

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
ETHEL RICHARDS : DECISION
for Revision of a Determination or for Refund of Sales and : DTA No. 805365
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period September 1, 1978 through August 31, 1984. :

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on January 10, 1991 with respect to the petition of Ethel Richards, 29-15 Butler Street, East Elmhurst, New York 11369 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, 1978 through August 31, 1984. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioner filed a brief in opposition. Oral argument, requested by the Division of Taxation, was denied.

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

ISSUES

I. Whether the notice of determination for the period September 1, 1978 through February 28, 1982 (S850330461C) was timely for the quarters ending February 28, 1981 and May 31, 1981.

II. Whether certain purchases made during the period March 1, 1982 through August 31, 1984 and classified by the corporation as "buildings and building improvements" are subject to a sales tax.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "3," "4," "6(b)," "6(c)," "6(d)" and "8(c)" which have been modified and finding of fact "5(b)" which we have deleted in view of our modification to finding of fact "6(c)".¹ We have also made additional findings of fact. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional findings of fact are set forth below.

Petitioner, Ethel Richards, was the secretary of Berg Chemical Co., Inc.

Mrs. Richards, at least at times, signed checks submitted in payment of sales and use taxes due from Berg Chemical.

Berg Chemical Co., Inc. was located at 920 East 132nd Street, Bronx, New York. It sold chemicals and chemical solutions at wholesale and retail. Its president was James Richards of East Elmhurst, New York, the husband of petitioner.

Berg Chemical filed sales tax returns for all quarters within the audit period. All pertinent records were available during the audit.

Berg Chemical filed under Chapter 11 of the Bankruptcy Code on October 20, 1982. It went into Chapter 7 bankruptcy in October 1984. A trustee was appointed on October 29, 1984. The trustee's report indicates that there was a very small distribution to general unsecured creditors.

A notice of determination of sales taxes due was mailed to Berg Chemical on December 5, 1984.

¹Finding of fact "5(b)" stated there was no information in the record regarding when returns for the periods ending February 28, 1981 and May 31, 1981 were originally filed. Our modification to finding of fact "6(b)" states that the returns for these periods were introduced into evidence at the hearing by the Division; that such returns indicate they were signed by petitioner on May 30, 1982 and received by the Division of Taxation on June 4, 1982.

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

By letter dated June 12, 1980, Berg Chemical Co., Inc. was authorized by the New York City Industrial Development Agency to act as its agent to acquire, construct and install a warehousing and distribution facility. The letter provided:

"[b]y this letter, the New York City Industrial Development Agency hereby serves notice to you as follows:

"1. The New York City Industrial Development Agency (Agency) constitutes a quasi-governmental corporation; and therefore, an exempt organization within the terms of New York State Tax Law Section 1116(a) (1) which organization is exempt from the imposition of any sales and use tax, having no exempt organization identification number.

"2. Pursuant to resolutions adopted by the Agency on January 11, 1977 and October 11, 1977, the Agency has authorized Berg Chemical Co. Inc (Company) as its agent to acquire, construct and install a warehousing and distribution facility to be located at 920 East 132 Street Bronx, consisting of the acquisition of real property and interests therein and buildings thereon and the making of improvements and renovations thereto, all for the warehousing and distribution of industrial chemicals.

"3. In connection with such resolutions and pursuant to the authority therein granted, the Agency hereby authorizes the Company, as agent of the Agency, to purchase such items as are necessary to complete the acquisition, construction and installation of the Project, provided however, that such items will be incorporated in and become an integral component part of the above described industrial and commercial facility owned by the Agency, and therefore exempt from the imposition of any sales and use tax, pursuant to New York State Tax Law Section 1115(a) (15).

"4. In order to be exempt from sales tax, where appropriate, each contract of purchase shall include the following language:

"[t]his contract is being entered into by Berg Chemical Co, Inc as agent for and on behalf of the New York City Industrial Development Agency, in connection with the acquisition, construction and installation by the Agency of a warehousing and distribution facility to be located at 920 East 132 Street, Bronx consisting of the acquisition of real property and interests therein and buildings thereon and the making of improvements and renovations thereto, all for the warehousing and distribution of industrial chemicals. Provided, however, that the liability of the Agency under this contract shall be limited to such proceeds of bonds of the Agency, if, as, when and to the extent issued, as may be used to finance the cost of such facility. In the event that the bonds of the Agency are not issued, or the proceeds of such bonds, if issued, are insufficient to pay all of such costs, the Agency shall not be liable, either directly or indirectly, or contingently upon this contract in any manner and to any extent whatsoever, and Berg Chemical Company, Inc shall be the sole party liable hereunder. By execution or acceptance and delivery of this contract, (Vendor) hereby accepts the terms and conditions set forth in this paragraph.

"5. The New York City Industrial Development Agency's Project Supervisor for the Company shall submit a signed affidavit certifying that the purchases for which this sales tax exemption document is issued constitute materials and/or fixtures to be incorporated into the physical structure of the above cited New York City Industrial Development Agency financed facility. The Project Supervisor shall thereafter report to the New York City Industrial Development Agency on the fifteenth of every subsequent month as to the purchase of materials and fixtures made in regard to the above cited facility until the completion of purchases. The report format (attached) includes the name and trade of the vendor, the item purchased, with cost per item and total cost, and date of the reason for the purchase.

"Thank you for your cooperation."²

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

During the audit period, Berg Chemical made purchases it labeled as "recurring expenses" of \$36,633.00 (\$8,343.00 of these were incurred after February 28, 1982). It also made purchases it described as fixed assets in the amount of \$127,216.43 (\$8,039.94 of these purchases occurred after February 28, 1982). The Division conducted a test period audit for recurring expenses which was agreed to by petitioner. The Division conducted a detailed audit of all purchase invoices for items described as fixed assets by petitioner.³

Although consents extending the period of limitation were signed for the taxable periods September 1, 1978 through August 31, 1981, none of such consents extended the limitations period beyond December 20, 1984. No determination of tax due was issued on or before that date.

Three notices of determination and demands for payment of sales and use taxes due were issued to petitioner on April 5, 1985.

We modify findings of fact "6(b)," "6(c)," and "6(d)" of the Administrative Law Judge's determination to read as follows:

²Finding of fact "3" of the Administrative Law Judge's determination read as follows:

"Berg Chemical Co., Inc. was authorized by the New York City Industrial Development Agency to act as its agent to purchase such items as were necessary to complete the acquisition, construction and installation of a warehouse and distribution facility ("the Project") provided, according to the contract, that the items purchased would be incorporated in and become an integral component part of the Project so as to be exempt from sales and use tax pursuant to Tax Law § 1115(a)(15)."

We have modified this finding of fact to more fully reflect the relationship between petitioner and the New York City IDA.

³We modified finding of fact "4" of the Administrative Law Judge's determination by adding the last two sentences to indicate that the Division performed a test period audit on recurring expenses of petitioner and a detailed audit on purchases of petitioner's fixed assets.

One determination (S850330460C) was for the sales tax quarter ending November 30, 1980 and is in the amount of \$1,434.22, plus penalty of \$358.56 and interest of \$754.70, for a total of \$2,547.48. The Division of Taxation (hereinafter the "Division") raised the timeliness of the notice at hearing and, in a post hearing letter to the Administrative Law Judge, dated August 2, 1989, conceded the untimeliness of the notice.

A second notice (S850330461C) was for the period September 1, 1978 through February 28, 1982 and is in the amount of \$7,666.96, plus penalty of \$1,916.72 and interest of \$4,244.02, for a total of \$13,827.70. (The quarter ending November 30, 1980, the subject of the first determination, is included here showing tax due of \$215.28, penalty of \$53.82 and interest of \$113.29). The Division raised the timeliness of the notice at hearing and, in a post hearing letter to the Administrative Law Judge, dated August 2, 1989, conceded the untimeliness of the notice for all but the two quarters ending February 28, 1981 and May 31, 1981. The Division introduced into evidence at the hearing sales tax returns for these two periods signed by petitioner on May 30, 1982. Petitioner testified that, in fact, she did sign the returns. The assessments for these two periods are \$174.88 tax, \$43.72 penalty and \$86.26 interest and \$128.32 tax, \$32.08 penalty and \$59.83 interest, respectively.

A third determination (S850330462C) is for the period March 1, 1982 through August 31, 1984, in the amount of \$1,351.55, plus penalty of \$310.24 and interest of \$368.17, for a total of \$2,029.96. (The second and third assessments together amount to \$9,018.51, plus penalty of \$2,226.96 and interest of \$4,612.19, for a total of \$15,857.66). This notice indicates that the tax was estimated and contains the same statement as the prior two notices, i.e., that because returns were not filed, the amounts were based on average taxable sales as reported on previous returns filed.⁴

⁴Findings of fact "6(b)," "6(c)," and "6(d)" of the Administrative Law Judge's determination read as follows:

"(b) One determination was for the sales tax quarter ending November 30, 1980 and is in the amount of \$1,434.22, plus penalty of \$358.56 and interest of \$754.70, for a total of \$2,547.48. The basis of the assessment is not explained in the record.

"(c) A second notice was for the period September 1, 1978 through February 28, 1982 and is in the amount of \$7,666.96, plus penalty of \$1,916.72 and interest of \$4,244.02, for a total of \$13,827.70. (The quarter ending November 30, 1980, the subject of the first determination, is included here showing tax due of \$215.28, penalty of \$53.82 and interest of \$113.29.)

"(d) A third determination is for the period March 1, 1982 through

A conciliation order was issued on December 18, 1987 sustaining the determinations.

For the period March 1, 1982 through August 31, 1984 the assessment of tax due is \$1,351.55, of which \$688.26 is attributable to "recurring expenses" and \$663.29 is attributable to fixed assets.

Petitioner does not contest the tax on recurring expenses.

We modify finding of fact "8(c)" of the Administrative Law Judge's determination to read as follows:

The Division commenced an audit of petitioner on October 30, 1981. The Division conducted an audit on fixed assets which involved an examination of each asset purchased by petitioner. The tax on fixed assets was computed at a rate of 8¼% on total purchases of fixed assets of \$8,039.94 found by the auditor to be in account 1230, entitled "buildings and building improvements." These purchases were not otherwise identified, but petitioner believes they were necessary capital improvements. Other items posted to this account were for a fire sprinkler system. The auditor segregated these purchases from those related to the IDA, which the auditor determined to be exempt from tax. Periodically, during the course of the audit, the auditor provided petitioner with his analysis of which purchases were taxable and which, in his opinion, were not taxable. At the conclusion of the audit, all purchase invoices examined in the audit were returned to petitioner.⁵

August 31, 1984, in the amount of \$1,351.55, plus penalty of \$310.24 and interest of \$368.17, for a total of \$2,029.96. (The second and third assessments together amount to \$9,018.51, plus penalty of \$2,226.96 and interest of \$4,612.19, for a total of \$15,857.66.)"

We have modified these findings of fact to more accurately reflect the record.

⁵Finding of fact "8(c)" of the Administrative Law Judge's determination read as follows:

"The tax on fixed assets was computed at a rate of 8¼% on total purchases of fixed assets of \$8,039.94 found by the auditor to be in account 1230 entitled 'buildings and building improvements.' These purchases were not otherwise identified, but petitioner believes they were necessary capital improvements. Other items posted to this account were for a fire sprinkler system."

We modified this finding of fact in order to more fully reflect the record.

We find the following additional facts.

The hearing in this case was held on July 13, 1989. At the hearing, petitioner "showed" the Administrative Law Judge a large book. Upon being shown the book, the Administrative Law Judge stated: "Can we stipulate to something here? Obviously, I don't want to take this into evidence." Petitioner referred the Administrative Law Judge and the attorney for the Division to two sections in the book relating to tax exemptions. The book was not offered into evidence by petitioner. By letter dated July 20, 1989 to petitioner, the Administrative Law Judge indicated as follows:

"I am not satisfied with the hearing of July 13, 1989 and I feel I must resume the hearing at a new date. The major reason for this is that I have reviewed the statutory section that you showed me and I find that there are facts that remain to be developed to have a complete record. In particular, I would like to see that very large volume you exhibited on July 13 to see if it contains relevant contracts or other items. I would also like to give you a chance to state as a witness some of the things you were stating when you were not under oath. Additionally, I would like to get from Mr. Palmer an explanation of the status of the assessments for the periods ending prior to and on February 28, 1982. They may have been abandoned by the Department as untimely. In an [sic] event, they are not covered by the Conciliation Order nor the petition for a hearing.

"In determining a new date to resume the hearing, I would like to suit everyone's convenience if possible. I notice that both myself and Mr. Palmer will be in New York next during the week beginning October 16. I would like to hear from you by letter or telephone your preferences in this matter."

Petitioner, by letter dated July 30, 1989, indicated she would be available on October 16, 1989. The Division, by letter dated August 2, 1989 to the Administrative Law Judge, expressed concern regarding the proposed reopening of the hearing. The Division asserted that both parties at hearing had a full opportunity to present evidence and develop the record, further stating the record was closed and both the taxpayer and the Division now had the opportunity to file briefs. The Division also asserted that whether or not petitioner has met her burden of proof, to reopen the record to afford further opportunity to present her case or for the Administrative Law Judge to advocate for her toward this end is questionable. The Division made a withdrawal of its objection to

petitioner's unsworn statements at hearing indicating it would treat such statements as testimony. The Division also consented to the receipt in evidence of the volume referred to in the letter of July 20, 1989, provided it was made available for review prior to the due date of the Division's brief. A request was made by the Division for sufficient time to review petitioner's testimony and the transcript and determine its position on the proposed reopening of the record and to articulate same.

On August 8, 1989, the Administrative Law Judge answered the Division's letter of August 2, 1989, advising of the expected rescheduling of the case for the week of October 16, 1989. On September 11, 1989, a final notice scheduling the hearing for October 16, 1989 at 1:15 p.m. was issued to petitioner. That hearing did not take place. The record does not contain any reason for adjournment.

On August 15, 1990, a final notice scheduling a hearing for September 21, 1990 at 9:00 a.m. was issued to petitioner. That hearing was held before Administrative Law Judge Thomas Sacca wherein petitioner, Ethel Richards, appeared on her own behalf. The Division did not appear. At this hearing, petitioner brought with her the exhibit pertaining to the New York City IDA and, in addition to reading into the record the July 20, 1989 letter she received from Administrative Law Judge Wright, made a motion that the case be defaulted as the Division failed to appear. The record of this hearing also shows that petitioner was told that her motion would be taken under advisement, that these matters would be brought back to the supervisors of the Administrative Law Judge in an attempt to resolve the matter, and that she would be contacted in some way.

OPINION

In the determination below, Administrative Law Judge Nigel Wright held that the notice issued for the quarter ending November 30, 1980 must be found invalid as the basis of its computation is not in the record. The Administrative Law Judge also held that the Notice of Determination for the period September 1, 1978 through February 28, 1982 was untimely as it was issued more than three years after the last return was filed, thus, "the issue [during this period] concerning purchases made by an IDA is academic and need not be addressed." The Administrative Law Judge, relying on Matter of Sunshine Developers v. Tax Commn. of State of New York (132 AD2d 752, 517 NYS2d 317, lv denied 70 NY2d 609, 522 NYS2d 109), further held that the "purchases made and described as building and building materials must be found to

be exempt [since] there has been no showing that their use was subject to tax." Finally, the Administrative Law Judge sustained the notice of determination for the period March 1, 1982 through August 31, 1984 with respect to the recurring expenses. The determination is silent with regard to the events occurring after July 13, 1989.

On exception, the Division, while conceding assessments of use tax based on assets acquired on or before February 28, 1982 are time barred by the terms of Tax Law § 1147(b), alleges petitioner has failed in her burden of proving that four items of tangible personal property acquired after February 28, 1982, and listed on Berg's books under the category "Building and Building Improvement," were exempt from tax as materials consumed in capital improvements. The Division does concede the untimely status of notice number S850330460C and the untimely status of all but two quarters of notice number S850330461C, namely, the quarters ending February 28, 1981 and May 31, 1981, as both these quarters were rendered timely due to late filed returns.

In response to the Division's exception, petitioner, on April 18, 1991, filed a request with the Tax Appeals Tribunal for a 30-day extension of time in which to file a brief in opposition to the Division brief. On June 3, 1991, petitioner filed a notice of exception to the Administrative Law Judge's determination, and said notice was received by the Secretary to the Tax Appeals Tribunal and treated as petitioner's brief. Petitioner alleges that it was not stated or implied in the determination rendered by the Administrative Law Judge that removing the New York tax debt from Berg Chemical Co. Inc. removes the debt from Ethel Richards, an officer, and all other officers of Berg Chemical Co., Inc.

We deal first with the timeliness of the Division's notice (S850330461C), dated April 5, 1985, for the quarters ending February 28, 1981 and May 31, 1981. We reverse the determination of the Administrative Law Judge.

Tax Law § 1147(b) provides that no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return.

It is well established that the statute of limitations defense is waived unless affirmatively raised by the taxpayer (see, Matter of Adamides v. Chu, 134 AD2d 776, 521 NYS2d 826, 828, ly denied 71 NY2d 806, 530 NYS2d 109; Matter of Convissar v. State Tax Commn., 69 AD2d 929, 415 NYS2d 305; Matter of Servomation Corp. v. State Tax Commn., 60 AD2d 374, 400 NYS2d 887). To establish this defense, the taxpayer must go forward with a prima facie case showing the date on which the limitations period commences, the expiration of the statutory period and receipt or mailing of the notice after the running of the period (see, Amesbury Apts., Ltd. v. Commissioner, 95 TC 227; Robinson v. Commissioner, 57 TC 735; Matter of Jencon, Tax Appeals Tribunal, December 20, 1990). Where the taxpayer has satisfied this initial burden, the burden of going forward with the evidence shifts to the Division to demonstrate that the bar of the statute is not applicable (see, Amesbury Apts., Ltd. v. Commissioner, *supra*; Adler v. Commissioner, 85 TC 535). The Division must then proceed with countervailing evidence that the statutory notice was timely mailed (see, Coleman v. Commissioner, 94 TC 82).

Since the Division has conceded the untimeliness of the notice for all but the two quarters ending February 28, 1981 and May 31, 1981, we need only concern ourselves with these two quarters, the returns for which were signed by petitioner on May 30, 1982 (see, Exhibit K-1; Tr., p. 65).

We note that petitioner did not affirmatively raise the statute of limitations defense in her petition, or at the hearing. Further, petitioner failed to introduce the evidence necessary to present a prima facie case to support the statute of limitations defense. Petitioner has neither alleged nor proven receipt of the notices after the expiration of the applicable limitations periods. In the absence of any evidence that the notice of determination and demand for payment of sales and use taxes due, dated April 5, 1985, was received after expiration of the statutory period,

petitioner has failed to establish an essential element of the statute of limitations claim (see, Matter of Jencon, Tax Appeals Tribunal, December 20, 1990).

We deal next with the purchases made and described as "Building and Building Improvement" and the Division's assertion that the burden of proof was on petitioner to show that the purchases were exempt from tax and that petitioner failed to meet this burden of proof.

The burden of proof was on petitioner to show that the purchases were exempt from taxation. The Administrative Law Judge's reliance on Matter of Sunshine Developers v. Tax Commn. of State of New York (*supra*) for his conclusion that these purchases "must be found to be exempt [since] there has been no showing [by the Division] that their use was subject to tax" is wrong and apparently results from reliance by the Administrative Law Judge on a passage in the Court's decision, i.e., "the burden of proving that the use was subject to tax is on the Department (see, Matter of Grace v. New York State Tax Commn., 37 N.Y.2d 193, 196, 371 N.Y.S.2d 715, 332 N.E.2d 886)."⁶

The context in which this passage appears and the reference to Matter of Grace makes clear that the burden on the Division arises only where there is some dispute, in the first instance, as to whether the income, property or specific transaction is subject to the taxing statute. "When, however, it is undisputed that the taxpayer's income [property or the transaction] is subject to the taxing statute, but he claims an exemption from taxation, a different rule applies. An exemption from taxation 'must clearly appear, and the party claiming it must be able to point to some provision of law plainly giving the exemption'" (citations omitted) (Matter of Grace v. New York State Tax Commn., *supra*, 371 NYS2d 715, 718, lv denied 37 NY2d 708, 375 NYS2d 1027).

⁶In Sunshine, the taxpayer was a Delaware corporation incorporated for the purpose of buying boats and chartering them to businesses for entertaining clients. Sunshine purchased a boat from a New York seller and took delivery of the boat outside the State. The Division asserted that Sunshine's mooring of the boat in New York State on a seasonal basis constituted use of the boat in the State, that such use was in connection with Sunshine's business and, therefore, Sunshine was liable for use tax on the boat. Sunshine asserted that it was exempt from use tax because it was a nonresident of the State and did not use the boat in the State. The Court affirmed the decision of the State Tax Commission.

Here, there is no question that the transaction is subject to the State Tax Law. The only issue is whether the transaction, i.e., the purchases, is exempt from tax as claimed by petitioner.

We deal next with whether petitioner met her burden of proof.

We cannot reach a conclusion on this issue because of the actions taken by the Administrative Law Judge with respect to this matter and the failure of the Administrative Law Judge to address these actions. First, the Administrative Law Judge actively discouraged petitioner from introducing certain evidence, i.e., the "large volume." Second, the determination of the Administrative Law Judge is silent with regard to the events which occurred after the July 13, 1989 hearing, i.e., his letter of July 20, 1990, which indicated he was not satisfied with the hearing of July 13, 1989 and that he felt he must resume the hearing because "there are facts that remain to be developed to have a complete record"; the fact that he stated he wanted to see that "very large volume" (petitioner) exhibited on July 13 to see if it contained relevant contracts or other items; the petitioner's response dated July 30, 1989, indicating she would be available on October 16, 1989, the date suggested by Judge Wright to resume the hearing; the Division's letter of August 2, 1989, indicating that a reopening of the hearing was not necessary; and petitioner's appearance at the September 20, 1990 hearing with the book and her motion for default judgment because of the Division's failure to appear at the hearing of September 20, 1990.

We remand the matter to the Administrative Law Judge to allow petitioner the opportunity to enter the "large volume" into evidence. After allowing the parties an opportunity to comment on the additional evidence, we direct the Administrative Law Judge, as quickly as possible, to issue a determination dealing with the taxable status of the purchases at issue and to explain the events subsequent to the July 13, 1989 hearing.

Accordingly, it is ORDERED, ADJUDGED and DECREED that this matter is remanded for further proceedings consistent with this decision.

DATED: Troy, New York

December 3, 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