

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ADIRONDACK AUTO BODY LLC : DETERMINATION
for Revision of a Determination or for Refund of : DTA NO. 829507
Sales and Use Taxes under Articles 28 and 29 of the :
Tax Law for the Period December 1, 2011 through :
February 28, 2017. :
_____:

Petitioner, Adirondack Auto Body LLC, 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 December 1, 2011 through February 28, 2017.

On February 20, 2021, petitioner, appearing by M&M Consulting of Saratoga Inc. (Michael A. Deyo, EA), and on March 8, 2021, the Division of Taxation, appearing by Amanda Hiller, Esq. (Mary R. Humphrey, Esq., of counsel), waived a hearing and submitted the matter for a determination based on documents and briefs, with the final brief to be submitted by July 26, 2021, which date began the six-month period for issuance of this determination. After due consideration of the documents and arguments submitted, Barbara J. Russo, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation was required to provide petitioner with a copy of a fully executed consent to extend the statute of limitations in order to toll such statute of limitations.

FINDINGS OF FACT

1. Petitioner, Adirondack Auto Body LLC, operates an automobile repair shop, offering complete collision services in Ballston Spa, New York.

2. On October 27, 2014, the Division of Taxation (Division) sent a letter to petitioner stating that the business's sales and use tax records had been scheduled for an audit for the period December 1, 2011 through August 31, 2014, and scheduled the initial audit appointment for December 9, 2014.

The letter further explained that all books and records pertaining to sales and use tax liability for the audit period must be available on the appointment date. Among the records specifically requested, in an attached Information Document Request (IDR), were sales tax returns, worksheets and canceled checks showing taxes paid; federal income tax returns; New York State corporation tax returns; general ledger; general journal and closing entries; sales invoices; exemption documents supporting non-taxable sales; chart of accounts; fixed asset purchase/sales invoices; expense purchase invoices; merchandise purchase invoices; bank statements, canceled checks and deposit slips for all accounts; cash receipts journal and sales journal; cash disbursement journal and purchase journal; the corporate book, including minutes, board of directors and articles of incorporation; depreciation schedules; and lease/rental agreements for the entire audit period.

3. Petitioner's then-representative, Victoria Vetsch, requested that the audit appointment be postponed. By letter dated November 26, 2014, the Division granted Ms. Vetsch's request and rescheduled the audit appointment to January 13, 2015. Included with the letter, the Division sent a second IDR, dated November 26, 2014.

Petitioner's then-representative subsequently requested that the audit appointment be further postponed, and by letter dated December 30, 2014, the Division again rescheduled the audit appointment to February 17, 2015, and included a third IDR.

4. The Division's auditor met with Ms. Vetsch on February 17, 2015. Ms. Vetsch informed the auditor that petitioner was not prepared with the sales portion of the audit and did not provide all of the requested books and records.

5. Ms. Vetsch signed a test period audit method election, dated February 17, 2015, on behalf of petitioner, granting the Division permission to conduct the audit using a test period for sales and recurring expense purchases.

6. On February 18, 2015, and November 30, 2016, respectively, the Division sent a fourth and fifth IDR to petitioner, requesting records previously requested but not provided by petitioner.

7. The Division received a new power of attorney form, dated April 15, 2016, authorizing Michael A. Deyo to represent petitioner for the audit.

8. By letter dated March 23, 2017, the Division informed petitioner that the audit period was expanded and covered the period December 1, 2011 through February 28, 2017. The Division requested books and records for the expanded audit period and issued a sixth IDR, dated March 23, 2017.

9. Petitioner, by its representative Mr. Deyo, signed a test period audit method election on February 18, 2018, agreeing to a test period audit for sales and recurring expense purchases for the expanded audit period.

10. During the course of the audit, petitioner agreed to extend the statute of limitations on assessments as follows: on December 29, 2014, petitioner, by its then-representative Ms. Vetsch, executed a consent to extend the statute of limitations (consent), allowing the Division until September 20, 2015 to assess any taxes determined due for the period December 1, 2011 through August 31, 2012. On December 30, 2014, the Division's auditor signed the consent.

On July 16, 2015, petitioner, by its managing member Glenn Varney, executed a consent allowing the Division until December 20, 2015 to assess any taxes determined due for the period December 1, 2011 through August 31, 2014. On July 17, 2015, the Division's auditor signed the consent.

On October 13, 2015, petitioner, by its managing member Glenn Varney, executed a consent allowing the Division until March 20, 2016 to assess any taxes determined due for the period December 1, 2011 through February 28, 2013. On October 16, 2015, the Division's auditor signed the consent.

On January 6, 2016, petitioner, by its managing member Glenn Varney, executed a consent allowing the Division until June 20, 2016 to assess any taxes determined due for the period December 1, 2011 through May 31, 2013. On January 14, 2016, the Division's auditor signed the consent.

On April 25, 2016, petitioner, by its representative Michael A. Deyo, executed a consent allowing the Division until September 20, 2016 to assess any taxes determined due for the period December 1, 2011 through August 31, 2013. On April 28, 2016, the Division's auditor signed the consent.

On July 8, 2016, petitioner, by its representative Michael A. Deyo, executed a consent allowing the Division until December 20, 2016 to assess any taxes determined due for the period December 1, 2011 through November 30, 2013. On July 13, 2016, the Division's auditor signed the consent.

On October 3, 2016, petitioner, by its representative Michael A. Deyo, executed a consent allowing the Division until March 20, 2017 to assess any taxes determined due for the period December 1, 2011 through February 28, 2014. On October 11, 2016, the Division's auditor signed the consent.

On January 4, 2017, petitioner, by its representative Michael A. Deyo, executed a consent allowing the Division until June 20, 2017 to assess any taxes determined due for the period December 1, 2011 through May 31, 2014. On January 4, 2017, the Division's auditor signed the consent.

On March 23, 2017, petitioner, by its representative Michael A. Deyo, executed a consent allowing the Division until September 20, 2017 to assess any taxes determined due for the period December 1, 2011 through August 31, 2014. On March 24, 2017, the Division's auditor signed the consent.

On June 16, 2017, petitioner, by its representative Michael A. Deyo, executed a consent allowing the Division until March 20, 2018 to assess any taxes determined due for the period December 1, 2011 through February 28, 2015. On June 19, 2017, the Division's auditor signed the consent.

On December 20, 2017, petitioner, by its representative Michael A. Deyo, executed a consent allowing the Division until June 20, 2018 to assess any taxes determined due for the

period December 1, 2011 through May 31, 2015. On December 26, 2017, the Division's auditor signed the consent.

On April 10, 2018, petitioner, by its representative Michael A. Deyo, executed a consent allowing the Division until December 20, 2018 to assess any taxes determined due for the period December 1, 2011 through November 30, 2015. On April 10, 2018, the Division's auditor signed the consent.

11. The Division reviewed the records provided by petitioner and determined that sales records were not adequate. Petitioner failed to provide documentation for exempt sales. By letter dated November 12, 2015, petitioner informed the Division that final sales invoices were not available. The Division's auditor reconciled gross sales to petitioner's federal and state returns and the reconciliation showed that sales were underreported.

12. Pursuant to the test period audit method election agreement (*see* findings of fact 5 and 9), the Division used a test period of March through May 2014 and September through November 2016 for sales records. Based on the review of sales records for each test period, the auditor determined that some of the tax collected was not remitted and that additional tax was also due for unsubstantiated exempt sales.

For the test period of March through May 2014, the Division determined additional tax due of \$5,707.65. The auditor projected this amount over the period December 1, 2011 through August 31, 2014 based on gross sales and determined additional taxable sales of \$821,928.28 and tax due of \$57,534.98 for this period.

For the test period September through November 2016, the Division determined additional tax due of \$2,381.39. The auditor projected this amount over the period September 1,

2014 through February 28, 2017 and determined additional taxable sales of \$365,401.85 and tax due of \$25,578.13 for this period.

13. The Division determined that petitioner's capital purchase records were adequate and reviewed the records in detail for the entire audit period. Based on a review of the capital records the auditor determined additional capital purchases for which tax was not paid or accrued of \$61,560.00, resulting in tax due of \$4,309.20.

14. The Division determined that petitioner's expense records were adequate. Based on the test period election agreement (*see* findings of fact 5 and 9), the Division reviewed expense records for 2013. Additional tax of \$1,580.74 was found due from the review of the test period and determined additional tax due for recurring expense purchases of \$8,298.78 for the entire audit period.

15. The Division issued a notice of determination number L-048646329 (notice), dated August 9, 2018, to petitioner, asserting tax due in the amount of \$95,721.09 plus penalties of \$38,134.93 and interest for the period December 1, 2011 through February 28, 2017.

CONCLUSIONS OF LAW

A. 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.” Such records include a “copy of each sales slip, invoice, receipt, statement or memorandum upon which subdivision (a) of section eleven hundred thirty-two requires that the tax be stated separately” (*id.*; 20 NYCRR 533.2 [b] [1]).

B. Tax Law § 1138 (a) (1) provides, in relevant part, that if a sales tax return is 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 an audit methodology reasonably calculated to reflect the tax due. The burden then rests upon the taxpayer to demonstrate that the audit methodology or the amount of the assessment was erroneous (*see Matter of Your Own Choice, Inc.*, Tax Appeals Tribunal, February 20, 2003).

C. The standard for reviewing a sales tax audit where an indirect audit methodology has been employed in the determination of sales tax liability is well established, and was set forth in *Matter of AGDN, Inc.* (Tax Appeals Tribunal, February 6, 1997), as follows:

“a vendor . . . is required to maintain complete, adequate and accurate books and records regarding its sales tax liability and, upon request, to make the same available for audit by the Division (*see*, Tax Law §§ 1138[a]; 1135; 1142[5]; *see, e.g., Matter of Mera Delicatessen*, Tax Appeals Tribunal, November 2, 1989). Specifically, such records required to be maintained ‘shall include a true copy of each sales slip, invoice, receipt, statement or memorandum’ (Tax Law § 1135). It is equally well established that where insufficient records are kept and it is not possible to conduct a complete audit, ‘the amount of tax due shall be determined by the commissioner of taxation and finance from such information as may be available. If necessary, the tax may be estimated on the basis of external indices . . .’ (Tax Law § 1138[a]; *see, Matter of Chartair, Inc. v. State Tax Commn.*, 65 AD2d 44, 411 NYS2d 41, 43). When estimating sales tax due, the Division need only adopt an audit method reasonably calculated to determine the amount of tax due (*Matter of Grant Co. v. Joseph*, 2 NY2d 196, 159 NYS2d 150, *cert denied* 355 US 869); exactness is not required (*Matter of Meyer v. State Tax Commn.*, 61 AD2d 223, 402 NYS2d 74, *lv denied* 44 NY2d 645, 406 NYS2d 1025; *Matter of Markowitz v. State Tax Commn.*, 54 AD2d 1023, 388 NYS2d 176, *affd* 44 NY2d 684, 405 NYS2d 454). The burden is then on the taxpayer to demonstrate, by clear and convincing evidence, that the audit method employed or the tax assessed was unreasonable (*Matter of Meskouris Bros. v. Chu*, 139 AD2d 813, 526 NYS2d 679; *Matter of Surface Line Operators Fraternal Org. v. Tully*, 85 AD2d 858, 446 NYS2d 451).”

D. In this case, the record establishes the Division's repeated clear and unequivocal written requests for books and records of petitioner's sales, as well as petitioner's failure to produce such books and records. Based on the lack of records provided, the Division reasonably concluded that petitioner did not maintain or have available books and records that were sufficient to verify gross and taxable sales for the audit period. Indeed, petitioner does not dispute that its records were insufficient for the period at issue. Having established the unavailability of required books and records, the Division was clearly entitled to resort to the use of indirect methods.

E. Petitioner has the burden of establishing that the audit method employed was unreasonable or that the amount of tax assessed as the result of the application of the method used in this case was erroneous (*see Matter of Surface Line Operators Fraternal Organization v Tully*, 85 AD2d 858 [3d Dept 1981]). Petitioner has not met this burden. As for the audit method employed, petitioner did not maintain adequate records of sales as required by the Tax Law. Petitioner agreed to a test period audit for both sales and expense purchases. For capital purchases, the Division performed a detailed review for the entire audit period. As such, petitioner has not met its burden of showing that the audit method was unreasonable.

Petitioner has likewise failed to meet its burden of proving that the amount of tax assessed was erroneous. Petitioner has presented no evidence or arguments on this point. Accordingly, it is found that Division's determination of additional tax due on sales, capital purchase and recurring expense purchases was proper.

F. The only issue raised by petitioner in its brief is regarding the consents. Over the course of the audit, several consents were signed by petitioner extending the period of limitations

for assessments (*see* finding of fact 10). Petitioner does not dispute that it signed the consents. Rather, petitioner argues the executed consents were never returned to it by the Division. Petitioner provided no sworn statements or other evidence to support its claim that it never received a copy of the consents after the Division signed them and presents only unsubstantiated arguments in its brief in this regard. As such, petitioner has not met its burden of proof to support its claim. Nevertheless, even if the Division did not return a copy of the consents to petitioner after the Division signed them, such would not invalidate the consents.

There is simply no requirement under the Tax Law that the Division return fully executed consents to the taxpayer in order to extend the period of limitations to assess sales and use tax.

Tax Law § 1147 (c) provides, in relevant part:

“Where, before the expiration of the period prescribed herein for the assessment of an additional tax, a taxpayer has consented in writing that such period be extended the amount of such additional tax due may be determined at any time within such extended period. The period so extended may be further extended by subsequent consents in writing made before the expiration of the extended period.”

In *Matter of The Executive Club LLC* (Tax Appeals Tribunal, April 19, 2017), the Tax Appeals Tribunal stated, “Tax Law § 1147 (c) requires only the consent of the taxpayer to extend an applicable statute of limitations and requires no action on the part of the Division to validate such consent.” The Tribunal found that neither the signature of the Division’s employee, nor the official seal is required for a valid extension of the statute of limitations in regard to sales and use taxes (*id.*).

Petitioner’s citation to Tax Law § 683 (c) (2) has no bearing on this matter, as such section pertains to personal income tax under article 22 of the Tax Law and is not relevant to

sales tax matters governed by articles 28 and 29.¹ Additionally, petitioner's reference to the requirement that notices shall be mailed by registered or certified mail under Tax Law § 1147 (a) (1) as support for its argument is without merit. The requirement under this section for registered or certified mailing pertains to notices of determination and has no relevance to consents.

G. While petitioner did not specifically raise the issue of the Division's assertion of penalties, such issue will be addressed herein. The Division asserted penalties against petitioner pursuant to Tax Law § 1145. Tax Law § 1145 (a) (1) (i) imposes a penalty for the failure to timely file a return or pay any tax imposed by articles 28 and 29 of the Tax Law. Tax Law § 1145 (a) (1) (vi) imposes additional penalties for underreporting sales tax in excess of 25% of the amount of tax required to be reported. Penalties may be abated if such failure or delay was due to reasonable cause and not due to willful neglect (Tax Law § 1145 [a] [1] [(iii)]). Consistent with this statute, the regulations provide that penalty imposed under Tax Law § 1145(a) (1) (i) "must be imposed unless it is shown that such failure was due to reasonable cause and not due to willful neglect" (20 NYCRR 2392.1 [a] [1]).

In establishing reasonable cause for the abatement of penalty, the taxpayer faces an onerous task (*see Matter of Philip Morris, Inc.*, Tax Appeals Tribunal, April 29, 1993). In *Philip Morris* it was explained that "[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 the tax according to a particular timetable be treated as a largely

¹ Tax Law § 683 (c) (2) provides that for purposes of article 22, the time for assessment may be extended by agreement where the tax commission and the taxpayer have consented in writing before the expiration of time for an assessment of tax prescribed in that section.

unavoidable obligation [citations omitted]” (*Matter of MCI Telecommunications Corp.*, Tax Appeals Tribunal, January 16, 1992, *confirmed* 193 AD2d 978 [3d Dept 1993]). Here, petitioner failed to make adequate books and records available for audit and substantially underreported and underpaid the tax due. Petitioner has failed to show reasonable cause for the abatement of penalties.

H. The petition of Adirondack Auto Body LLC is denied, and the notice of determination dated August 9, 2018 is sustained.

DATED: Albany, New York
January 20, 2022

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE