

STATE OF MICHIGAN
DEPARTMENT OF ENERGY, LABOR & ECONOMIC GROWTH
MICHIGAN TAX TRIBUNAL

Hoffman's Corner Store Inc,
Petitioner,

v

MTT Docket No. 329920
Assessment No. O398135

Department of Treasury,
Respondent.

Tribunal Judge Presiding
Rachel J. Asbury

FINAL OPINION AND JUDGMENT

INTRODUCTION

Petitioner appeals Respondent's Assessment No. O389135 for failure to pay sales tax for the tax periods beginning November 1, 2002 through November 30, 2005. No informal conference was conducted by the Department of Treasury. Petitioner timely appealed the final assessment to the Tribunal. A hearing was held in the above-captioned case on May 19, 2009. Petitioner was represented by Jayesh Sharma. Respondent was represented by Michael Bell, Assistant Attorney General.

BACKGROUND

Mr. Jayesh Sharma is the President of Hoffman's Corner Store Inc. Respondent conducted an audit of the period November 1, 2002 through November 30, 2005. Respondent determined that Petitioner had a sales tax liability because the "taxpayer was overstating its food for human consumption deduction versus total sales."¹

¹ Respondent's prehearing statement

Petitioner asserts that all sales taxes have been paid. At the prehearing conference, Petitioner stated that Respondent did not take into account that the store was remodeled and doubled in size and inventory.

Assessment No. O389135 for Sales Taxes, November, 2002 through November 30, 2005:

Tax	\$14,977.00
Penalty	\$ 1,489.00
Interest *	\$ 3,229.44*
Total	\$19,695.44

*Interest accruing and to be computed in accordance with Sections 23 and 24 of 1941 PA 122.

The Tribunal, having considered the testimony and evidence properly submitted, and the file in the above-captioned case, finds that Assessment No. O389135 is affirmed as follows:

Assessment No. O389135 for Sales Taxes, November, 2002 through November 30, 2005:

Tax	\$14,977.00
Penalty	\$ 1,489.00
Interest *	\$ 3,229.44*
Total	\$19,695.44

*Interest accruing and to be computed in accordance with Sections 23 and 24 of 1941 PA 122.

PETITIONER'S POSITION

Petitioner did not exchange or file an exhibit list, did not exchange a list of expert and other witnesses it expected to testify, and failed to exchange exhibits with Respondent as required by Tribunal Orders entered March 18, 2008 and March 18, 2009. Petitioner offered the following proposed exhibit to which Respondent objected. The exhibit was not admitted.

P-4 Daily money reports for June, 2005

In his opening statement on behalf of Petitioner, Mr. Jayesh Sharma stated that he is the President of Hoffman's Party Store Inc. and that he "fully devoted my time to Hoffman's."² Mr. Sharma stated that when Mr. Eric Poll, representing Respondent, came to the store to conduct the audit, he "opened our doors, our electronic cash registers or books. Whatever he asked we provided at the time, because we have always, always performed this business in the most accurate and possibly timely manner of filing the taxes and everything else."³ During the audit, "there was some confusions that we cleared up . . . And I'm sure Eric today will say that our store -- he had commented several times that our store has been one of the most organized stores ever he has found. Meeting with John, our accountant, a couple of times clarified several things."⁴ Mr. Sharma further stated that he told Mr. Poll that they had "doubled the space of the store"⁵ and that Mr. Poll told him "that would make a difference."⁶ After several attempts to contact Mr. Poll, he was told that the case was "going to the Lansing office now."⁷

Mr. Sharma stated that it was a "most confusing state for me especially, because I was not given direction which way to go to resolve this issue. So first I was given several numbers. I called at least ten numbers. And finally I was given the Tribunal's number,"⁸ after which he filed this appeal with the Tribunal.

² Transcript page 18, l 117

³ Transcript page 18, ll 20-25

⁴ Transcript page 19, ll 10-17

⁵ Transcript page 19, l 22

⁶ Transcript page 19, l 24

⁷ Transcript page 20, ll 1-2

⁸ Transcript page 20, ll 4-8

Mr. Sharma stated that he purchased a computer system from “CRS, Cash Register Systems . . . giving me the different categories, different departments, different price structures, different base counts, all kinds of different things. So we have . . . this accurate system so that my wife and I can leave the store and still monitor the inventory.”⁹ When Mr. Sharma is not at the store, he testified that his “wife, Neha, helps me run the books. Her job is to go to the store every morning, make sure . . . every clerk is reporting the sales on their Z-tapes. And it's calculated. It's added. It's double-checked.”¹⁰ Mr. Sharma asserted that he does not run “the number of the reports. I depend on my accountants. They have done the Hoffman's accounting for over last 20 years.”¹¹ Petitioner asserted that his “main witness is my accountants, John and Jerry Davis.”¹² Petitioner further asserted that he had “exhibits here . . . [for] John or Jerry [to] explain.”¹³ Petitioner offered his exhibits at this time.

Respondent, at the beginning of the hearing, objected to Petitioner’s witnesses and exhibits. The Tribunal withheld a ruling on Respondent’s objections until Petitioner moved to admit an exhibit or offer the testimony of a witness. In support of its objection, Respondent contended that Petitioner did not file the required witness list and did not exchange exhibits lists or exhibits with Respondent until the day of the hearing and that to allow the witnesses to testify or the exhibits to be admitted would be “highly prejudicial.”¹⁴ The Tribunal found that to allow the admission of Petitioner’s exhibits at this late date would be highly prejudicial to Respondent. The exhibits consisted of itemized daily receipts for the month of June, 2005; handwritten and typed letters

⁹ Transcript page 21, ll 5-12

¹⁰ Transcript page 21, l 24- page 22, l 2

¹¹ Transcript page 22, ll 21-24

¹² Transcript page 23, ll 8-7

¹³ Transcript page 24, ll 16-17

¹⁴ Transcript page 13, l 4

from persons not identified previously by Petitioner and not available for questioning at the hearing; an unsigned letter addressed to Eric Poll with Petitioner's assertions of profit mark-up estimates and substantiating documentation; and copies of answers to interrogatories. Respondent and Respondent's experts were not able to adequately review the material or formulate any response to the material, having been served the material immediately prior to the hearing. Respondent's objection to the admission of Petitioner's exhibits was sustained.

The Tribunal found that, although Petitioner did not file its witness list as required, Petitioner had provided sufficient notice, through numerous pieces of correspondence, to the Tribunal and Respondent, of his intention to call Mr. John Davis as a witness. The Tribunal overruled Respondent's objection to the testimony of Mr. John Davis who would be allowed to testify but in a limited capacity, as the financial records Petitioner proposed as exhibits were not admitted.

Petitioner moved to adjourn the hearing to another day to allow Respondent adequate time to review the exhibits. The Tribunal found that Petitioner had filed his appeal in 2006, the hearing had already been adjourned once at his request, he had made numerous complaints about the length of time resolution of this matter had taken and his desire for a speedy conclusion, and that adequate notice and time had been provided to him to fulfill the filing and exchange requirements as ordered. Further delay was unwarranted. The Tribunal denied Petitioner's motion for adjournment.

Petitioner offered the testimony of Mr. John Davis. Mr. Davis testified that he is "a public accountant, and ... [has] been doing management reports, sales tax and payroll reports for Mr.

Sharma since 2002.”¹⁵ Mr. Davis testified that Petitioner gave him “payroll data . . . [and] a rather comprehensive sales report, which details his total sales, taxable and nontaxable, also includes the amount of . . . taxes he’s collected as well as bottle deposits and that kind of thing.”¹⁶ Petitioner offered Petitioner’s exhibit J-4 about which he wished to question Mr. Davis. Respondent objected to the admission of the exhibit as the exhibit had not been exchanged prior to the hearing and contained a substantial amount of income data that Respondent had had no opportunity to review or verify. Respondent’s objection was sustained and Petitioner’s exhibit J-4 was not admitted.

Mr. Davis testified that he received “sales information from Mr. Sharma each month. . . which gives me a total sales, total tax and other nontaxable income such as . . . bottle deposits. . . [a]nd I also get another departmental review, which shows me by type of item, beer, wine coolers, grocery and so on.”¹⁷ Mr. Davis further testified that Mr. Sharma “demonstrated the ability to get me everything, not necessarily in a very timely manner at all times. . . .”¹⁸ Petitioner asked Mr. Davis to comment on any issues that were of concern to him in the audit. Mr. Davis testified that there were two things that he noticed. First, the “rise and fall of inventory wasn’t taken into consideration, because two months were audited.”¹⁹ Mr. Davis asserted that “in so doing I believe the auditor’s way of determining what is taxable is they just take what is bought in the month and assuming what is bought is all sold in that month,”²⁰ however, inventory may stay on the shelf for some time. Further, Mr. Davis testified that he noticed that “the large amount of

¹⁵ Transcript page 31, ll 5-7

¹⁶ Transcript page 31, ll 10-15

¹⁷ Transcript page 32, ll 20-25

¹⁸ Transcript page 33, ll 13-14

¹⁹ Transcript page 35, ll 6-7

²⁰ Transcript page 35, ll 11-14

bottle deposits that Mr. Sharma takes in was not included in the calculation made to determine what was taxable and what wasn't. . . . I didn't see any deduction for bottle deposits, which was quite substantial over a three-year period of time.”²¹ Mr. Davis felt that Petitioner was doing his due diligence and that Petitioner hadn't been negligent. Mr. Davis further testified that the calculations he made indicated that “there's about a \$3,000 discrepancy. . . . Mr. Sharma should owe about \$3,000 less than what the calculation was, simply based on bottle deposits not being figured in. . . . I'm assuming that they didn't based on the numbers that I saw.”²²

On cross examination, Mr. Davis testified that he was not a certified public accountant, he did not have an accounting degree, and he attended continuing education programs. He testified that he believed he took “15 hours of accounting classes to obtain my business degree, and everything else was taught by my fellow colleagues when I started at the accounting firm.”²³ Mr. Davis further testified that monthly he received a “sales report. . . basically total income from sales. And I also get. . . the departmental sales which gives me total sales for the goods, and then it shows tax taken out. . . .”²⁴ Mr. Davis did not receive any of the “backup documents that would generate that report. . . for example, purchase invoices.”²⁵ Mr. Davis testified that his firm,

generally maintain the income statement, a balance sheet, a general ledger, a check register, a bank statement, a bank account reconciliation, the write-up that we do and most if not all the information given to us by him in order to produce the management statements that we give back to him. . . . [which is] not reviewed, it's not scrutinized by peers, and is. . . not an audited statement, which means that

²¹ Transcript page 35, ll 19-25

²² Transcript page 36, ll 10-15

²³ Transcript page 37, ll 20-22

²⁴ Transcript page 39, ll 3-8

²⁵ Transcript page 39, ll 9-12

it's not something that I could certify as an audit and certify before the IRS as an audited statement. So it's management purposes only.²⁶

When asked to clarify his statement related to unaccounted for bottle deposits, Mr. Davis testified that he believe “[i]t would come to approximately 55,330 in deposits.”²⁷ He further testified that this number was a number Mr. Sharma reports and that he doesn't “actually see all the receipts and the backup detail.”²⁸ Respondent asked specifically about “food for human consumption sales that are deductible versus . . . exempt services per se.”²⁹ Mr. Davis testified that he considered exempt services to be “resale food for human consumption”³⁰ and “basically any nontaxable income, which includes any nontaxable income like grocery as well as bottle deposits, keg deposits, things that wouldn't be taxed,”³¹ and tended to “lump sales that aren't taxable into that [exempt services] category.”³²

Petitioner offered the testimony of Neha Sharma, general manager of Hoffman's Corner Store. Mrs. Sharma testified that at the beginning of each day, the first thing she does “is balance all my drawers to make sure that all my employees that have worked the day before have everything correct. Then I balance all the z's . . . [and] run my z report. . . and make a deposit for that day.”³³ Mrs. Sharma testified that it is important to her to have her “paperwork straight from the

²⁶ Transcript page 40, l 15-page 41, l 1

²⁷ Transcript page 42, l 19

²⁸ Transcript page 43, ll 1-3

²⁹ Transcript page 44, ll 18-20

³⁰ Transcript page 44, l 5

³¹ Transcript page 44, l 23-page 45, l 1

³² Transcript page 43, l 23

³³ Transcript page 63, l 24-page 64, l 5

very, very beginning. . . and that's the one reason I love the system, because it gives the report of every single thing.”³⁴

On cross examination and in response to specific questions, Mrs. Sharma testified that Petitioner has “all of the purchase invoices and everything that it would use to buy inventory with. . . copies of z-tapes,. . . [a]nd the z-report totals.”³⁵

Mr. Sharma testified that he believed when his numbers were compared to Respondent’s numbers, the “overall for the three-year period, the difference that in my mind, we owe is only \$4157.”³⁶ He further asserted that the bottle deposits were not included. Mr. Sharma testified that he used sales and Respondent used purchases to determine the amount of taxes owed and that resulted in the difference in liability.

RESPONDENT’S POSITION

Respondent offered the following proposed exhibits:

- R-1 Sales Tax Audit Summary 11/02 to 11/05
- R-2 Bill for Taxes Due. Assessment No. 0389135 11/2/02 to 113005
- R-3 Sales Tax Recon Sheet for 2005
- R-4 Sales Tax Recon Sheet for 2004
- R-5 2003 Annual SUW Tax Return
- R-6 2002 US 1120S & MI C-8000
- R-7 2003 US 1120S & MI C-8000
- R-8 2004 US 1120S & MI C-8000

Respondent submitted monthly income statements of Petitioner but did not offer them into evidence. Respondent’s exhibits 1, and 2 were admitted. Petitioner objected to the admission of

³⁴ Transcript page 65, ll 1-6

³⁵ Transcript page 66, ll 5-10

³⁶ Transcript page 70, ll 20-21

Respondent's exhibits 6-9 as not relevant. Petitioner's objections were partially sustained.

Respondent offered the documents to illustrate Petitioner's due diligence in filing tax returns.

The returns were not admitted as to the underlying data.

Respondent asserts that the "taxes in controversy are sales taxes . . as the result of a sales tax audit. . . [and] Petitioner's auditor correctly determined the amount of sales tax due."³⁷

Respondent contends that "the taxpayer overstated its food for human consumption deduction versus total sales by a range of 6% to 16%."³⁸ Further, the "Department's auditor also determined that Hoffman's was negligent in record keeping as well as ringing up items for sales properly and he recommended that negligence penalty be assessed."³⁹

Respondent offered the testimony of Mr. Eric Poll, Auditor for the Michigan Department of Treasury. Mr. Poll testified that he has a bachelor's degree of business administration in accounting, he is not a CPA, he does not attend continuing education courses, and he takes courses sponsored by the Department of Treasury related to his auditing position.⁴⁰ Mr. Poll testified that when conducting an audit, the steps he follows begin with

an interview of the taxpayer at their place of business. From there we determine generally how their sales and recording procedures are – flow through to their financial statements. . .we request financial statements and documentation. . . which includes a sample of their purchases . . comparing that sample to what is reported on their financial statements and tax returns.⁴¹

³⁷ Respondent's answer

³⁸ Respondent's prehearing statement

³⁹ Respondent's prehearing statement

⁴⁰ Transcript page 77, ll 16-24

⁴¹ Transcript page 78, l 19– page 79, l 2

Mr. Poll further testified that he was assigned to conduct the audit of Petitioner and followed the above steps. Upon completion of the audit, Mr. Poll shared the document⁴² with Mr. Sharma.

The audit was for the period November 2002 through November 2005. Mr. Poll testified that he used a two month period, chosen by the taxpayer, and looked at purchases to determine a sales mix of taxable and nontaxable items, “and then use that percentage to see if the deductions they’re taking on their SUW returns coincide with what was found.”⁴³ Mr. Poll testified that he spoke with Mr. Sharma and Mr. John Davis. He requested “[a]ny documents detailing the determination of sales tax . . . including income statements, profit and loss statements, s-slips and then also purchase invoices for the sample period and any tax returns filed . . . during the audit period.”⁴⁴ Mr. Poll found that the “only deduction that was listed was the exempt service”⁴⁵ but he “noticed that there was a large amount of grocery items that were for resale at the store.”⁴⁶

Mr. Poll testified that although he did not receive all of the monthly information for the full years of the audit period, he was able to conduct the audit with the information provided. He concluded that Petitioner “was taking a larger food for human consumption deduction than what the audit resulted and they should be allowed to take.”⁴⁷

Respondent asked Mr. Poll questions on the purchase spread portion of his audit report,⁴⁸ schedule H1. Mr. Poll testified that the “purpose is to determine the product mix for the taxpayer and to -- we also use that to determine the allowable amount for food deduction percentage for

⁴² Respondent’s exhibit R-1

⁴³ Transcript page 83, ll22-24

⁴⁴ Transcript page 81, 1 22-page 82, 1 1

⁴⁵ Transcript page 82, ll 6-7

⁴⁶ Transcript page 82, ll 10-12

⁴⁷ Transcript page 83, ll 10-12

⁴⁸ Respondent’s exhibit R-1

the audit.”⁴⁹ The purchases are broken down into categories and category 5 represents nontaxable purchases. Mr. Poll testified that he used vendor invoices and cross referenced check registers and Petitioner’s general ledger. The information was summarized on schedule D which showed the “purchase spread total by category with additional adjustments that are made to those figures from bottle deposits, which are -- bottle deposits and refunds. Those are adjusted to remove those from the purchase spread.”⁵⁰ Mr. Poll testified that schedule D1 shows “(\$4710)” which indicates that that amount “is reducing the beer and wine figure for the -- for the purchase spread by the bottle deposits -- the net bottle deposits on the invoices for the purchase spread.”⁵¹ Based on his analysis Mr. Poll determined that 19% of Petitioner’s purchases “were food and nontaxable items.”⁵² As part of his calculations, Mr. Poll determined what the mark-up on all items were. He determined “that beer and wine has a 17% markup, cigarettes has a 13%, other taxables, 33 and food is 24.”⁵³ Those percentages were used to determine what “sales of those items would be . . . the sales price.”⁵⁴ Respondent pointed to the \$20,075 figure under the "Purchases" column which Mr. Poll explained “would be the amount of purchases for those -- for the 12 block sample period of August through September 2005”⁵⁵ and that he determined that “the markup on that amount of purchases would be at 24%”⁵⁶ which would equal the \$4,739 in profit resulting “with the sales figure for the block sample period of 24,817.”⁵⁷ Mr. Poll explained that in the final column on D-3, for the "Food" line item it shows 20% rather than the 19% mark up from schedule D1 “[b]ecause when taking markups into consideration, the food sales would be

⁴⁹ Transcript page 86, ll 8-10

⁵⁰ Transcript page 87, ll 15-18

⁵¹ Transcript page 88, ll 9-11

⁵² Transcript page 89, ll 12-13

⁵³ Transcript page 89, l 24-page 90, l 1

⁵⁴ Transcript page 90, ll 5-6

⁵⁵ Transcript page 90, ll 11-12

⁵⁶ Transcript page 90, ll 14-15

⁵⁷ Transcript page 90, ll 20-21

higher than -- a higher percentage of the sales than the food would be of the total purchases. So we make that adjustment to account for the fact that the taxpayer's marking up their products.”⁵⁸ In this way, Mr. Poll testified, the audit looked at sales not only purchases of inventory.

Mr. Poll testified that there was “significant difference between what Hoffman's Corner Store was reporting for their food deduction and what was found to be allowable by the audit.”⁵⁹ Mr. Poll further testified that he reviewed Petitioner’s monthly sales tax information and annual sales tax returns. There were “no numbers in [the] line item”⁶⁰ for bottle deposits or Lotto sales or Lotto commissions, or under “Michigan Liquor Control Commission sales. . . pharmacy or prescriptions, . . . or prepared food.”⁶¹ For audit purposes, Mr. Poll reclassified the “exempt service figure that was reported . . . as ‘food for human consumption.’”⁶² Although initially reclassified dollar for dollar, “additional adjustments . . . were made because the food percentage was different from what they had taken to what was found in the audit. . .”⁶³ Mr. Poll concurred with Mr. Davis’ statement that Petitioner had lumped all of the food for human consumption under exempt services when it should have been separately categorized. Mr. Poll calculated a food deduction percent per record by dividing the food deduction per sales tax by the net merchandise sales for each of the audit periods.⁶⁴ From this information he determined the percentage difference between what was reported and what was found in the audit. Mr. Poll prepared a schedule entitled “Audit Adjustment Exempt Service to Food for Human

⁵⁸ Transcript page 91, ll 10-14

⁵⁹ Transcript page 92, ll 15-17

⁶⁰ Transcript page 94, l 12

⁶¹ Transcript page 94, ll 20-25

⁶² Transcript page 95, ll 17-18

⁶³ Transcript page 96, ll 7-9

⁶⁴ Transcript page 97

Consumption,” which summarized his adjustments from Petitioner’s exempt services category to the food for human consumption designation. Mr. Poll testified that some of the deductions taken by Petitioner were “disallowed based on the analysis of their purchases and the . . . purchase spread.”⁶⁵ He determined that \$4,909 was categorized as nontaxable but should have been taxed.

Mr. Poll determined “the balance that would be subject to the 6 percent tax rate”⁶⁶ including all the adjustments, specifically the adjustment for food for human consumption, multiplied that amount by the tax rate to calculate the total tax due. In addition to the tax due, interest had accrued and continues to accrue. Mr. Poll recommended the imposition of a negligence penalty because “[p]enalties are standard for our audits, given that the -- with the amount of time that it took taxpayer to get me the additional information and also the -- with the --with how long the audit was drawn out. That is reasons we usually apply a negligence penalty.”⁶⁷

Mr. Poll was questioned regarding Mr. Davis’ assertion that theft losses should have been taken into account. Mr. Poll testified that nobody represented to him “that theft was a problem at the store that would substantially impact the audit. . .”⁶⁸ He further testified that he was not shown “any records of police reports, anything itemizing the amount of theft or anything of that nature.”⁶⁹ Mr. Poll further testified that he took into account the increase in size and changes in inventory of certain types of food in his audit findings.

⁶⁵ Transcript page 99, ll 14-15

⁶⁶ Transcript page 109, l 24

⁶⁷ Transcript page 112, ll 14-19

⁶⁸ Transcript page 115, ll 8-10

⁶⁹ Transcript page 115, ll 11-12

On cross examination, Mr. Poll testified that he had conducted between 25 and 35 audits at the time he did Petitioner's. Mr. Poll confirmed that Petitioner was unable to give him a z-ring at the entrance interview but supplied him with an x-ring instead, which did not provide complete information. Mr. Poll did not subsequently request an x-ring from Petitioner. In response to Petitioner's questions, Mr. Poll stated to Mr. Sharma, "I believe you were very cooperative."⁷⁰ Mr. Poll testified that the two month purchase spread was standard for audit purposes and that Petitioner had provided him with two books each containing all the purchase orders for one of the chosen months. Mr. Poll further clarified that he was given "estimates of theft and breakage, but no backup documentation was given to substantiate those figures."⁷¹ Petitioner asked Mr. Poll to review Respondent's exhibit R-1, schedule H-1 on which certain items were notated as "taken from general ledger."⁷² Mr. Poll explained that he had invoices for most items. If there was no invoice, he took the entry from the general ledger. Petitioner used one example of Paw Paw Wine Distributing dated 8-18-2005 for \$1,079.60. Mr. Poll explained that there had been a physical invoice for that purchase and although he categorized it as wine, it included all wine and beer purchases, and that nonalcoholic beverage purchases would have been reflected in a separate category. Petitioner asserted that there was no comparable nonalcoholic beverage purchase noted for the invoice date and that there was always a nonalcoholic purchase when alcoholic beverages were purchased to illustrate his contention that Respondent's "reports are not accurate."⁷³ Mr. Poll testified that "[t]he bottle deposits, if they can be verified, would be given as a deduction under the exempt service or the -- or the other deduction."⁷⁴ However, Mr. Poll

⁷⁰ Transcript page 122, 14

⁷¹ Transcript page 126, ll 5-6

⁷² Transcript page 127, 113

⁷³ Transcript page 129, 16

⁷⁴ Transcript page 130, ll 9-11

continued, “[o]n the report as it stands here, there has been no way credit given for bottle deposits.”⁷⁵

On redirect, Mr. Poll testified that he did not recall the invoices for each Paw Paw transaction or whether pop purchases were listed. He further testified that, because pop was a nontaxable item, if Respondent did not include those purchases, “it would help the taxpayer in this situation. It would increase -- if the -- their pop should have been added to the -- to the purchase spread. That would increase the food percentage and would be allowable food percentage.”⁷⁶ Mr. Poll testified that his “audit sample took into consideration the increase in store size.”⁷⁷

FINDINGS OF FACT

Petitioner does not dispute that sales were made. Nor does Petitioner dispute that sales tax was due and payable to the State during the tax periods at issue. Petitioner regularly filed sales tax returns with payments. Respondent conducted an audit of Petitioner’s business. Petitioner chose the sample period and did not contest the use of that sample period. Petitioner was cooperative with Respondent’s auditor and opened its books and records to Respondent. Petitioner disputes the amount of sales tax as assessed by Respondent in the Final Assessment based on the auditor’s findings. Petitioner asserts that Respondent failed to take into consideration in its audit the full extent of exempt sales and other deductions, such as bottle deposits, that would have reduced Petitioner’s liability. Consequently, Petitioner believes that Respondent’s assessment was in excess of the tax that was actually due.

⁷⁵ Transcript page 130, ll 24-25

⁷⁶ Transcript page 133, ll 12-16

⁷⁷ Transcript page 135, ll 17-18

Petitioner's witness, Mr. John Davis, testified that it was his belief that bottle deposits were under estimated and Respondent did not take the rise and fall of inventory into consideration.

Based on these assumptions, his contention was that Petitioner's liability should be about \$3,000 less than assessed. Mr. Davis did not dispute any specific calculation or information in the audit report. Further, Mr. Davis provided no specific evidence to support his assertion that Petitioner's liability should be \$3,000 less than assessed. Mr. Davis questioned the use of the sample period as there might have been an unusual amount of purchases during that year but admitted that he only gets an inventory once per year and that he "can't verify that. This is solely going from what he's (Mr. Sharma) told me."⁷⁸ Mr. Davis admitted that in preparing returns and reports for Petitioner, he used sales reports, grand totals and departmental totals, bank statements, and check stubs and did not see underlying documentation such as invoices. Mr. Davis stated that his firm would "maintain the income statement, a balance sheet, a general ledger, a check register, a bank statement, a bank account reconciliation, the write-up that we do and most if not all the information given to us by him in order to produce the management statements that we give back to him."⁷⁹

The Tribunal finds that the audit performed by Respondent's auditor evaluation was comprehensive, as was Respondent's audit report. Respondent's auditor used the information, materials, and documents provided by Petitioner. Mr. Poll reviewed, among other documents, tax returns, management statements, check registers, bank statements, general ledger entries, and invoices. The audit report included Petitioner's purchases, categorized based on type of tangible personal property, and sales. Mr. Poll allowed for exemptions and deductions supported by

⁷⁸ Transcript page 42, ll 7-10

⁷⁹ Transcript page 40, ll 15-19

Petitioner's documentation. Exemptions that Respondent's auditor disallowed are clearly outlined and supported by the documentation included in the audit report. After conferring with Mr. Sharma and Mr. Davis before the audit was finalized, Mr. Poll revised the audit report and the final assessment reflected an amount less than originally determined.

Petitioner's accountant admitted that "for the annual reconciliation we tend to -- and it's probably to our discredit, but we tend to lump sales that aren't taxable into that [exempt services] category."⁸⁰ Respondent's determination that all of the sales so categorized were not exempt is supported by the auditor's report. Respondent's auditor clearly outlines how the exempt services category was broken down for audit purposes and how all calculations were made to determine the final assessment. Mr. Poll further explained how the final assessment took into account bottle returns, specific nontaxable items, expansion of the floor space of the store, added items for sale, and food for human consumption.

In contrast, Petitioner did not offer any alternative tax amount due. Petitioner did not present any evidence to counter Respondent's audit report findings or to support the amounts Petitioner originally asserted. The Tribunal does not question Petitioner's claim to have always filed timely, to have a good computer system, or that Mr. Sharma is an honorable business person. However, those qualities do not provide the Tribunal with Petitioner's contention of an alternative tax liability amount or support the cancelling of the assessment as issued.

⁸⁰ Transcript page 43, ll 21-23

The Tribunal further finds that Petitioner's argument that Respondent did not ask for additional information to facilitate its audit is unpersuasive. It is Petitioner's burden to go forward with evidence to support his assertion that the assessment should be cancelled or modified. Petitioner demonstrated, with the records that were brought to the hearing, that it had the understanding and capacity to provide information and documentation that would facilitate Respondent's and the Tribunal's analysis. It was Petitioner's choice to wait until the day of the hearing to produce the documents that may have supported its contention that some adjustment of the assessment might have been appropriate. Petitioner further complained that it waited three years between the filing of its appeal for a hearing. That is more than enough time to have produced, and timely exchanged, what it considered to be clarifying information. It was incumbent upon Petitioner, if it wanted the accountant's analysis to be considered, to have presented that information to Respondent or the Tribunal during that three-year period and in a timely manner.

In addition to the tax and interest, Respondent assessed a negligence penalty against Petitioner. Mr. Poll testified that “[p]enalties are standard for our audits, given that the -- with the amount of time that it took taxpayer to get me the additional information and also the -- with the -- with how long the audit was drawn out. That is reasons we usually apply a negligence penalty.”⁸¹ Mr. Poll further testified that “. . . with the additional complications of the unprompted, I guess, delivery of records and things like that, that's the penalty we would apply for that.”⁸²

⁸¹ Transcript page 112, ll 14-18

⁸² Transcript page 150, ll 7-10

The Tribunal finds that Petitioner did not provide sufficient, credible and reliable evidence to support an amount of sales tax due for the periods at issue other than the amount as assessed in Respondent's Final Bill for Taxes Due.

CONCLUSIONS OF LAW

The assessment at issue in this matter is for unpaid sales tax. The Sales Tax Act, 1933 PA 167, provides for the levy and collection of a sales tax on the transfer of ownership of tangible personal property. Section 2 of the act, MCL 205.52, provides,

Sec. 2. (1) Except as provided in section 2a, there is levied upon and there shall be collected from all persons engaged in the business of making sales at retail, by which ownership of tangible personal property is transferred for consideration, an annual tax for the privilege of engaging in that business equal to 6% of the gross proceeds of the business, plus the penalty and interest if applicable as provided by law, less deductions allowed by this act.

The burden of proof to refute the assessment lies with Petitioner. The Tax Tribunal has authority to allocate the burden of proof in a manner consistent with the legislative scheme. *Zenith Industrial Corp. v Dep't of Treasury*, 130 Mich App 464, 343 NW2d 495 (1983). Although the revenue statute at issue here, MCL 205.21, does not state which party has the burden of proof, imposing the burden on the taxpayer is consistent with the overall scheme of the tax statutes and the Legislature's intent to give the Department a means of basing an assessment on the best information available to it under the circumstances. See *Vomvolakis v Dep't of Treasury*, 145 Mich App. 238, 377 NW2d 309 (1985), lv den. 424 Mich 887 (1986).

The Final Assessment at issue in this case was issued based upon an extensive and comprehensive audit. The audit report is supported by credible and reliable information and data. Further, the audit report clearly outlines the information used and the calculations made in

computing the final tax liability for the tax periods at issue. Petitioner failed to meet its burden of proof that Petitioner's sales tax liability for the tax periods at issue were other than as assessed by Respondent in Assessment No. O389135.

MCL 205.23(3) provides,

. . . if any part of the deficiency or an excessive claim for credit is due to negligence, but without intent to defraud, a penalty of \$10.00 or 10% of the total amount of the deficiency in the tax, whichever is greater, plus interest as provided in subsection (2), shall be added. . . If a taxpayer subject to a penalty under this subsection demonstrates to the satisfaction of the department that the deficiency or excess claim for credit was due to reasonable cause, the department shall waive the penalty.

Guidance for waiver of a negligence penalty is found the administrative rules at R205.1012 which provides:

Rule 12. (1) Negligence is the lack of due care in failing to do what a reasonable and ordinarily prudent person would have done under the particular circumstances. The standard for determining negligence is whether the taxpayer exercised ordinary care and prudence in preparing and filing a return and paying the applicable tax in accordance with the statute. The facts and circumstances of each case will be considered.

(2) When the department imposes a negligence penalty, the department bears the burden of establishing facts to support a finding of negligence and the taxpayer bears the burden of establishing facts that will negate a finding of negligence. The taxpayer shall file a written statement that explains, in detail, the facts which are relied upon to defeat the penalty and which constitute reasonable cause.

Petitioner asserts that the penalty portion of the assessment should be waived. Respondent's auditor testified that the reason for assessing the penalty in this matter were complications in the audit process, delay in delivering information during the audit process, and the length of time the audit took. The statute allows the imposition of a penalty if a taxpayer did not exercise ordinary care and prudence in preparing and filing a return and paying the tax. The standard relates to the underlying filing requirements, not the audit process. For this reason, the Tribunal concludes that

Respondent did not meet its burden of proof to establish a finding of negligence under the applicable statutory provision or within the scope of the rules promulgated for the implementation of that provision.

JUDGMENT

IT IS ORDERED that Assessment No. O389135 is AFFIRMED AS MODIFIED.

IT IS FURTHER ORDERED that Assessment No. O389135 is MODIFIED as follows:

Tax	\$14,977.00
Penalty	\$ 0
Interest *	\$ 3,229.44*
Total	\$18,206.44*

*Interest accruing and to be computed in accordance with Sections 23 and 24 of 1941 PA 122.

This Opinion and Judgment resolves all pending claims in this matter and closes this case.

MICHIGAN TAX TRIBUNAL

Entered: July 17, 2009 By: Rachel J. Asbury