subject to New York sales tax. The Division contends that a presumption of correctness attaches to a notice at the time of its issue. The Division argues that petitioners bore the burden of proving by clear and convincing evidence that the sales tax assessment was erroneous. It contends that petitioners, however, submitted no testimonial or documentary evidence at the hearing to meet their respective burdens. Further, in response to petitioners' argument that the UCC requires that Hotel Depot's sales should be presumed to have been out of state, the Division contends that the UCC section cited by petitioners has no factual or legal impact on the situation presented by this matter.

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]." Tax Law § 1105 (c) (3) imposes a sales tax on the receipts from the sale of the installation of tangible personal property, with some exclusions not relevant here. "Receipt" is defined under the Division's regulations as ". . . the amount of the sale price of any property and the charge for any service taxable under articles 28 and 29 of the Tax Law, valued in money, whether received in money or otherwise" (20 NYCRR 526.5 [a]). A "sale" is defined as "[a]ny transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the

rendering of any service, taxable under this article, for a consideration or any agreement therefor” (Tax Law § 1101 [b] [5]).

Tax Law § 1132 (c) creates a presumption that all receipts for property or services subject to tax under subdivisions (a) through (d) of Tax Law § 1105 are subject to tax and the burden of proving the contrary is borne by the vendor or its customer (20 NYCRR 532.4 [a] [1]; [b] [1]). Moreover, it is well settled that a presumption of correctness attaches to a properly issued statutory notice issued by the Division and the taxpayer bears the burden to prove that the methodology is erroneous and the assessment is incorrect (*Matter of Darman Bldg. Supply Corp. v Mattox*, 106 AD3d 1150 [3d Dept 2013]; *Matter of Blodnick v New York State Tax Commn.*, 124 AD2d 437 [3d Dept 1986] *appeal dismissed* 69 NY2d 608 [1987]).

Petitioner contends that the Division relied on a flawed audit methodology and that the assessment is arbitrary and capricious without shipping documentation. The record establishes that the Division reviewed all the documentation that Hotel Depot provided during the audit, but petitioners seem to argue that the Division was obligated to produce evidence of shipping beyond that which was produced during the audit. Based upon the above precepts, however, it is petitioners here who must come forward in the first instance with evidence to establish errors in either the methodology used in determining the assessment or the assessment itself and we, therefore, reject petitioners’ suggestion that the Division had the burden to present evidence of shipping documentation in order to prove the propriety of its assessment (*see Matter of Leogrande v Tax Appeals Trib.*, 187 AD2d 768 [3d Dept 1992], *lv denied* 81 NY2d 704 [1993]; *Matter of Blodnick v New York Tax Commn.*).

Although the Division did not have the burden of proof on any of the issues raised in this matter, the methodology underlying the Division’s assessment must be rational to be sustained

upon review (*see Matter of Orvis, Inc.*, Tax Appeals Tribunal, January 14, 1993, *confirmed* 86 NY2d 165 [1995]; *Matter of Atlantic & Hudson Ltd. Partnership*, Tax Appeals Tribunal, January 30, 1992). The presumption of correctness raised by the issuance of the assessment itself provides the rational basis so long as no evidence is introduced challenging the assessment (*id.*). There is no dispute that the transactions under review were taxable. Indeed, petitioners posit that the Division should seek payment of use tax from Hotel Depot's customers in New York. The central question that must be answered here is whether the Division may impose upon this out-of-state taxpayer the obligation to collect sales tax on its receipts for sales and services to New York customers.

Under Article 28 of the Tax Law, a "person required to collect tax" includes every vendor of tangible personal property or services (Tax Law § 1131 [1]). A "vendor" includes "[A] person making sales of tangible personal property or services within the state, the receipts from which are taxed by [Article 28]" (Tax § 1101 [b] [8]). The Division's regulations during the audit period included in the definition of vendor: "[A] person making sales of services, the receipts from which are subject to tax, is a vendor. This may include a person entering this State from outside the State to perform services on property located in this State" (20 NYCRR 526.10 [a] [1] [ii]).

The Division's determination that Hotel Depot was a vendor and, therefore, responsible for the sales tax was based on a detailed audit of Hotel Depot's books and records (*see* finding of fact 10). The Division contends that invoices and other documentation provided by Hotel Depot during the audit demonstrate that it made sales of tangible personal property to New York hotels and was performing installation and measurement services in New York. The invoices showed no sales tax being charged or collected on those sales and services (*see* finding of fact 3). The

Division determined that a total of 1,675 of Hotel Depot's invoices involved taxable sales in New York during the audit period (*see* finding of fact 5). The audit resulted in the subject notices of determination, which were issued after the Division's auditor provided certain credits to Hotel Depot and made adjustments pursuant to the Division's "overlapping audit policy" (*see* finding of fact 6).

The sales tax is a "transactions tax," i.e., liability for the tax occurs at the time of the transaction (*see Matter of D.J.H. Constr. v Chu*, 145 AD2d 716 [3d Dept 1988]). The tax becomes due at the time of transfer of title to or possession of (or both) tangible personal property or at the time of the rendition of a qualified service (20 NYCRR 525.2 [a] [2]). The sales tax is also a "destination tax," that is, the point of delivery or point at which possession is transferred by the vendor to the purchaser, or his designee, controls both the incidence of tax and its rate (20 NYCRR 525.2 [a] [3]). In the absence of evidence to the contrary, it was not irrational for the Division to conclude that the tangible personal property was delivered to the customer at the "ship to" address on the invoice and that Hotel Depot was a vendor responsible for collecting and remitting New York sales tax.

Furthermore, as determined by the Administrative Law Judge, the presence of the "[a]ll taxes and freight will be paid by the customer or the owner to the appropriate authority" notation on the invoices is consistent with the Division's interpretation that Hotel Depot's sales involved delivery to customers in New York and not customer pick-ups in New Jersey (*see* finding of fact 13). Additionally, Hotel Depot's "terms and conditions" for bids for large contracts with New York hotels included terms indicating that the hotel room furnishings sold by Hotel Depot were to be transported by it to the New York hotel in question (*id.*). Finally, the invoices for installation and measurement services evidence activity of Hotel Depot's employees or agents in

the state that provides an additional basis to determine that it was a vendor subject to tax (*see Matter of Orvis Co. v Tax Appeals Trib. of State of N.Y.*, 86 NY2d 165, 180-181 [1995]; 20 NYCRR 526.10 [a] [1] [ii]). Based upon the facts before us and the statute and regulations in place during the audit period, the Division had a rational basis to conclude that Hotel Depot was a vendor required to collect tax on its receipts from sales and services in New York and that the assessment has a rational basis.

Having determined that the Division had a proper basis for issuing the notice, the issue is then whether petitioners sustained their burden to prove, with clear and convincing evidence, that Hotel Depot was not a vendor or that the audit methodology was not reasonably calculated to reflect the taxes due (*Matter of Darman* 106 AD3d at 1151; *Matter of W.T. Grant Co. v Joseph* 2 NY2d 196, 206-07 [1957], *rearg denied* 2 NY2d 992 [1957], *cert denied* 355 US 869 [1957]). The resolution of this issue obviously depends on the facts and circumstances surrounding petitioners' sales in New York.

We note that petitioners have not contested nexus and have provided no proof with respect to the nexus issue. Because petitioners bore the burden on that issue, their failure means that they have abandoned any argument that they might have been able to make about Hotel Depot's contacts with New York (*see Matter of Orvis Co. v Tax Appeals Trib. of State of N.Y.; Matter of Stainless, Inc.*, Tax Appeals Tribunal, April 1, 1993). Our review of the record indicates that the assessment is based on documentation, largely sales invoices, evidencing a substantial number of transactions between Hotel Depot and New York hotels. Although petitioner offered no evidence at the hearing to establish the manner in which it conducted business, it has presented alternating scenarios of how the goods it sold were transferred to its customers. In the proceeding below, petitioners seemed to argue that the goods were moved

from out-of-state manufacturers to Hotel Depot's warehouse in New Jersey, where they were picked up by either the New York hotels or shippers who were the agents of the hotels. On exception, petitioners argue that it was, merely, a "clearing exchange" or broker and that the goods were shipped from out-of-state manufacturers or third-party vendors directly to the hotels and that petitioner never had possession of the property it sold. Petitioners provided no evidence to support either scenario. They failed to provide evidence on how goods were shipped and evidence on payments made for freight and delivery charges in response to a request by the auditor (*see* finding of fact 4). Likewise, they failed to rebut the documentation obtained during the audit indicating that Hotel Depot delivered, or arranged to have delivered, the goods to hotels in the State. Petitioners rely on UCC § 2-401 (3) (b) in support of their position.³ For the reasons stated above, however, we agree with the conclusion of the Administrative Law Judge that we are properly guided by the Tax Law and regulations and that the UCC provision relied upon by petitioners is inapplicable to the issues in this proceeding. Petitioners further argue that the facts in this proceeding are analogous to those in *Matter of Bloomingdale Bros v Chu*, 70 NY2d 218, 222 [1987] and that we should follow the holding in that case. In *Bloomingdale*, the question was whether a non-New York resident's out-of-state purchase of a gift from an out-of-state store that also does business in New York is a transaction subject to New York State sales tax solely because, at the customer's request, the store arranges to have the gift delivered by common carrier to the ultimate intended recipient of the gift in New York. The court held that, in such circumstances, the transaction must be deemed to have occurred solely outside New York and that New York sales tax was inapplicable. In *Bloomingdale*, the vendor

³ UCC § 2-401 (3) (b) provides: "(3) Unless otherwise explicitly agreed where delivery is to be made without moving the goods . . . (b) if the goods are at the time of contracting already identified and no documents are to be delivered title passes at the time and place of contracting."

and purchaser were both situated outside the state. The ultimate recipient of the gift was located in New York. In contrast, the invoices in this proceeding demonstrate that petitioner contracted to sell tangible personal property and services directly to hotels in New York, which were the ultimate recipients of the property and services. As such, we find that the facts in this proceeding are inapposite to those in *Bloomingtondale*.

In addition to failing to submit evidence on the factual details regarding its sale of tangible personal property, including shipping documentation and payments for shipping, petitioners have failed to come forward with witness testimony or documentary evidence regarding its sales of installation and measurement services in the State. Petitioners have not established how Hotel Depot arranged for the installation and measurement services, and they have not quantified the number of times the services were performed during the audit period or by whom they were performed. Such sales make Hotel Depot a vendor subject to assessment pursuant to tax regulation 20 NYCRR 526.10 (a) (1) (ii) (*see also Matter of Orvis Co.*, 86 NY2d at 180-181).

Petitioners' failure to establish the facts and present evidence about Hotel Depot's activities in New York means that we must decide that petitioners failed to meet their burden to prove that the audit methodology was flawed (*Matter of Darman*, 106 AD3d at 1151; *Matter of Stainless, Inc.*). Thus, we conclude that Hotel Depot was a vendor within the meaning of Tax Law § 1101 (b) (8) and regulation 20 NYCRR 526.10 (a) (1) (ii) for the periods at issue and that its receipts for property and services were properly subject to tax.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Hotel Depot, Inc. and Dipesh Parikh is denied;
2. The determination of the Administrative Law Judge is affirmed;

3. The petitions of Hotel Depot, Inc. and Dipesh Parikh are denied; and
4. The notices of determination dated September 18, 2015 and September 21, 2015 are sustained.

DATED: Albany, New York
January 24, 2020

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

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

/s/ Anthony Giardina
Anthony Giardina
Commissioner