

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
JOSEPH AND DOLORES BONANNO :
for Redetermination of a Deficiency or for :
Refund of Personal Income Tax and Unincorporated :
Business Tax under Articles 22 and 23 of the :
Tax Law for the Years 1978 through 1981. :

In the Matter of the Petition :
of :
JOSEPH BONANNO :
D/B/A ELWOOD MARKET OF THORNWOOD :
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 May 31, 1984. :

DECISION

In the Matter of the Petition :
of :
ELWOOD MARKET, 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 April 1, 1984 :
through May 31, 1984. :

In the Matter of the Petition :
of :
JOSEPH BONANNO, :
OFFICER OF ELWOOD MARKET, 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 April 1, 1984 :
through May 31, 1984. :

Petitioners Joseph and Dolores Bonanno, 4 Wartburg Place, Valhalla, New York 10595, filed an exception to the determination of the Administrative Law Judge issued on March 1, 1990 with respect to their petition for redetermination of a deficiency or for refund of personal income tax and unincorporated business tax under Articles 22 and 23 of the Tax Law for the years 1978 through 1981 (File Nos. 801185 and 801246).

Petitioner Joseph Bonanno d/b/a Elwood Market of Thornwood, 810 Commerce Street, Thornwood, New York 10594, filed an exception to the determination of the Administrative Law Judge issued on March 1, 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 September 1, 1981 through May 31, 1984 (File No. 803919).

Petitioner Elwood Market, Inc., 810 Commerce Street, Thornwood, New York 10594, filed an exception to the determination of the Administrative Law Judge issued on March 1, 1990 with respect to its 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, 1984 through May 31, 1984 (File No. 804228).

Petitioner Joseph Bonanno, officer of Elwood Market, Inc., 4 Wartburg Place, Valhalla, New York 10595, filed an exception to the determination of the Administrative Law Judge issued on March 1, 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, 1984 through May 31, 1984 (File No. 804229).

Petitioners appeared by Leonard E. Lombardi, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Lawrence A. Newman, Esq., of counsel).

Petitioners filed a brief on exception. The Division submitted a letter stating that it agrees with the Findings of Fact and Conclusions of Law set forth by the Administrative Law Judge. Oral argument was requested but not granted.

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

ISSUE

Whether the Division of Taxation properly determined additional income and unincorporated business taxes due by using figures from a sales tax audit of Elwood Market of Thornwood.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and such facts are stated below.

On March 30, 1984 the Division of Taxation issued notices of deficiency against petitioners Joseph and Dolores Bonanno for personal income tax and unincorporated business tax due for the tax years 1978, 1979, 1980 and 1981. The amounts asserted were as follows:

Notices of Deficiency issued to Joseph and Dolores Bonanno
for Personal Income Taxes

	<u>Deficiency</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
1978	\$ 7,967.90	\$ 398.40	\$ 4,262.98	\$12,629.28
1979	7,270.94	363.55	3,238.20	10,872.69
1980	9,615.38	480.77	3,420.25	13,516.40
1981	<u>10,545.82</u>	<u>527.29</u>	<u>2,400.47</u>	<u>13,473.58</u>
	\$35,400.04	\$1,770.01	\$13,321.90	\$50,491.95

Notice of Deficiency issued to Joseph Bonanno
for Unincorporated Business Tax

	<u>Deficiency</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
1980	\$2,497.80	\$1,136.50 ¹	\$888.47	\$4,522.77

On August 13, 1986, as the result of a field audit, the Division of Taxation issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner Joseph Bonanno d/b/a Elwood Market of Thornwood in the amount of \$21,227.12,

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Total penalty per Statement of Unincorporated Business Tax Audit Changes should be \$1,111.53 resulting in a total assessment of \$4,497.80.

plus penalty and interest of \$7,878.10, for a total amount due of \$29,105.22 for the period September 1, 1981 through May 31, 1984.

On November 12, 1986, two additional notices of determination and demands for payment of sales and use taxes due were issued as the result of the same audit. These notices were issued to Elwood Market, Inc. and Joseph Bonanno, president of Elwood Market, Inc. for the period April 1, 1984 through May 31, 1984 assessing additional tax due of \$1,649.87, plus penalty and interest of \$962.29, for a total of \$2,612.16. The latter notice contained the following explanation:

"You are liable individually and as officer of Elwood Market, Inc. under Sections 1131(1) and 1133 of the Tax Law for the following taxes determined to be due in accordance with Section 1138(a) of the Tax Law."

Petitioner Joseph Bonanno owned and operated Elwood Market of Thornwood ("Elwood"), a grocery store and delicatessen which sold sandwiches and hot meals in addition to groceries, as a sole proprietorship throughout the periods encompassed by the income tax and sales tax audits which are the subject of this hearing, i.e. 1976 through March 31, 1984.

Joseph Bonanno incorporated Elwood Market as of April 1, 1984 and the notices of determination and demands for payment of sales and use taxes due issued to the corporate entity and Mr. Bonanno, as officer, resulted therefrom. He assumed the title of president of the corporate entity and performed all daily operation and management functions as its owner.

The Income Tax Audit

As indicated by above, notices of deficiency for personal income and unincorporated business taxes due for the tax years 1978 through 1981 were issued to Joseph and Dolores Bonanno as a result of an income tax audit. The Division of Taxation issued, on March 30, 1984, a Statement of Personal Income Tax Audit Changes and Statement of Unincorporated Business Tax Audit Changes which offered the following explanation for the adjustments made in those years:

PERSONAL INCOME TAX AUDIT CHANGES

	<u>1978</u>	<u>1979</u>	<u>1980</u>	<u>1981</u>	
Additional business gross receipts	\$52,135.00	\$52,085.00	\$68,417.00	\$72,249.00	
Spoilage	2,175.00	3,200.00	3,000.00	3,500.00	
Tuition deduction disallowed as unsubstantiated	<u> </u>	<u> </u>	<u> </u>	<u>2,000.00</u>	
Net Adjustment	54,310.00	55,285.00	71,417.00	77,749.00	
Taxable Income Previously Stated	<u>18,785.00</u>	<u>17,554.47</u>	<u>12,520.00</u>	<u>15,843.00</u>	
Corrected Taxable Income	73,095.00	72,839.47	83,937.00	93,592.00	
Tax on Corrected Taxable Income IT-250	9,224.25	8,391.93	9,705.03	10,546.12	
Tax Previously Computed	<u>1,256.35</u>	<u>1,120.99</u>	<u>89.65</u>	<u>.30</u>	
Total Additional Tax Due	7,967.90	7,270.94	9,615.38	10,545.82	
Penalties: 685(b) negligence	398.40	363.55	480.77	527.29	
Interest	<u>4,262.98</u>	<u>3,238.20</u>	<u>3,420.25</u>	<u>2,400.47</u>	
Total	\$12,629.28	\$10,872.69	\$13,516.40	\$13,473.58	\$50,491.95

UNINCORPORATED BUSINESS TAX AUDIT CHANGES

	<u>1980</u>
Additional gross receipts	\$68,417.00
Spoilage	3,000.00
Net Income Reported on Federal Schedule C	<u>1,028.00</u>
	72,445.00
Allowance for Taxpayer Services	(5,000.00)
Business Exemption	<u>(5,000.00)</u>
Net Adjustment per Audit	62,445.00
Taxable Business Income Previously Stated	-0-
Corrected Taxable Income	62,445.00
Tax @ 4%	2,497.80
Unincorporated Business Tax Previously Computed	-0-
Total Additional Tax Due	2,497.80
Penalties: 685(a)(1) failure to file 22¼%	562.01
685(a)(2) failure to pay 17%	424.63
685(b) negligence	124.89
Interest	<u>888.47</u>
Total	\$4,522.77 ²

The income tax audit changes and unincorporated business tax audit changes were the result of a prior sales tax audit of Elwood Market of Thornwood for the periods December 1, 1975 through February 29, 1976 and September 1, 1977 through August 31, 1981. The prior audit led the

Division of Taxation to conclude that Elwood Market had unreported sales from its operations. The Division of Taxation proceeded to use the sales tax findings in that audit to reconstruct Schedule C gross sales for the years at issue. Review of the evidence pertaining to the prior sales tax audit indicated that the Division of Taxation utilized a markup technique to reconstruct the sales of petitioner. During the audit it was disclosed that petitioner's purchases were estimated and a markup of 46.49 percent was applied to reconstruct gross sales. In comparing the estimated purchases determined by the prior sales tax audit, the auditor responsible for the income tax audit indicated that the estimated purchases amount arrived at during the sales tax audit was actually a lower figure than purchases reported by Mr. Bonanno on his Federal Schedule C. The auditor then used the same sales tax technique in reconstructing sales, but applied the markup to the Federal purchases reported by petitioner. In addition, review of Schedule C expenses disclosed amounts for spoilage which were disallowed as already having been included in purchases. The only other adjustment was a disallowed tuition deduction which petitioner did not substantiate.

Additional sales were not assessed for unincorporated business tax purposes for years other than 1980 since it was determined during the income tax field audit that years prior to that were beyond the statute of limitations. Thus, unincorporated business tax was asserted only for 1980.

The Sales Tax Audit

The assessments referred to in above resulted from a sales tax field audit of the grocery store and delicatessen owned by petitioner Joseph Bonanno which commenced in November 1984. Records requested and made available during the audit included sales tax returns, Federal and State income tax returns, check disbursements journal, purchase invoices and monthly bank statements. Other records which were requested but not made available to the auditor included register tapes, sales invoices, general ledger and cash receipts journal.

According to the field audit report, Elwood's accountant had prepared worksheets which segregated cash and check purchases by nontaxable items, meats and taxable items. The auditor determined that the records provided were inadequate to verify Elwood's reported taxable sales

and, in view of the lack of available records, the auditor performed a purchase markup test by analyzing the cash and check purchases for October 1981, April 1982 and February 1983 to determine taxable purchases. Invoices were not available for the check purchases; however, the auditor applied her knowledge of petitioners from her own experience to determine the taxable status of such purchases. The auditor made several requests to obtain invoices and arrange an appointment to visit the subject premises but petitioners' accountant did not accommodate her requests.

Based on the analysis of purchases made during the test period, the auditor computed taxable purchases for the audit period of approximately \$305,000.00. It was noted by the auditor in her workpapers that the taxable sales reported for the audit period were approximately \$225,000.00,³ resulting in purchases exceeding reported sales by more than \$80,000.00 for the audit period.

Having determined that the taxable grocery purchases were approximately \$305,000.00, the markup percentage from the prior audit for the periods 1976 through 1981 of 57.2 percent was applied to result in adjusted taxable grocery sales of \$478,402.12. Added to that amount were sandwich sales of \$37,687.50, soup sales of \$2,010.00, sales of rolls of \$3,015.00, and coffee sales of \$28,659.93 for total adjusted taxable sales of \$549,774.55. The amounts added to grocery sales for sandwiches, soups and rolls were based on the prior audit and computed as follows:

$$\begin{array}{r} \text{Sandwiches - 25 per day x 5 days x } \$2.25 = \$281.25 \text{ per week} \\ \text{weeks per audit} \quad \quad \quad \times \quad \underline{134} \\ \text{Sandwich sales per audit} \quad \quad \quad \$37,687.50 \end{array}$$

$$\begin{array}{r} \text{Soups - 8 per day @ 5 days @ } 75\text{¢} = \$30.00 \\ \text{weeks per audit} \quad \quad \quad \times \quad \underline{67} \\ \text{Soup sales per audit} \quad \quad \quad \$2,010.00 \end{array}$$

$$\begin{array}{r} \text{Rolls - 10 per day @ 5 days @ } 45\text{¢} = \$22.50 \\ \text{weeks per audit} \quad \quad \quad \times \quad \underline{134} \end{array}$$

³Although the testimony of Ms. Reichl indicates on page 35 of the transcript that reported taxable sales were \$425,000.00, page 4 of the audit workpapers contained within the Division of Taxation's Exhibit "P" indicates taxable sales reported of \$225,000.00.

Rolls sold per audit \$3,015.00

After adjusted taxable sales of \$549,774.55 were determined, the auditor allowed for reported taxable sales of \$225,416.00. This resulted in additional sales tax of \$18,650.62.

During the sales tax audit, the auditor also examined fixed expense purchase invoices available for the same three-month test period used as the subject of the sales tax audit. She determined that of the total amount of fixed expense purchases tested, 42.44 percent did not have the required tax paid. She applied this percentage to expenses purchased by both cash and check resulting in total fixed expense purchases of \$52,738.39 estimated as having no tax paid. It is from the calculation of tax due on taxable sales and tax due on expenses that the assessment of \$21,227.12, plus penalty and statutory interest, was issued. The auditor noted that in spite of having been incorporated since April 1984, all sales were reported through May 1984 as a sole proprietorship. She initially prepared the audit to reflect only the sole proprietorship; however, upon revision, a separate assessment was made for the final two months encompassing the corporate business period for April and May of 1984, and a Notice of Assessment Review was issued to Joseph Bonanno d/b/a Elwood Market reducing the tax due to \$19,577.25 to reflect taxes due through March 31, 1984 as a result of the change in ownership.

OPINION

In the determination below, the Administrative Law Judge found that as a result of the Appellate Division decision in Matter of Bonanno v. State Tax Commn. (145 AD2d 693, 534 NYS2d 829), which sustained the sales tax audit of petitioner Joseph A. Bonanno d/b/a Elwood Market of Thornwood's performed for the periods February 29, 1976 through November 30, 1980 and February 1, 1981 through August 31, 1981, it was proper and legal to let stand unaltered, the income tax assessment against petitioners, Joseph and Dolores Bonanno, which resulted from said sales tax audit. The Administrative Law Judge further found that petitioners failed to meet their burden to prove that the results of the more recent sales tax audit were in error or that Joseph Bonanno was not a person required to collect tax on behalf of Elwood Market, Inc., the corporate petitioner, and, thus, liable for the unpaid sales and use taxes due.

Petitioners, on exception and in their brief in support of said exception, raise issues only with respect to the first sales tax audit. Specifically, petitioners allege that the Division of Taxation (hereinafter the Division) did not thoroughly review the records for the entire audit period as required, choosing to do only a three month test period audit. Petitioners further request that they be allowed to present before the Court or the Division their records for the periods involved for a full and complete review.

In response, the Division argues that petitioners have failed to carry their burden of proving the notices of deficiency to be incorrect and requests that the determination of the Administrative Law Judge be sustained. The Division further argues that petitioners' brief unduly burdens the record with matters of a prior proceeding which must be disregarded as outside the record.

We find no basis in the record before us for modifying the Administrative Law Judge's determination in any respect. The only issue raised by petitioners on exception, the correctness of the first sales tax audit, has been reviewed and decided against petitioners by the Appellate Division in Matter of Bonanno v. State Tax Commn. (*supra*). Having had the opportunity in the previous proceeding to fully litigate the issue of the validity of the sales tax assessment, petitioners are collaterally estopped from relitigating that issue here (*see, Schuykill Fuel Corp. v. B. & C. Nieberg Realty Corp.*, 250 NY 304). If the sales tax assessment was in error, petitioners' remedy was direct review of the prior decision. Therefore, this Tribunal affirms the determination of the Administrative Law Judge for the reasons stated in said determination.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of petitioners Joseph and Dolores Bonanno, Joseph Bonanno d/b/a Elwood Market of Thornwood, Elwood Market, Inc., and Joseph Bonanno, Officer of Elwood Market, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Joseph and Dolores Bonanno, Joseph Bonanno d/b/a Elwood Market of Thornwood, Elwood Market, Inc., and Joseph Bonanno, Officer of Elwood Market, Inc. is denied; and

4. The Notice of Determination dated August 13, 1986, as revised by the Notice of Assessment Review, the notices of determination dated November 12, 1986 and the notices of deficiency dated March 30, 1984 are sustained.

DATED: Troy, New York
December 13, 1990

/s/John P. Dugan

John P. Dugan
President

/s/Francis R. Koenig

Francis R. Koenig
Commissioner

/s/Maria T. Jones

Maria T. Jones
Commissioner