

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

METROPOLITAN MINIMART CORP. :

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, 2009 through August 31, 2011. :

DETERMINATION
DTA NOS. 826155
AND 826156

In the Matter of the Petition :

of :

AHMED ISSA :

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 September 1, 2010 through August 31, 2011. :

Petitioner Metropolitan Minimart Corp. 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, 2009 through August 31, 2011.

Petitioner Ahmed Issa 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 September 1, 2010 through August 31, 2011.

A hearing was held before Donna M. Gardiner, Administrative Law Judge, in New York, New York on July 7, 2015, with all briefs to be submitted by December 7, 2015. Petitioners

appeared by The Antonius Law Firm (Jacqueline S. Kafedjian, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Brian Evans, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation's failure to mail a copy of the Notice of Determination L-040191591 to petitioners' representative renders the notice invalid.

II. Whether the audit method employed by the Division of Taxation was reasonable or whether petitioners have shown error in either the method or result.

FINDINGS OF FACT

1. Ahmed Issa is the owner and president of Metropolitan Minimart Corp. (Minimart Deli) located at 1924 2nd Avenue, New York, New York. The business is open 24 hours. The business is a typical New York City bodega and goods sold by the business during the audit period included both taxable and nontaxable items. Minimart Deli is equipped with four refrigerators and two aisles with grocery items. Minimart Deli did not sell hot meals.

2. The business transacts tax-exempt food stamp sales and these EBT transactions are deposited daily by the third-party merchant in its bank account tagged at "Efunds." Minimart Deli also accepts credit cards with a \$5.00 minimum purchase. The business used two cash registers.

3. The Division of Taxation (Division) commenced a sales tax field audit of the corporation's books and records by issuance of an appointment letter dated December 14, 2011. This appointment letter requested that the corporation's books and records for the period December 1, 2008 through August 31, 2011 be made available for audit. Within the letter, the Division requested cash register tapes, cash receipts journal, cash disbursement journal, sales invoices, lease contracts for the entire audit period and the general ledger.

4. On February 29, 2012, the Division's auditor met with petitioners' former representative, Elvin Olivera. On April 2, 2013, petitioners retained their current representative.

5. The records produced on audit were the corporation's federal income tax returns, some bank statements, a day book, some purchase invoices and cash register tapes that were for dates that fell outside the audit period. The cash register tapes could not be relied upon to get an accurate daily sales average because the tapes were not given for both cash registers and the purchases were not itemized to determine the taxability of the sale. After a review of the documentation provided, the auditor was unable to verify what was sold and whether it was a taxable item.

6. The auditor determined that petitioners' records were inadequate to perform a detailed audit. Petitioners agree that they did not maintain accurate books and records.

7. On September 18, 2012, the auditor conducted a survey of the business premises. The auditor noted on the first page of her Field Audit Report that petitioners' business was a deli grocery. She further noted a description of the business as a convenience store without gas. At the conclusion of her Field Audit Report, the auditor described that petitioners sold sandwiches, beer, soda, water, energy drinks, juices, cigarettes, detergent, snacks, candy, bread, bakery items, fruits and vegetables. By letter dated December 27, 2012, the auditor requested permission to perform an observation methodology of the premises. By letter dated January 15, 2013, petitioners denied this request.

8. The auditor then decided to employ a utility factor in order to estimate the corporation's gross sales for the audit period. The utility factor was chosen because the auditor determined that the Con Edison utility bills were in line with the utility expense reported on petitioners' federal income tax returns.

9. To apply the utility factor method, the auditor used an industry index entitled Restaurant Industry Operations Report (RIOR). The auditor testified that this publication was commonly used in the auditor's office and the auditor was familiar with its use. The auditor determined the corporation's gross sales using the table entitled "Exhibit D-18, Limited Service Restaurants, Statement of Income and Expenses - Ratio to Total Sales." This table relates to limited service restaurants with a sandwiches/subs/deli menu theme. The group "Limited Service Restaurants" is described in the RIOR to include "quick-service and fast casual restaurants." Based upon her review of the corporation, the auditor identified the type of business as being a deli/grocery, with its major business of selling prepared food. Thus, the auditor testified that she selected this table as it was the closest accurate index for petitioners' specific business. This classification was based on what the auditor saw while performing her survey of the business.

10. Using petitioners' federal income tax returns for the years 2009, 2010 and 2011, the auditor added the utility expenses for the corporation for those three years, resulting in the total utility expenses paid for by petitioners during the audit period as \$56,087.33. The auditor then applied the utility factor of 3.9% from the RIOR to the total utility expenses paid. The 3.9% factor was chosen since the 3.9% upper quartile column on the RIOR table results in a lower additional tax after the calculation which is more favorable to petitioners, compared to using either the lower 2.0% or median 2.7% quartiles. The auditor testified that using the upper quartile percentage yields the least amount of gross sales.

11. The auditor divided the total utility expenses paid of \$56,087.33 by the 3.9% utility factor to determine the additional taxable sales to be \$1,438,136.67. After applying the 8.875% tax rate to the \$1,438,136.67 of taxable sales, the auditor calculated that the corporation's additional tax due was \$127,634.63. The auditor then credited petitioners for the amount of

reported sales tax paid of \$13,014.65 which reduced the final additional tax due amount to \$114,619.98 plus penalties and interest.

12. The Division issued to Minimart Deli a Notice of Determination, L-039999924, dated August 16, 2013, assessing tax due in the amount of \$138,791.09 plus penalties and interest for the period in issue. This amount was subsequently reduced by the amount of \$13,014.65, as a credit for sales tax reported and paid on its tax return.

13. The Division issued to Mr. Issa, as a responsible officer, a Notice of Determination, L-040191591, dated October 9, 2013, assessing tax due in the amount of \$85,292.01. Mr. Issa does not dispute that he is a responsible officer of Minimart Deli.

14. The duly authorized representative for Mr. Issa was not served with a copy of the Notice of Determination.

15. Petitioners filed a timely petition with the Division of Tax Appeals.

16. The Division presented the auditor as a witness. The auditor testified as to her conduct of the audit and her use of the external index in order to calculate an estimate of additional tax owed.

17. Petitioners' representative questioned the auditor regarding her choice of the utility factor used to determine any additional taxes due. The auditor was unwavering in her position that petitioners' business was similar to a Subway restaurant. However, unlike a Subway, the auditor noted that petitioner accepted food stamps, that petitioner did not have ovens on the premises and that petitioner sold many grocery items that were not the type of items sold by a Subway restaurant. The auditor confirmed that petitioner did not prepare or sell hot meals.

CONCLUSIONS OF LAW

A. The first issue to be addressed is the consequence of the Division's failure to mail a copy of the notice of determination to petitioners' authorized representative in this matter.

Petitioners claim that this failure renders the notice issued to Mr. Issa invalid.

While the Tax Law does not specifically provide for service of the notice on a taxpayer's representative, the Tax Appeals Tribunal has consistently held that the 90-day period for filing a petition or request for a conciliation conference is tolled if the taxpayer's representative is not served with the notice (*see Matter of Nicholson*, Tax Appeals Tribunal, June 12, 2003; *Matter of Kushner*, Tax Appeals Tribunal, October 19, 2000; *Matter of Brager*, Tax Appeals Tribunal, May 23, 1996; *Matter of Multi Trucking*, Tax Appeals Tribunal, October 6, 1988). Therefore, case law dictates that the proper remedy is a tolling of the statute of limitations within which to protest the notice. The failure to serve a copy of the notice to petitioners' representative does not require that the notice be canceled.

Similarly, petitioner Issa also makes the argument that the notice was not mailed to him at his last known address. However, there is no dispute that he received the notice and timely petitioned it herein. When the receipt of the notice by the taxpayer is established, the 90-day period for filing a petition or a request for a conciliation conference commences with the date of actual notice (*see Matter of Riehm v. Tax Appeals Trib.*, 179 AD2d 970 [3d Dept 1992], *lv denied* 79 NY2d 759 [1992]) and does not result in a cancellation of the notice, but rather, ensures petitioner his right to timely protest the underlying notice.

B. The next issue to address is whether petitioners have shown that the audit methodology employed by the Division in this case was unreasonable. There is no dispute that petitioners failed to maintain adequate books and records. Accordingly, the Division was authorized to

employ an external index in order to estimate petitioners' sales tax liability. The estimate methodology used must be reasonably calculated to reflect taxes due and exactness is not required. The taxpayer bears the burden of proving with clear and convincing evidence that the assessment is erroneous or that the audit methodology is unreasonable. Moreover, it is noted that considerable latitude is given an auditor's method of estimating sales under such circumstances (*see Matter of Your Own Choice*, Tax Appeals Tribunal, February 20, 2003; *Matter of AGDN, Inc.*, Tax Appeals Tribunal, February 6, 1997).

In *Matter of Abbasi* (Tax Appeals Tribunal, June 12, 2008), the Tax Appeals Tribunal stated, in pertinent part, that:

“As a general principle, the conduct of government proceedings based on secret information, which the individual citizen has no opportunity to challenge or even examine, strongly suggests the absence of fairness. Accordingly, in order to impose on petitioner the heavy burden of proving by clear and convincing evidence that the audit methodology is unreasonable, it is not sufficient for the Division simply to present an estimated dollar amount of sales and to state that it is based on the Division's ‘experience.’ Instead, the record must contain sufficient evidence to enable the trier of fact to determine whether the audit has a rational basis, as well as specific information identifying the external index employed by the Division in estimating tax liability [*see Matter of Grecian Sq. v. New York State Tax Commn.*, 119 AD2d 948 (3d Dept 1986); *Matter of Spallina*, Tax Appeals Tribunal, February 27, 1992; *Matter of Fokos Lounge*, Tax Appeals Tribunal, March 7, 1991; *Matter of Fashana*, Tax Appeals Tribunal, September 21, 1989; *Matter of Savino*, Tax Appeals Tribunal, September 22, 1988].”

In this case, the auditor employed a utility factor in order to estimate gross sales. The auditor testified to using the RIOR. Specifically, she used a table entitled “Limited Service Restaurants” and the auditor testified that the table related to limited service restaurants with a sandwiches/subs/deli menu theme, which included quick service and fast casual restaurants. When questioned regarding her use of this particular table, the auditor repeatedly and consistently stated that she used it because she believed that Minimart Deli was similar to a

Subway restaurant. For this reason, it is determined that using the RIOR for a limited service restaurant as an external index was not reasonable in this case.

It is clear from the record, including the auditor's own workpapers, that Minimart Deli was a typical New York City bodega. The auditor's Field Audit Report described the business and its sales of sandwiches, beer, soda, water, energy drinks, juices, cigarettes, detergent, snacks, candy, bread, bakery items, fruits and vegetables. The auditor's initial classification of the business was of a convenience store without the sale of gas. The auditor's use of an index of a utility factor based upon a limited service restaurant and her insistence that petitioners' business was similar to a Subway was not reasonable.

The auditor was asked to confirm that there were no ovens at petitioners' business premises and that petitioners did not prepare or sell hot meals. Obviously, when using a utility factor for a restaurant, it is implied that such restaurant has ovens and cook tops in order to prepare food. Clearly, as was confirmed by the auditor, petitioner did not have these types of energy-driven appliances. Therefore, the choice to utilize the utility factor in the RIOR for a limited service restaurant was not reasonable and, as such, petitioners have proven that the audit results lacked a rational basis (*see Matter of Fokos Lounge*).

C. The petitions of Metropolitan Minimart Corp. and Ahmed Issa are granted and the notices of determination are canceled.

DATED: Albany, New York
May 26, 2016

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE