

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
TOKAY HUNGARIAN RESTAURANT, INC. : DETERMINATION
For Revision of a Determination or for Refund : DTA NO. 813493
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period September 1, 1981 :
through February 28, 1982. :
:

Petitioner, Tokay Hungarian Restaurant, Inc., 439 East 75th Street, New York, New York 10021-3102, 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, 1981 through February 28, 1982.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on September 19, 1995 at 9:15 A.M., with all briefs to be submitted by January 12, 1996, which date began the six-month period for the issuance of this determination. Petitioner appeared by its officers, Marianna and Kazmer Kovacs. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Robert J. Jarvis, Esq., of counsel).

ISSUES

- I. Whether the refund claim filed by petitioner was timely filed.
- II. Whether petitioner has established that there was a duplication of sales and use tax payments for the period at issue thus entitling it to the refund claimed.

FINDINGS OF FACT

1. Petitioner, Tokay Hungarian Restaurant, Inc. ("Tokay"), operated the Red Tulip Restaurant located at 439 East 75th Street, New York, New York 10021. The president and secretary of Tokay were Kazmer and Marianna Kovacs, respectively. The business's identification number was 13-3130640. For the quarter ended November 30, 1981, petitioner

submitted a partial remit return, paying \$3,502.00 on its tax liability of \$3,611.44. For the following sales and use tax quarter, which ended on February 28, 1982, petitioner submitted a timely, no remit return, which showed sales and use tax due of \$4,958.21.

2. The Division of Taxation ("Division") issued to petitioner a Notice and Demand (D8203141335) for the quarter ended November 30, 1981 and a Notice and Demand (D8206208315) for the quarter ended February 28, 1982. During the years 1978 through 1992, petitioner was assessed approximately 125 times, which included sales, withholding and corporation taxes.

3. According to Mr. Kovacs, he went to the Tax Compliance Division in November 1982 to inquire as to whether a deferred payment agreement ("DPA") could be arranged. He was told that his request would be reviewed and a certified check in the amount of \$2,500.00 would be needed as a downpayment. He returned to the Tax Compliance office in January 1983 and a deferred payment agreement was signed.

4. On January 18, 1983, petitioner entered into a deferred payment agreement (MD01173H61) with the Division. The agreement provided for nine monthly payments of \$2,466.97. According to the agreement, should petitioner fail to meet any of its conditions, the privilege of installment payments would be withdrawn. Failure to make timely payments would lead to default and further enforcement action without additional notice to petitioner. In addition, payments made under the agreement were to be applied to tax, penalty and interest according to the order of assessments listed on the agreement. Finally, the downpayment entry on the deferred payment agreement indicated "-0-".

The assessments were listed in chronological order on the deferred payment agreement as follows:

<u>Assessment #</u>	<u>Period</u>	<u>Penalty & Tax Due</u>	<u>Current Interest</u>	<u>Amt. Due</u>
W8210152594	8/1 - 9/30/81	\$ 155.52	\$ 78.02	\$ 233.54
D8009045824	3/1 - 5/31/80	1.00	507.97	508.97
D0812153744	6/1 - 8/31/80	132.00	390.48	522.48
D8104058600	9/1 - 11/30/80	931.28	1,603.22	2,534.50
D8106170130	12/1 - 2/28/81	3,392.96	1,635.41	5,028.37
D8110178598	3/1 - 5/31/81	3,137.76	1,324.13	4,461.89
D8112146996	6/1 - 8/31/81	-0-	659.55	659.55
D8203141335	9/1 - 11/30/81	109.44	661.02	770.46
D8206208315	12/1 - 2/28/82	<u>4,958.21</u>	<u>986.61</u>	<u>5,944.82</u>
Total		\$12,818.17	\$7,846.41	\$20,664.58

Additional estimated penalty and interest \$ 1,538.18

Estimated Total liability \$22,202.76

5. At the closing of a mortgage loan taken out by petitioner, held on July 12, 1989, the Division received a number of checks from petitioner to satisfy numerous outstanding assessments that had been issued to petitioner. One of the checks and its application was as follows:

<u>Check No.</u>	<u>Check Date</u>	<u>Assessment No.</u>	<u>Amount</u>	<u>Period</u>
8770	7/12/89	D8206208315	\$13,142.68	2/28/82
		D8203141335	\$ 1,009.91	11/30/81

6. On June 12, 1990, the Division received an Application for Credit or Refund of State and Local Sales or Use Tax from petitioner for the period September 1, 1981 through February 28, 1982. The amount of the refund claimed was \$14,173.15, plus interest. The basis for the refund claim was the allegation that the sales and use tax due for the two quarters at issue was paid pursuant to the deferred payment agreement of January 17, 1983 and again at the closing of the mortgage loan on July 12, 1989.

7. The auditor investigating the refund claim contacted an agent of the Tax Compliance Division and received information concerning the allocation of the payments made to the deferred payment agreement and of the payments made in July 1989. He received a listing of the payments made by petitioner and how they were applied to the assessments listed on the deferred payment agreement. As the checks came in under the deferred payment agreement, the

Tax Compliance Division paid the tax, penalty and interest beginning with the oldest assessment and working toward the newest, with the two quarters at issue being the newest.

8. The following checks, each in the amount of \$4,933.94, were submitted by petitioner and applied to the deferred payment agreement as follows:

<u>Check No.</u>	<u>Date of Check</u>	<u>Amount Applied</u>	<u>Assessment</u>
2026	5/6/83	\$ 509.00	D8009045824
		531.15	D8012153744
		2,574.78	D8104058600
		1,066.09	D8106170130
		252.92	W8210152594
		<u>\$4,933.94</u>	
2127	8/16/83	\$1,730.58	D8106170130
		736.39	D8110178598
		2,466.97	D8106170130
		<u>\$4,933.94</u>	
2227	12/11/83	\$4,189.08	D8110178598
		659.52	D8112146996
		85.34	D8203141335
		<u>\$4,933.94</u>	

9. The following checks were submitted by petitioner and claimed to have been applied to the deferred payment agreement but were applied elsewhere:

<u>Check No.</u>	<u>Date of Check</u>	<u>Amount</u>
1825	11/30/82	\$2,500.00
1989	3/28/83	\$2,466.97
2320	3/14/84	\$2,466.97

Check number 1825 in the amount of \$2,500.00 was written on November 30, 1982, was certified by Manufacturers Hanover Trust Company ("MHTC") on November 30, 1982 and date-stamped paid by the same bank on January 10, 1983. It contained on the back, handwritten by a tax compliance agent, the DPA number MD120782H61 and the identification number of the business as 13-6373802. Check number 1989 was written on March 28, 1983, was certified by MHTC on June 7, 1983 and was date-stamped paid by MHTC on June 27, 1983. On the front of the check is a serial number stamp of "W1041260". Such a serial number beginning with the letter "W" indicates it was applied to petitioner's withholding tax liabilities. On the

bottom of the check a tax compliance agent wrote, "This check was applied to withholding taxes." Finally, check number 2320 was written on March 14, 1984, was certified by MHTC on March 14, 1984 and was date-stamped paid by the same bank on March 23, 1984. The check was paid to the order of the "NY State Tax Commission" and was endorsed by "Chemical Bank, New York State Department of Taxation and Finance, Tax Compliance Bureau Exchange". There is no deposit serial number on the check to indicate where the money was applied and no such information was supplied by the Division at the hearing. The check contains the handwritten number of the deferred payment agreement. It appears to have been written by Kazmer Kovacs.

10. On November 5, 1993, the Division issued a letter to petitioner's representative advising that the claim for refund of sales tax of \$14,173.15 was denied in its entirety. The denial letter stated that:

"The refund was denied due to the fact the vendor could not substantiate their claim of paying the tax on a deferred payment arrangement and again at a closing in July 1989. It was determined that the deferred payment arrangement was never satisfied and the balance of tax due was correctly collected at the closing in 1989."

11. On November 26, 1984, the Division issued a Notice of Determination and Demand for Payment of Sales and Use Tax Due (S841126281M) to petitioner covering the period September 1, 1981 through August 31, 1983 and assessing tax in the amount of \$14,484.94, plus penalty and interest. The notice of determination stated that the reason for the assessment was as follows:

"Since you have not submitted your records for audit as required by Section 1142 of the Tax Law, the following taxes are determined to be due in accordance with Section 1138 of the Tax Law and are based upon available records and information"

The total amount assessed for the sales and use tax quarters ended November 30, 1981 and February 28, 1982 was \$6,102.33. The former Tax Appeals Bureau Conference held in regard to the notice of determination reduced the total amount due to \$8,280.28 by eliminating the amounts assessed for the period at issue. A Withdrawal of Petition and Discontinuance of Case

form was executed by Mr. Kovacs on behalf of petitioner on December 11, 1986 which indicated the reduced amount of tax due, plus penalty and interest.

CONCLUSIONS OF LAW

A. Tax Law § 1139(a) states that a refund or credit of any tax, penalty or interest erroneously, illegally or unconstitutionally collected or paid shall be made:

"if application therefor shall be filed with the tax commission . . . in the case of a tax, penalty or interest paid by the applicant to the tax commission, within three years after the date when such amount was payable under this article Such application shall be in such form as the tax commission shall prescribe"

In the present matter, Tokay was required to file the tax returns and pay the tax due for the quarters at issue on December 20, 1981 and March 20, 1982 (Tax Law § 1136[b]; § 1137[a], [e][1]). The latest the tax, penalty and statutory interest became payable was at the time the returns were due. Thus, based on Tax Law § 1139(a)(ii), petitioner had until three years from December 20, 1981 and March 20, 1982 (or until December 20, 1984 and March 20, 1985) to file an application for refund (Matter of Nierenstein, Tax Appeals Tribunal, April 21, 1988). As petitioner's refund claim was filed on June 12, 1990, the application was untimely filed as to the sales tax quarters at issue.

B. The Tax Appeals Tribunal, in Matter of Bleistein (August 11, 1994), noted that Administrative Law Judges may not "moot" issues and directed the analysis of all issues raised by the parties in the administrative hearing. Consequently, the remaining issues will be addressed.

C. Petitioner has not established that duplicate tax payments were made for the two sales and use tax quarters at issue. As it is unquestioned that the Division seized certain checks from petitioner at the mortgage closing which included payment of the sales tax quarters ended November 30, 1981 and February 28, 1982, the issue remains as to whether petitioner paid these two quarters pursuant to the deferred payment agreement. The evidence indicates that it did not.

Check number 1825 was written in the amount of \$2,500.00 and was claimed by Mr. Kovacs to have been a deposit on the deferred payment agreement. However, the deferred

payment agreement indicated that no deposit was made when it was initially entered into, the check contained on the back and written by a tax compliance agent a different deferred payment agreement number and a different business identification number and was paid by the bank of certification on January 10, 1983, seven days prior to the date the parties entered into the deferred payment agreement. All of the above establish that there was no downpayment made on the deferred payment agreement and that this check was not applied to the period at issue.

Check number 1989 was written on March 28, 1983, was certified by MHTC on June 7, 1983 and was date-stamped paid by MHTC on June 27, 1983. On the front of the check is date-stamped the serial number "W1041260", which indicates that the check was applied toward petitioner's withholding tax liabilities. Finally, written on the bottom of the check by a tax compliance agent is the statement that "This check was applied to withholding taxes." The evidence establishes that this check was not applied toward the deferred payment agreement but instead was applied to petitioner's withholding tax liabilities.

Check number 2320 was written on March 14, 1984, was certified by MHTC on the same date and was paid by the same bank on March 23, 1984. This check was written three months after the last check had been applied to the deferred payment agreement and three months after the final payment was to have been made pursuant to the agreement. By the time this check had reached the Division, petitioner had defaulted on the deferred payment agreement and as a result of such default, the agreement had expired. However, the check was certified by the MHTC, was paid to the order of the "NY State Tax Commission", was endorsed by "Chemical Bank, New York State Department of Taxation and Finance, Tax Compliance Bureau Exchange" and was paid by the MHTC. There is no deposit serial number on the check to indicate where the money was applied and no such information was supplied by the Division. Therefore, since the check's funds were received by the Division but not applied to the deferred payment agreement or anywhere else, petitioners would be entitled to a refund or credit of the amount of check number 2320, or \$2,466.97 but for the running of the statute of limitations as discussed in Conclusion of Law "A".

D. The three checks that were applied to the deferred payment agreement (#2026, #2127 and #2227) totalled \$14,801.82. The estimated total due under the deferred payment agreement was \$22,202.76. The checks were applied by the Tax Compliance Division from the oldest assessment to the newest assessment, with the period at issue being the two newest assessments. Only \$85.34 was applied to the quarter ended November 30, 1981 at the conclusion of the application of these three checks. Thus there was no double payment of the period at issue when money was seized by the Division at the closing of the mortgage loan on July 12, 1989.

E. The notice of determination issued by the Division on November 26, 1984 (S841126281M) initially contained the two quarters at issue herein. However, following a former Tax Appeals Bureau Conference, Mr. Kovacs executed on behalf of petitioner a Withdrawal of Petition and Discontinuance of Case form which indicated an amount due that reflected the elimination of the amounts due for the quarters ended November 30, 1981 and February 28, 1982. Hence, double payment of the period at issue did not result from petitioner's satisfaction of this notice of determination.

F. The petition of Tokay Hungarian Restaurant, Inc. is in all respects denied.

DATED: Troy, New York
July 3, 1996

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE