

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
LEON SERGOLD, OFFICER OF : **DECISION**
ALFRIEDMAN KNITTING MACHINERY, INC. :
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 March 1, 1977 through May 31, 1980. :

Petitioner Leon Sergold, Officer of Alfriedman Knitting Machinery, Inc., 5716 South Bayberry Lane, Tamarac, Florida 33319 filed an exception to the determination of the Administrative Law Judge issued on March 15, 1990 with respect to his 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 March 1, 1977 through May 31, 1980 (File No. 800480). Petitioner appeared by Ballon, Stoll & Itzler (Norman R. Berkowitz, Esq. of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation filed a letter in lieu of a brief which supported the determination of the Administrative Law Judge. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the Division of Tax Appeals has jurisdiction to determine the issues raised in the petition.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "2," "3," "4(b)" and "5" which have been modified. We have also made an additional finding of fact. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional finding of fact are set forth below.

Petitioner Leon Sergold acknowledges having been an officer of Alfriedman Knitting Machinery, Inc. ("Alfriedman"), and having signed some of the sales tax returns that were filed by Alfriedman in his capacity as an officer of the corporation. While petitioner does not contest his responsibility for delinquent sales taxes, he does contend that the liability for these taxes should be shared equally with the other officers of the corporation.

We modify the Administrative Law Judge's finding of fact "2" to read as follows:

Alfriedman started in the used knitting machine equipment business in 1977 and ceased operations in 1979. At the onset of the enterprise, Alfriedman's stockholders were Alan Friedman, Leon Sergold and an unidentified third party. Alfriedman's business involved purchasing used knitting machinery, making the necessary repairs if required, and then selling or leasing this equipment to knitting companies, including out-of-state and foreign companies. A typical leasing agreement was for 60 months in duration with an option to purchase the equipment at the expiration of the lease for one dollar.

Alfriedman ceased doing business when Manufacturers Hanover Trust Company, as a secured creditor, seized all of the corporation's equipment for nonpayment of a loan. In the last months of Alfriedman's operations, the corporation could not service its leased equipment which resulted in customers cancelling lease agreements.¹

We modify the Administrative Law Judge's finding of fact "3" to read as follows:

Mr. Sergold failed to produce any evidence to substantiate his claim of grossed-up sales payments and has no recollection of

¹We have modified the Administrative Law Judge's finding of fact "2" by deleting the clause "[h]owever, in spite of Alfriedman's financial problems, the corporation never filed for nor advanced through bankruptcy proceedings." We deleted this clause because it is irrelevant.

the placement of any accounting records or where his former bookkeeper may be reached to verify petitioner's contention.²

A Notice and Demand for Payment of Sales and Use Taxes Due (S810724405Q) was issued on July 24, 1981 against Leon Sergold for the period March 1, 1977 through May 31, 1979 in the amount of \$9,887.44, plus penalty of \$2,471.79 under Tax Law § 1145 and interest of \$4,217.06, for a total amount due of \$16,576.29. (This notice states that petitioner is liable as an officer under Tax Law §§ 1131(1) and 1133(a) for the taxes determined to be due in accordance with Tax Law § 1138. It does not inform the recipient of any rights to a hearing.)

We modify the Administrative Law Judge's finding of fact "4(b)" to read as follows:

This Notice and Demand calculates tax only for the sales tax quarters ending May 31, 1977, August 31, 1977, November 30, 1977 and for the quarters ending August 31, 1978 and May 31, 1979. The Division of Taxation, in its answer to petitioner's petition, affirmatively states that sales tax returns were filed on behalf of Alfriedman for these five quarters (Division's Ans., ¶ 4).

The Division of Taxation introduced sales tax returns for two of the periods covered by the notice, i.e., the periods ending May 31, 1977 and May 31, 1979. The Division also introduced a memorandum from Robert J. Brady to Gary Palmer dated November 2, 1988 with a computer printout attached. The memorandum explained that the computer printout indicated sales tax returns were filed without remittance of tax due for the other three periods covered by the notice, i.e., August 31, 1977, November 30, 1977 and August 31, 1978.³

²We have modified the Administrative Law Judge's finding of fact "3" by eliminating the first and second sentences which read as follows:

"There exists a minimal claim that Alfriedman may have reported its purported leases of equipment as sales and paid taxes on a grossed-up amount of the least payments. There exists no evidence to support this contention."

We have deleted these two sentences because they are irrelevant

³The Administrative Law Judge's original finding of fact "4(b)" read as follows:

"(b) This notice calculates tax only for the sales tax quarters ending May 31, 1977, August 31, 1977, November 30, 1977 and for the quarters ending August 31, 1978 and May 31, 1979. These are quarters for which Alfriedman had filed sales tax returns but had not paid the tax. (It thus does not cover four quarters during the time period for which the notice was issued.)"

We modify the Administrative Law Judge's finding of fact "5" to read as follows:

A Notice of Determination and Demand for Payment of Sales and Use Taxes Due (S810724406Q) was issued on July 24, 1981 against Leon Sergold for sales and use taxes for the periods ending August 31, 1979 and November 30, 1979 in the amount of \$8,366.26, plus penalty under Tax Law § 1145 of \$2,049.73 and interest of \$1,498.73, for a total amount due of \$12,214.72.

A Notice of Determination and Demand for Payment of Sales and Use Taxes Due (S810730400Q) was issued on July 30, 1981 for the period December 1, 1979 through May 31, 1980 in the amount of \$8,366.26, plus penalty of \$1,798.74 under Tax Law § 1145 and interest of \$2,760.85, for a total amount due of \$12,925.85. In its answer to petitioner's petition, the Division states that petitioner failed to file sales tax returns for the four quarters ending August 31, 1979, November 30, 1979, February 29, 1980 and May 31, 1980 (Division's Ans., ¶ 6) and that for these quarters the Division of Taxation estimated sales tax due (Division's Ans., ¶ 7).⁴

We find the following additional fact:

At hearing, the Division of Taxation cancelled both of these notices of determination.

We modified this finding of fact to more accurately reflect the record.

⁴The Administrative Law Judge's original finding of fact "5" read as follows:

"(a) A Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued on the same date against Leon Sergold for sales and use taxes for the period June 1, 1979 through November 30, 1979 in the amount of \$8,366.26, plus penalty under Tax Law § 1145 of \$2,049.73 and interest of \$1,498.73, for a total amount due of \$12,214.72. These amounts were estimated on the basis of 125% of the sales tax reported for the period ending November 30, 1977 (the highest period for which returns were available.)

"(b) A notice of determination was issued on July 30, 1981 for the period December 1, 1979 through May 31, 1980 in the amount of \$8,366.26, plus penalty of \$1,798.74 under Tax Law § 1145 and interest of \$2,760.85, for a total amount due of \$12,925.85. These amounts were estimated on the basis of 125% of the sales tax reported for the period ending November 30, 1977."

We modified this fact to more accurately reflect the record.

OPINION

The Administrative Law Judge determined that petitioner filed returns admitting to tax liability but without remittance of the tax due; that the Division of Taxation (hereinafter the "Division") issued a Notice and Demand for Payment of Sales and Use Taxes Due (S810724405Q) for the periods ending May 31, 1977, August 31, 1977, November 30, 1977 and the periods ending August 31, 1978 and May 31, 1979. The Administrative Law Judge, relying on Matter of Parsons v. State Tax Commn. (34 NY2d 190, 356 NYS2d 593) and Matter of Hall v. New York State Tax Commn. (108 AD2d 488, 489 NYS2d 787), determined that, under the facts in the case, the Division of Tax Appeals was without power to afford petitioner the right to an administrative hearing. The Administrative Law Judge dismissed petitioner's petition with respect to the Notice and Demand. The Administrative Law Judge, relying on Matter of Roncone (State Tax Commn., March 11, 1986), also cancelled the two Notices of Determination as arbitrary and capricious since they merely increased sales from a prior period by 25%.

Petitioner asserts that the Administrative Law Judge erred in concluding that the Division of Tax Appeals was without the power to afford petitioner an administrative hearing. Petitioner, on exception, asserts that the Division has failed to prove that petitioner filed sales tax returns without remittance of tax due for the periods at issue and, thus, petitioner is entitled to a hearing.

The Division agrees with the determination of the Administrative Law Judge that the Division of Tax Appeals is without power to afford petitioner a hearing for the periods covered by the notice and demand. The Division also points out that, at the hearing, it cancelled the notices of determination for the periods ending August 31, 1979 and November 30, 1979, and February 29, 1980 and May 31, 1980, thus, rendering it unnecessary for the Administrative Law Judge to deal with those notices in his determination.

We deal first with the two notices of determination issued by the Division. We agree with the Division that, in fact, it did cancel such notices at hearing (Tr., pp. 6-7), thus, rendering it unnecessary for the Administrative Law Judge to deal with the notices in his determination. The

only issue before this Tribunal then is whether petitioner is entitled to a hearing for the periods ending May 31, 1977, August 31, 1977 and November 30, 1977 and for the periods ending August 31, 1978 and May 31, 1979.

We sustain the determination of the Administrative Law Judge.

Matter of Parsons v. State Tax Commn. (supra) and Matter of Hall v. New York State Tax Commn. (supra) are dispositive of the issue that where correct returns were filed for the period at issue by the corporation, without remittance of tax due, the Division was without power to proceed administratively against the taxpayer through the issuance of a notice of determination and demand for taxes.⁵

Stated differently, the court in Parsons determined that the specificity of the language of former section 1138(a) of the Tax Law, "if a return required by this article is not filed, or if a return when filed is incorrect or insufficient" meant that unless one of these two conditions was met, the former State Tax Commission was without power to proceed administratively against the taxpayer. The court rejected the Commission's argument that its administrative remedy was "fair, practical and prompt" (Matter of Parsons v. State Tax Commn., supra, 356 NYS2d 593, 597). The court pointed out that the Commission had recourse to collect taxes due pursuant to Tax Law § 1141(a) and (b).

In Matter of Stern (Tax Appeals Tribunal, September 1, 1988), this Tribunal concluded that the amendment to Tax Law § 1138(a) had no effect with regard to notices issued prior to the effective date of the amendment.

Here, the Division in its answer affirmatively stated that petitioner filed sales tax returns for the periods at issue reporting sales tax due and that such tax due was not paid. The Division introduced returns for two of the periods. This Division also introduced a memorandum from Robert J. Brady to Gary Palmer dated November 2, 1988 with a computer printout attached. The

⁵Cf., Chapter 65 of the Laws of 1985 which amended section 1138(a) of the Tax Law to provide the Commissioner of Taxation and Finance with such authority.

memorandum explained that the computer printout indicated sales tax returns were filed without remittance of tax due for the other three periods covered by the notice, i.e., August 31, 1977, November 30, 1977 and August 31, 1978. We are troubled by the Division's failure to explain its inability to produce these three returns and, in other circumstances, we might find the evidence offered insufficient to establish the fact that petitioner is not entitled to a hearing. However, here petitioner did not even address, much less refute, the Division's evidence at hearing. Accordingly, we can only find that petitioner filed such returns, that Matter of Parsons v. State Tax Commn. (supra) and Matter of Hall v. New York State Tax Commn. (supra) are applicable and that the Division of Tax Appeals is without power to afford the petitioner a hearing.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Leon Sergold, Officer of Alfriedman Knitting Machinery, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Leon Sergold, Officer of Alfriedman Knitting Machinery, Inc. is dismissed; and

4. The Notice and Demand dated July 24, 1981 is sustained and the notices of determination dated July 24, 1981 and July 30, 1981 are cancelled by the act of the Division of Taxation.

DATED: Troy, New York
May 23, 1991

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner