STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
TOPS, INC.	:	DECISION
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, 1979 through May 31, 1982.	:	

Petitioner, Tops, Inc., 60 Dingens Street, P.O. Box 1027, Buffalo, New York 14240, filed an exception to the determination of the Administrative Law Judge issued on December 1, 1988 which denied 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, 1979 through May 31, 1982 (File No. 801669). Petitioner appeared by Hodgson, Russ, Andrews, Woods & Goodyear (Benjamin M. Zuffranieri, Jr. and Mark S. Klein, Esqs., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division filed a letter in reply to petitioner's brief. At the request of petitioner oral argument was heard on May 23, 1989.

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

ISSUES

I. Whether additional sales taxes are owed by petitioner, Tops, Inc., as a result of the rendering of repair and maintenance services to petitioner by individuals employed by T. A. Buscaglia, Inc., petitioner's sister corporation.

II. Whether assessments for the sales tax quarters ending February 28, 1982 and May 31, 1982 are barred by the statute of limitations because these dates were not expressly stated on the Notice of Determination and Demand for Payment of Sales and Use Taxes Due.

FINDINGS OF FACT

We accept and repeat the facts as determined by the Administrative Law Judge except for findings of fact "6", "7", "8", "9", "19" and "21" which are modified below.

Petitioner, Tops, Inc. ("Tops"), is a wholly-owned and wholly-controlled subsidiary of Niagara Frontier Services, Inc. ("NFS"). Tops owns and operates retail supermarkets in the Buffalo, New York area.

T. A. Buscaglia, Inc. ("TAB") is also a wholly-owned and wholly-controlled subsidiary of NFS. TAB is engaged in new store construction, equipment installation and maintenance of Tops stores and Tops equipment.

On audit, the Division reviewed certain TAB invoices for repair and maintenance work performed in petitioner's stores during the audit period. These invoices charged petitioner for labor and materials in respect of services performed in petitioner's stores. The invoices charged sales tax on the materials set forth thereon, but did not charge sales tax on labor.

The Division was subsequently advised by petitioner that, although all of its repair and maintenance services were recorded on TAB invoices, many of the services in question were actually performed by Tops employees. The Division then determined that, while services provided by Tops employees should not be subject to sales tax, services performed for petitioner by employees of TAB were properly subject to tax.

The Division then determined the deficiency herein by review of TAB invoices representing work performed for petitioner during the audit period.[1] Petitioner also provided the auditor with a list of individuals on its payroll during the audit period. The auditor reviewed the invoices and compared the name of the serviceman listed on each invoice with the payroll list. If the

[1]It should be noted that the Division made a detailed review of the TAB invoices in question for a portion of the audit period, and employed, with petitioner's consent, a computer-assisted sampling of the invoices for the balance of the audit period. It should be further noted that the computation of the deficiency herein is not at issue.

serviceman's name was not on the payroll list, the Division determined that the serviceman was a TAB employee and therefore that his services were properly subject to tax.

We modify findings of fact "6" and "7" of the Administrative Law Judge's determination as follows:

> On October 5, 1984, following the audit described above, the Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due which assessed $83,293.44 in total tax due plus minimum interest.
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> The notice of determination contained a schedule of the deficiencies for the quarterly sales tax periods comprising the audit period. The periods listed on the
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> schedule began with the period ending 3/31/79 and ended with the period ending 5/31/81. The final two periods were incorrectly listed on the notice as the periods ending 2/28/81 and 5/31/81. These two periods should correctly have been listed as 2/28/82 and 5/31/82. The "period designators" listed next to the incorrect dates of 2/28/81 and 5/31/81 were 382 and 482, respectively, which correspond with the correct calendar dates for those periods of 2/28/82 and 5/31/82. Additionally, prior to the issuance of the notice, petitioner had been provided with copies of Division workpapers which listed tax due for the periods ending 2/28/82 and 5/31/82. The audit workpapers indicate in several places that the audit period extended through May 31, 1982.[2]

We modify finding of fact "8" of the Administrative Law Judge's determination as follows:

> As stated previously, both petitioner and TAB were wholly-owned subsidiaries of NFS. Together, the three corporations operated a unitary food service corporation. NFS's function included control of the financial and administrative activities of both petitioner and TAB. NFS provided accounting services for both

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[2]The Administrative Law Judge's findings of fact "6" and "7" originally read as follows:

"6. On October 5, 1984, following the audit described above, the Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due which assessed $83,293.44 in total tax due plus minimum interest for the period March 1, 1979 through May 31, 1982.

"7. The notice of determination listed a schedule of the deficiency for the quarterly sales tax periods comprising the audit period. The final two periods were incorrectly listed on the notice as the periods ended 2/28/81 and 5/31/81. These two periods should correctly have been listed as 2/28/82 and 5/31/82. The "period designators" listed next to the incorrect dates of 2/28/81 and 5/31/81 were 382 and 482, respectively, which correspond with the correct calendar dates of 2/28/82 and 5/31/82. Additionally, prior to the issuance of the notice, petitioner had been provided with copies of Division workpapers which listed tax due for the periods ended 2/28/82 and 5/31/82. The amounts listed as tax due for the last two periods on the notice of determination corresponded with the amounts listed as due on workpapers provided to petitioner for the periods ended 2/28/82 and 5/31/82."

Portions of these findings of fact have been deleted and material has been added to more accurately reflect what was on the notice and in the audit workpapers.

> petitioner and TAB and paid vendors who submitted bills to both subsidiaries. Of the three corporations, only NFS had a cash disbursing checking account. Only NFS had check-writing authority. Additionally, NFS borrowed and invested on behalf of both subsidiaries. Only NFS provided financing to petitioner and TAB. All of Tops' receipts were deposited in NFS's bank accounts. All year-end profits earned by NFS's subsidiaries were transferred to NFS for its benefit.[3]

We modify finding of fact "9" of the Administrative Law Judge's determination to read as follows:

> NFS paid the employees of both petitioner and TAB, although the three corporations each had separate Federal employer identification numbers, and three separate payroll lists were maintained. NFS, on its subsidiaries' behalf, issued W-2 forms to all employees of the three corporations. The name of the employer listed on the W-2 corresponded with the particular payroll on which an employee was listed. An employee could receive W-2s with different corporate names on them if he was transferred or promoted to a different subsidiary or the parent corporation during the tax year.[4]

NFS and its subsidiaries filed combined New York State franchise tax reports and consolidated Federal income tax returns during the period at issue. The three corporations requested permission to file franchise tax reports on a combined basis.

Petitioner and TAB each filed separately for sales tax purposes during the audit period. Petitioner, however, reported TAB's sales tax liability for work performed in noncompany franchise stores on petitioner's returns.

NFS made all decisions regarding capital improvements and investments in petitioner's facilities. All major operating decisions for both petitioner and TAB were made by NFS management.

NFS also exercised detailed control over day-to-day operations of both petitioner and TAB. Neither subsidiary could authorize an expenditure in excess of $1,000.00 without NFS

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[3]The following sentence was added to the Administrative Law Judge's original finding of fact "8" to reflect the record in more detail:

> All of Tops' receipts were deposited in NFS's bank accounts.

[4]The last sentence has been added to the original finding of fact "9" of the Administrative Law Judge's determination to reflect the record in more detail.

approval. NFS leased vehicles used by TAB and Tops service personnel. Also, NFS provided each subsidiary with necessary insurance, including directors' and officers' liability policies and general liability policies.

During the audit period, petitioner's corporate secretary also held that same office with NFS and TAB. In addition, the president and treasurer of petitioner and TAB also held positions with NFS and were on NFS's payroll. The controller of NFS also acted as controller for the subsidiaries, although he formally held that title only with NFS and was paid by NFS.

Petitioner and TAB shared office space on Dingens Street in Buffalo. They also shared telephones, secretaries, two-way radios and receptionists, and used the TAB dispatcher service.

NFS also served a personnel function as individuals on the NFS payroll hired TAB employees. Promotions and advancements of personnel of the three corporations were intermingled among the three corporations depending upon qualifications of applicants and available job opportunities. For example, Tops store managers, who were Tops employees, could be promoted to district managers employed by NFS.

As stated previously, TAB provided maintenance and repair services to petitioner's stores. Generally, the procedure was that a store manager of petitioner called a dispatcher of TAB and described a list of tasks that the manager needed to have done at petitioner's store. Additionally, less urgent work, the "weekly log", was called in to the dispatcher by the manager.

In response to a service request, the serviceman reported to the store manager upon his arrival at the store and was "signed in". The manager then told the serviceman of his primary assignment. Upon completion of the assigned task, the serviceman reported back to the manager. The manager could then assign the serviceman to other tasks, if necessary. If there was no other work for the serviceman, the manager "signed him out" and the serviceman contacted the dispatcher for his next assignment.

We modify finding of fact "19" of the Administrative Law Judge's determination to read as follows:

> Following completion of his assigned tasks, the TAB serviceman submitted an invoice to the Tops store manager

> detailing his labor and the cost of materials, if any. The invoice indicated the number of hours worked and contained an hourly rate which varied on the invoices presented. A total amount due was contained on each invoice consisting of the total labor cost based on the number of hours worked at the specified hourly rate, the total cost for parts, and sales tax on the cost for parts. Entries were then made on the books of each corporation with respect to the submitted invoices.[5]

While in a Tops store, TAB servicemen were subject to all of the same rules and regulations as Tops' other employees, including rules relating to lunch and break times, permissible smoking areas, etc.

We modify finding of fact "21" of the Administrative Law Judge's determination to read as follows:

> When calling the dispatcher for service, the Tops store manager could request a specific individual if he felt that the work required that individual. The dispatcher would attempt to meet the store manager's request. The store manager also had veto power over allowing a particular serviceman to work in his store. The store manager also had the power to send a serviceman home if he disregarded the store's rules or failed to satisfactorily perform his assigned task. A TAB employee could not be fired by a Tops' manager.[6]

As indicated previously, servicemen were on the payroll of either petitioner or TAB. The relationship between the store manager and the servicemen was the same as that described above, whether the particular serviceman was on the Tops or TAB payroll. Often the store manager was unaware of which payroll a serviceman was on.

Store managers were, from time to time, consulted by NFS personnel to evaluate the performance of servicemen who had worked in their stores.

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[5]The Administrative Law Judge's finding of fact "19" originally read as follows:

"19. Following completion of his assigned tasks, the TAB serviceman submitted an invoice to the Tops store manager detailing his labor and the cost of materials, if any. Appropriate accounting entries were then made on the books of each corporation with respect to the submitted invoices."

The finding has been modified to reflect the record in more detail and to eliminate aspects of the Administrative Law Judge's description of the entries which represent conclusions as to these entries, not factual statements.

[6]The last sentence has been added to finding of fact "21" of the Administrative Law Judge's determination to reflect the record in more detail.

In addition to its service function, TAB also was involved in the construction of new stores for NFS and the remodeling of stores for NFS.

OPINION

The Administrative Law Judge held that the Division had properly determined that the services provided to petitioner by TAB servicemen did not fall within the exclusion contained in Tax Law § 1105(c) and that the labor costs for these services were subject to sales tax. In addition, the Administrative Law Judge found that the errors in the notice of determination pertaining to the periods ending February 28, 1982 and May 31, 1982 were not sufficient to invalidate the notice as to those periods.

Petitioner in its exception asserts that the services performed by the TAB servicemen are exempt from taxation under Tax Law § 1105(c) because the TAB servicemen were "special employees" of Tops, or alternatively that Tops and TAB were "alter egos" of NFS, and therefore all work performed by TAB personnel for Tops was really work performed by NFS employees for NFS. Petitioner also asserts that the statute of limitations bars any assessment relating to the periods ending February 28, 1982 and May 31, 1982 because these dates were not expressly stated in the statutory notice.

The Division supports the determination of the Administrative Law Judge, arguing that the petitioner has not shown the existence of a "special employee" relationship and that even if it had, such a showing would be irrelevant to the issue of taxability here. The Division argues that the existence of the two separate corporate entities, Tops and TAB, renders these transactions taxable. With regard to the error in the notice of determination, the Division relies on the analysis of the Administrative Law Judge asserting that the petitioner was always aware of the tax periods at issue.

Tax Law § 1105(c)(5) imposes a sales tax upon the receipts from the sale, except for resale, of the services of "[m]aintaining, servicing or repairing real property." The final paragraph of subdivision (c) provides as follows:

> "Wages, salaries and other compensation paid by an employer to an employee for performing as an employee the services described in

> paragraphs (1) through (5) of this subdivision (c) are not receipts subject to the taxes imposed under such subdivision."

Both sides and the Administrative Law Judge rely on the decision in 107 Delaware Associates et al. v. State Tax Commn. (99 AD2d 29, 472 NYS2d 467, revd on dissenting opn below 64 NY2d 935, 488 NYS2d 634) in support of their positions, claiming that the major issue here is whether the services provided to petitioner by TAB servicemen fall within the above referenced exclusion from sales tax.

In 107 Delaware Associates, the taxpayer was a partnership which owned real property. The real property was serviced by a cleaning and maintenance staff who were the employees of a corporation owned by the partners of 107 Delaware Associates. One of the partners was the president of the corporation. The individual partners were the sole shareholders of the corporation. As part of the real property was used by the corporation, the costs of the cleaning and maintenance were apportioned between the corporation and the partnership based on the square foot occupancy used by each. The cost consisted of the wages and benefits paid to the employees of the corporation performing these services. The Division assessed sales tax on the amount allocated to the partnership. The Third Department annulled the Tax Commission's decision which upheld the Division assessment. Justice Casey dissented in a separate opinion. The majority found that because of the extent of control over the staff exerted by the partnership that "it cannot be said, in fact or in law, that there was no employer/employee relationship . . ." (107 Delaware Associates, supra, 472 NYS2d 467, 469). The Court of Appeals reversed on the dissenting opinion of Justice Casey.

The entire relevant portion of Justice Casey's opinion consists of one paragraph:

> "In my view, there is substantial evidence in the record to support the Tax Commission's finding that petitioner was not entitled to the exclusion provided by section 1105 (subd [c], par [5]) of the Tax Law and, therefore, its determination should be confirmed. The individual partners of petitioner elected to conduct their business in the form of two separate entities, petitioner and Stassett Corporation, with a single maintenance and cleaning staff carried on Stassett's payroll. Petitioner paid Stassett a percentage of the expense of the staff based upon the portion of the building utilized by petitioner. Significantly, Stassett reported the funds received from petitioner as income on its State and federal tax returns, and

> availed itself of the appropriate deductions. Having elected to conduct their businesses under this format, and having reaped the benefits thereof, the individual petitioners [the partners] now seek to avoid any disadvantage arising out of the selected format. There is nothing irrational about the Tax Commission's determination which has the effect of binding the taxpayers to the form of business chosen by them." (Cites omitted.) (Supra, 472 NYS2d 467, 470-471)

The petitioner argues that its case can be distinguished from 107 Delaware Associates because NFS, Tops and TAB did not treat themselves as separate entities as evidenced by the fact that a consolidated return for Federal income tax purposes and a combined report for State franchise tax purposes were filed which included all three entities. With the elimination of intercompany transactions in these reports and returns, petitioner alleges that no income tax benefit was obtained and its situation is therefore unlike that of the parties in 107 Delaware Associates. In addition, petitioner argues that no "special employee" relationship existed in 107 Delaware Associates while the facts here establish such a relationship.

The Administrative Law Judge found that 107 Delaware Associates supports the Division's assessment, reasoning that since petitioner conducted its business using separate entities, as the taxpayers did in 107 Delaware Associates, the petitioner is now bound to treat these transactions as being between separate entities. Its receipt of services from TAB is, therefore, taxable. Apparently agreeing with the petitioner that Justice Casey found that the taxpayer must receive a tax benefit from the form of its business in order for the sales tax liability to attach, the Administrative Law Judge found that the benefit here was whatever benefit the petitioner and its related corporations received by its election to file franchise tax reports on a combined basis. The Administrative Law Judge also found that in holding the parties to the form of their business structure, Justice Casey was rejecting the "special employee" determination reached in the majority opinion.

The Division agrees with the Administrative Law Judge that the existence of a "special employee" relationship is irrelevant but that in any case, it has shown that there was no "special employee" relationship here. The Division also argues that Justice Casey's opinion does not

require that a tax benefit be realized for the entities to be bound by the business form chosen and for the Division to treat them as separate entities for sales tax purposes.

We uphold the result reached by the Administrative Law Judge, however, for reasons set forth below, we disagree in part with his reasoning. We agree that the opinion in 107 Delaware Associates controls our decision here.

We deal first with our conclusion that petitioner is not entitled to the exclusion in Tax Law § 1105(c) for wages paid to employees under any of the theories advanced by it.

Petitioner cannot (and does not) argue that the TAB servicemen were general employees of Tops. Instead, petitioner seeks to obtain the protection of the exclusion by arguing that the concept of "special employees" should be applied to the sales tax area. Under this theory, which has been articulated in some negligence and workers compensation cases, the exercise of a sufficient degree of direction and control by one entity over the employees of another may lead to the conclusion that the employees are "special employees" and that a employee/employer relationship exists for the purposes at issue in those cases (Brooks v. Chemical Leaman Tank Lines, Inc., 71 AD2d 405, 422 NYS2d 695; Irwin v. Klein, 271 NY 477 [1936]; Stone v. Bigley Bros, 285 App Div 457, 137 NYS2d 924, affd 309 NY 132).

We find that the concept of "special employees" is not applicable to the sales tax for the purpose of determining eligibility for the exclusion in § 1105(c). This conclusion is supported by 107 Delaware Associates. The Tax Commission decision in 107 Delaware Associates does not discuss the "special employee" concept. Instead it concludes that the petitioner has not shown the existence of an employee/employer relationship. The majority opinion in the Third Department introduced the concept of "special employee" and held that the Tax Commission was wrong to find no employee/employer relationship when the facts supported the existence of a "special employee" relationship. Justice Casey in his dissent finds substantial evidence to support the Tax Commission's decision. By reversing based on Justice Casey's dissent, the Court of Appeals appears to have rejected the Third Department's application of the "special employee" concept to the sales tax.

Petitioner has also argued that because of NFS's dominance over the affairs of TAB and Tops, the separate corporate structures should be ignored and the work performed for Tops be treated as work performed by NFS personnel for NFS. The exclusion under § 1105(c) would then be applicable.

We find that for the purpose of sales tax liability petitioner is bound by the form it has chosen (107 Delaware Associates, supra; Greco Bros. v. Chu, 113 AD2d 622, 497 NYS2d 206). We do not read Justice Casey's opinion as requiring a showing that the petitioner must have received a separate "tax" benefit in order for the taxpayer to be bound by the form it has chosen. Thus, we find that the Division need not show that the petitioner received a benefit of any kind, where as here, "[i]n determining the applicability of an exclusion, it is the form of the transaction, not the substance, which controls . . . ." (Greco, supra, 497 NYS2d 206, 208.)

We uphold the determination of the Administrative Law Judge with regard to the issue of the error in the notice of determination and find that the periods ending February 28, 1982 and May 31, 1982 were properly assessed. The audit report received by the petitioner contained several indications that the audit period extended to May 31, 1982 and that these two quarters were included. The petitioner has not indicated that it was harmed by the mistake in the notice, or even that it was unaware of the periods in question. Under these circumstances, although we deplore the lack of care in the preparation of the notice, we do not regard the error as fatal to the assessment for these periods in this case (Pepsico, Inc. v. Bouchard, 102 AD2d 1000, 477 NYS2d 892; City Linen and Towel Supply Co, Inc., Tax Appeals Tribunal, March 2, 1989; Randall J. Kadish and Kahina, Inc., Tax Appeals Tribunal, January 12, 1989; Sanderling, Inc. v. Commr., 66 T.C. 743; Scofield Est., et al. v. Commr., 25 T.C. 774; Fernandez v. Commr., 39 T.C. Memo 569).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner, Tops, Inc., is in all respects denied;
2. The determination of the Administrative Law Judge is in all respects affirmed;
3. The petition of Tops, Inc. is in all respects denied; and

4. The notice of determination issued on October 5, 1984 is sustained.

DATED: Troy, New York
November 22, 1989

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

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

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