STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
S-3950 McKINLEY PARKWAY, 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 December 1, 1982 through August 31, 1985.	:	

Petitioner, S-3950 McKinley Parkway, Inc. , S-3950 McKinley Parkway, Blasdell, New York 14219, filed an exception to the determination of the Administrative Law Judge issued on June 9, 1988 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 December 1, 1982 through August 31, 1985 (File No. 804092). Petitioner appeared by Malcolm D. Brutman, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

Neither the petitioner nor the Division filed a brief on exception. Oral argument, at the petitioner's request, was heard on September 6, 1988.

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

ISSUE

Whether the Division properly determined that the petitioner owes sales tax on payments made under lease agreements with RCA in view of prior litigation between the petitioner and RCA, to which the Division was not a party.

FINDINGS OF FACT

We find the facts as stated in the determination of the Administrative Law Judge and such facts are incorporated, unmodified, herein by this reference. These facts are summarized below.

On September 12, 1986, following an audit, the Division of Taxation issued to petitioner, S-3950 McKinley Parkway, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period December 1, 1982 through August 31, 1985 which assessed tax due of $4,662.15, plus penalty and interest.

The deficiency herein consists of two components. The first amounts to $1,582.91 and was determined by the Division from a comparison of taxable sales per petitioner's books with taxable sales per its sales tax returns with respect to petitioner's fiscal year ended March 31, 1985. Petitioner did not dispute this component of the deficiency.

The second component of the deficiency herein, which is disputed by petitioner, was determined by the Division following a review of certain payments made by petitioner to RCA Service Corporation ("RCA") pursuant to the terms of two lease agreements entered into by and between McKinley Park Inn, predecessor to petitioner, and RCA in 1977. Petitioner assumed its predecessor's obligations under the lease agreement. On audit, the Division determined that sales tax was properly payable on such lease payments and that such sales tax had not been paid. The Division then totaled payments made by petitioner pursuant to the leases and calculated sales tax due from that total. Sales tax determined due as a result of the foregoing analysis was $3,079.24.

Petitioner owns and operates a business known as "McKinley Park Inn," a motel, restaurant and bar. The same individual, Victor Liberatore, is president of petitioner and was a partner in the predecessor partnership. In 1977, petitioner's predecessor, McKinley Park Inn, a partnership, entered into two lease agreements with RCA Service Company. The first lease agreement, dated July 7, 1977, provided for the lease of telephone equipment for use in petitioner's business operation. This lease had a term of 120 months and listed a rental per month of $746.30.[1] The same parties (McKinley Park Inn and RCA) also executed a lease agreement dated September 19, 1977 which provided for the lease of television sets and a music/paging system. The term of this lease was 84 months and the Agreement called for a "Rental per Month" of $851.00.

Both of the aforementioned lease agreements were standard-form agreements used by RCA. Each set forth a "Rental per Month" amount as noted above. Additionally, each agreement included the following provision:

> "4. Rentals. Lessee shall pay to RCA during the term of this Lease_____equal successive monthly rental payments in the amount specified below. The first rental payment for each location shall be due the day of completion of the installation of the equipment. The aggregate rental of this Lease shall be_____Payments hereunder will be made to RCA at Cherry Hill, New Jersey or at such other address as RCA may notify Lessee in writing." (The respective term and aggregate rental were inserted in the blank spaces.)

Each agreement also stated that the agreement was subject to provisions printed on the reverse side of the agreement. The photocopies of the agreements introduced into evidence did

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[1]The parties to this lease also executed an "Equipment Reconciliation Amendment" to said lease in December 1977. This amendment added to and removed from the schedule of leased equipment certain equipment and had the effect of increasing the "Rental per Month" for this lease to $752.00.

not include this reverse side. Such other provisions were thus not introduced into the record in this matter.

The agreements contained no definition of "rental" and no explicit indication as to whether sales tax was to be included in the monthly rental amount set forth on each agreement.

Neither of the portions of the agreements introduced into the record made any explicit reference to sales tax.

Following the execution of the agreements, RCA billed petitioner for the amount listed on the agreements as rental per month, and, in addition, billed sales tax based on the monthly rental. Petitioner refused to pay the amount billed as sales tax claiming that the rental per month as set forth in the agreements included any and all sales tax.

RCA subsequently brought an action in the Town Court of Hamburg, New York, to collect the amounts listed on the bills as sales tax. The matter was heard before Justice Thomas H. Rosinski on April 23, 1979, and in his written decision dated May 7, 1979, he dismissed the cause of action "on the merits after trial." His written judgment did not state the facts upon which it was based. RCA did not appeal Justice Rosinski's decision.

RCA subsequently moved in the Supreme Court, Erie County, to replevy the leased equipment for nonpayment of the sales tax amounts. In an opinion dated May 11, 1981, Justice Joseph J. Ricotta ruled that the prior decision of Justice Rosinski was "the law of this case with reference to sales tax" and that RCA was "not entitled to any sales tax pursuant to said agreements as aforesaid." Pursuant to an order of Justice Joseph S. Mattina, dated July 16, 1981, RCA's complaint was dismissed.

During the periods prior to and subsequent to the above-noted actions petitioner refused to pay amounts listed as sales tax on the RCA billing. Subsequent to the conclusion of the Supreme Court action, in September 1986, RCA revised its billings so as to accede to petitioner's position in the dispute; that is, the billings set forth a monthly rental amount plus a sales tax figure with the total amount due approximately equal to the amounts set forth in the lease agreements as rental per month.

OPINION

The Administrative Law Judge found that sales tax was properly payable on the entire amount listed in the lease agreements as "rental per month." The Administrative Law Judge reached this conclusion by finding that the amount set forth on the leases as "rental per month" constituted "receipts" as defined by Tax Law section 1101(b)(3). The Administrative Law Judge rejected petitioner's argument that such "rental per month" included both receipts for lease of equipment and sales tax on those receipts. The Administrative Law Judge also concluded that the weight to be given petitioner's success in two different state courts rested solely on principles of res judicata or collateral estoppel, both inapplicable here since the Division was not a party to the prior actions. We sustain the Administrative Law Judge.

The petitioner asserts that it has already paid the applicable sales tax since its agreement with RCA was that the monthly payments under the lease agreements included a sum for the payment of sales tax. Petitioner attempts to substantiate its position with evidence that it successfully defended two lawsuits brought by RCA for the purpose of collecting sales tax due on the entire amount listed in the agreements as rental per month. Petitioner argues that, between it and RCA, the prior litigation affected a reformation of the leases to conform to the

parties' intent that the monthly payment amount included an amount for the payment of sales tax. Petitioner further argues that the Division, having already collected the tax from RCA, should be estopped from collecting the tax from the petitioner as an attempt to collect sales tax twice on the same receipts.

The Division argues that the lease itself contains no "agreement" between the parties that the rental payments include sales tax. Further, that since it was not a party to the court action between petitioner and RCA, it is not bound by the decisions in those cases.

We first address the lease arrangement itself.

The petitioner concedes that the rental payments under the lease agreements with RCA constitute receipts and are subject to sales tax (see, Tax Law §§ 1105[a]; 1101[b][5][6]). It is also uncontroverted that the petitioner did not pay over to the vendor any amount over the monthly rental as listed in the lease agreements. Therefore, the propriety of the assessment hinges on whether the Division properly determined that the receipts subject to sales tax are the amount listed in the lease agreements as "rental per month" and reflected in the monthly billings received by the petitioner from RCA during the audit period.

Since a lease transaction is taxed on each rental payment (Matter of Petrolane Gas Service, Inc. v. State Tax Commn., 79 AD2d 1043 [3d Dept 1981]), the parties are free to agree on the consideration, and thus the receipts subject to sales tax, for each rental period. In this case, the parties agreed by way of lease agreements that the consideration would be the same each month. Therefore, in the absence of some expression to the contrary, the Division could properly look to the fixed sum in the lease agreements as the taxable receipts for each rental period. We agree with the Administrative Law Judge that there was nothing in the lease agreement itself to

indicate that the petitioner and RCA agreed that lease payments included sales tax. The petitioner's argument that there was such an agreement is undermined by the fact that the billings received by the petitioner during the audit period conform to the "rental per month" clause in the lease agreements. The petitioner's assertions that it was improperly billed by RCA are unsubstantiated and do not convince us that there was an agreement between the parties to include sales tax in the monthly rental payment. Quite apart from demonstrating that the billings did not conform to the lease agreements, the evidence submitted by the petitioner at the hearing establishes the exact opposite - that the amount billed the petitioner each rental period was the amount agreed to between the parties in the lease agreement.

We also find unpersuasive evidence that RCA changed its billing procedure after the audit period so that the combination of monthly rental and separately stated sales tax exactly equalled the monthly amount set forth in the lease agreements. The petitioner admits in its exception that the change in billing procedure was brought about by adverse determinations of the courts and that the earlier billings, those relevant for the audit period, were not changed to reflect such determinations. Considering the circumstances which motivated the vendor to change its billing procedure, we remain unconvinced that the vendor acknowledged that the billings during the audit period were in error and did not reflect the agreement between the parties. Therefore, we hold that taking the lease agreements and the billings together, the Division properly determined that the petitioner owes sales tax on rental payments made under lease agreements.

We next address the significance of prior state court litigation instituted by the vendor, RCA, against the petitioner which the Administrative Law Judge found to be in the nature of actions for the collection or nonpayment of sales tax. The Administrative Law Judge concluded

that the weight to be given petitioner's success in two different state courts rested solely on principals of res judicata or collateral estoppel, both inapplicable here since the Division was not a party to the prior actions. The petitioner counters that the significance to attach to the prior litigation rests not on doctrines of res judicata or collateral estoppel but rather as a state court's interpretation binding upon the parties that sales tax was included in the monthly rent under the lease agreements. For reasons stated below, we affirm the Administrative Law Judge.

We note first that we do not agree with the decision of the Administrative Law Judge to the extent it holds that no weight should be given in administrative tax proceedings to state court judgments in actions where the State Tax Commission was not made a party. The petitioner correctly points out that principles of res judicata and collateral estoppel do not render completely useless in administrative proceedings a judgment of a State court which settles a purely private dispute between the parties. Here, even though the Division may not be bound by the outcome of the prior litigation, the orders and judgment from the prior litigation may have independent evidentiary significance bearing upon whether, in fact, the parties agreed in the lease agreements to include sales tax as part of the monthly rental.

We first address the question whether the Division is estopped from asserting the sales tax deficiency because the petitioner successfully defended against efforts by RCA, the vendor, initiated in the State courts to collect the same tax. The problem for the petitioner here is more than just the principle that judgments bind only those that were parties to the action. We find that the prior litigation between RCA and the petitioner, in the form of actions commenced for the purpose of collecting sales tax, should never have proceeded to judgment. By statute, the Tax Commission was a necessary party to the prior actions instituted by RCA which the

Administrative Law Judge found to be actions to collect sales tax, a point not disputed by the petitioner in these proceedings.

Tax Law section 1133(a) provides:

> "Except as otherwise provided in section eleven hundred thirty-seven, every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article. Any such person shall have the same right in respect to collecting the tax from his customer or in respect to nonpayment of the tax by the customer as if the tax were a part of the purchase price of the property or service, amusement charge or rent, as the case may be, and payable at the same time; provided, however, that the tax commission shall be joined as a party in any action or proceeding brought to collect the tax." (Emphasis added.)

We find then that as a matter of substantive law and a condition to bringing suit against the petitioner for the collection of sales tax, RCA was required to join the Tax Commission as a party to the actions (see, Stuyvesant Fuel Service Corp. v. Scola, 117 Misc 2d 944 [1982]).

The reasoning behind mandatory joinder of the Tax Commission in vendor initiated suits lies in the statutory framework for sales tax collection. The Tax Commission is given the right to collect the tax only once, from either the vendor or the purchaser (Tax Law §§ 1132[a], 1133[b]; Matter of Fifth Avenue Bldg. Co. v. Joseph, 207 NY 278 [1948]).If the vendor fails to collect or the purchaser fails to pay over the sales tax, both vendor and purchaser are obligated to the Tax Commission for the tax. We believe the legislative Intent behind joinder in Tax Law section 1133(a) was twofold. First, the Legislature sought to avoid the delay in revenue collection brought about by duplicity of actions or proceedings to collect the same tax. Second the Legislature sought to ensure that before a court rendered a decision in this type of action, it would have the benefit of the tax expertise of the Commission, who is after all the real party in interest. This is obviously not a situation where the interests of a nonparty, the Tax

Commission, although affected by a judgment, are nevertheless adequately protected and any possible prejudice is avoided (see, Hotel Wallorf-Astoria Corp.v. State Tax Comm., 86 AD2d 330 [3d Dept 1982]). We do not believe that we are unduly burdening the petitioner for RCA's failure to join the Tax Commission in the prior actions since it was within the petititioner's power to join the Tax commission on its own motion (CPLR 1001) or, in the alternative, seek dismissal of the action (CPLR §§, 1003 3211[a][10]). We hold then that the Division is not bound by the outcome of the judicial action, commenced by RCA against the purchaser for the purpose of collecting sales tax, when the Division was not joined as a party to the action.

We now address the question whether the petitioner by submitting at the hearing the orders and judgment from the prior litigation has proven the existence of an agreemnt to include sales tax, as part of the monthly rental payments even if the orders and judgment are not binding on the Division. We find that the petitioner has not proven its case for the fundamental reason that the proof adduced at the hearing does not establish that a State court ever interpreted the lease agreements to include an agreement between the parties that the sales tax was included in the monthly rental payment. The petitioner's documentary and testimonial evidence establish only that an action brought by RCA to collect monies due and owing for sales tax was dismissed on the merits after trial and thereby became res judicata to any further action to collect sales tax.

The petitioner argues that it was successful in the first action before the Honorable Thomas H. Rosinski because the Court interpreted the lease agreements to include an agreement on the sales tax question. To sustain the petitioners argument requires a factual finding which we are unable to make on the record before us. We find the record

conspicuously deficient in evidence that would help explain the exact issues before Justice Rosinski and the basis of his decision to dismiss the action. Such evidence could take the form of decisional memoranda, the transcript of the trial or even the actual pleadings. In any event, we are not persuaded by the judgment alone (see, petitioner's exhibit #4) and the petitioner's bare assertions for the proposition that Justice Rosinski looked at the lease agreements, found an agreement between the parties to include sales tax as part of the monthly rental, and thereby dismissed the suit. Moreover, the testimony of Joseph E. Orsini, the memorandum decision of Justice Joseph J. Ricotta, and the order of Justice Joseph S. Mattina cannot compensate for the deficiency of proof surrounding the first action. In fact, reading the memorandum decision of Justice Ricotta (petitioner's exhibit #6), we believe more in the way of documentation of the action before Justice Rosinski exists, specifically a written decision dated May 7, 1979 and pleadings. We find then that the evidence before us fails to establish that Justice Rosinski, or any other court, construed the lease agreements to include an agreement to sales tax. This failure of proof is fatal to the petitioner since the propriety of the Division's assessment is unrebutted by any persuasive evidence.

Lastly, we cannot address the petitioner's assertion that the Division has already collected tax on these receipts from RCA. There is absolutely no evidence in the record before us to indicate that any portion of the tax has already been collected from RCA.

Accordingly it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner, S-3950 McKinley Parkway, Inc., is denied;

2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of S-3950 McKinley Parkway, Inc. is denied and the Notice

of Determination dated September 12, 1986 is sustained.

Dated: Albany, New York
MAR 02, 1989

John P. Dugan
President

Francis R. Koenig
Commissioner