STATE OF MICHIGAN
DEPARTMENT OF LICENSING & REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
MICHIGAN TAX TRIBUNAL

Liquor Basket Party Store, Inc.,
Petitioner,

v

MTT Docket No. 449145
Assessment No. TM35570

Michigan Department of Treasury,
Respondent.

Tribunal Judge Presiding
Steven H. Lasher

FINAL OPINION AND JUDGMENT

Administrative Law Judge Thomas A. Halick issued a Proposed Opinion and Judgment on November 1, 2013. The Proposed Opinion and Judgment states, in pertinent part, "the parties shall have 20 days from date of entry of this Proposed Opinion and Judgment to file exceptions and written arguments with the Tribunal consistent with Section 81 of the Administrative Procedures Act (MCL 24.281)."

On November 16, 2013, Petitioner filed exceptions to the Proposed Opinion and Judgment. In the exceptions, Petitioner states that "Judge Halick's [decision] fails to take into consideration simple mathematics." More specifically, Petitioner contends that Judge Halick's conclusion that "Petitioner under reported [sic] his gross sales during the audit period by $2,727,783.00" results in "$121.43 of unreported sales per hour" which Petitioner argues "is simply unrealistic." Petitioner further contends that, "[e]ven assuming for the sake of argument some Z-Tapes are in fact missing, *Petitioner makes no such concession*, employing the gross-up method to reconstruct them would yield far more accurate results," which Petitioner contends was the method used by the Tribunal in *Khirfan v Michigan Dep't of Treasury*, 4 MTT 439 (Docket No. 78563, September 5, 1986). [Emphasis in original.] In that regard, Petitioner "wonder[s] that perhaps it would have been far better for [it] had [it] done what the taxpayer in *Khirfan* did and simply not produce a single Z-Tape at all." With that, Petitioner contends that "there is simply no conceivable way Petitioner received as much sales tax as the [decision] suggests," and argues that "[r]equiring Petitioner to remit more than he could have possibly received amounts to state sanctioned confiscation of Petitioner's hard earned money."

Respondent has not filed exceptions to the Proposed Opinion and Judgment or a response to Petitioner's exceptions.

The Tribunal has considered the exceptions and the case file and finds that the Administrative Law Judge properly considered the testimony and evidence submitted in the rendering of the Proposed Opinion and Judgment. In that regard, although Petitioner is merely restating arguments previously presented, albeit in greater detail, *and addressed* by the Administrative Law Judge in his Proposed Opinion and Judgment, the Tribunal will once again explain why

Petitioner failed to prove, by a preponderance of the evidence, that the assessment at issue, as modified by the Administrative Law Judge, was invalid.

MCL 205.68 states:

> (1) A person liable for any tax imposed under this act *shall* keep accurate and complete beginning and annual inventory and purchase records of additions to inventory, complete daily sales records, receipts, invoices, bills of lading, and all pertinent documents in a form the department requires.
>
> * * *
>
> (4) If the taxpayer fails to file a return or to maintain or preserve proper records as prescribed in this section, or the department has reason to believe that any records maintained or returns filed are inaccurate or incomplete and that additional taxes are due, the department may assess the amount of the tax due from the taxpayer *based on information that is available or that may become available to the department. That assessment is considered prima facie correct for the purpose of this act and the burden of proof of refuting the assessment is upon the taxpayer.* [Emphasis added.]

Here, Petitioner failed to comply with MCL 205.68(1), and therefore, based on information that was available to Respondent when it conducted its audit of Petitioner for the March 2006 – February 2010 audit period (i.e., Petitioner's Z-ring tapes); Respondent assessed Petitioner for a deficiency in sales tax in the amount of $176,794.00 plus penalty and interest.

Although Petitioner continues to assert that "employing the gross-up method to reconstruct [its gross sales] would yield far more accurate results," as opposed to Respondent's reliance on Petitioner's Z-ring tapes, the Tribunal finds Petitioner's contention to be mistaken, as applied to the facts of this case. More specifically, although the gross-up method is a valid method to determine a taxpayer's sales tax liability, as upheld as a valid method by the Michigan Court of Appeals in *Vomvolakis v Dep't of Treasury*, 145 Mich App 238; 377 NW2d 309 (1985), there was no reason to resort to this method in *this* case because "actual daily sales can be determined with reasonable certainty from the available daily Z-rings," whereas employing the gross-up method would have been based on a potentially incomplete set of purchase invoices. Proposed Opinion and Judgment at 32, 39. The Michigan Court of Appeals has further stated that a "fair reading of the relevant statutes indicates that the Legislature intended to give the Department of Treasury power to base assessments on the *best* information that it could obtain." *Vomvolakis, supra* at 244. [Emphasis added.] Applying the foregoing, the *best* information in this case was to determine Petitioner's sales tax liability based on its *actual* daily gross sales for days where Z-ring tapes were available and to use the same to estimate sales on days which they were not. As a result, because Petitioner failed to prove that its gross-up method was more accurate than Respondent's reliance on actual sales based on Petitioner's own Z-ring tapes, and because

Petitioner has no right to demand a particular audit method when it fails to comply with MCL 205.68(1) by not maintaining adequate records, see *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 42; 703 NW2d 822 (2005), the Tribunal finds that Petitioner has failed to refute the assessment at issue in this case. Furthermore, although Petitioner contends that the Administrative Law Judge "fail[ed] to take into consideration simple mathematics" and that his decision "is simply unrealistic," the Tribunal disagrees, as the Administrative Law Judge's "mathematics" in rendering his decision was based on Petitioner's *own* Z-ring tapes.

Given the above, Petitioner has failed to show good cause to justify the modifying of the Proposed Opinion and Judgment or the granting of a rehearing. See MCL 205.762. As such, the Tribunal adopts the Proposed Opinion and Judgment as the Tribunal's final decision in this case. See MCL 205.726. The Tribunal also incorporates by reference the Findings of Fact and Conclusions of Law contained in the Proposed Opinion and Judgment in this Final Opinion and Judgment. As a result:

a. The taxes, interest, and penalties as levied by Respondent are as follows:

Assessment Number: TM35570

Taxes	Interest	Penalties
$176,794.00	$43,146.46	$44,199.00

b. The final taxes, interest, and penalties are as follows:

Assessment Number: TM35570

Taxes	Interest	Penalties
$165,987.00	*	$41,496.75

*Interest to be calculated in conformity with 1941 PA 122.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that Respondent shall cause its records to be corrected to reflect the taxes, interest, and penalties, as finally shown in the Proposed Opinion and Judgment within 20 days of entry of this Final Opinion and Judgment.

IT IS FURTHER ORDERED that Respondent shall collect the affected taxes, interest, and penalties or issue a refund as required by this Order within 28 days of entry of this Final Opinion and Judgment.

This Final Opinion and Judgment resolves the last pending claim and closes this case.

By: Steven H. Lasher

Entered: Mar 5, 2014
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