STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
ROBRITT LIQUOR STORE, INC. AND GEORGE ROBINSON, AS OFFICER	:	DECISION DTA No. 806354
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1982 through May 31, 1985.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on March 28, 1991 with respect to the petitions of Robritt Liquor Store, Inc. and George Robinson, as officer, 1996A Fulton Street, Brooklyn, New York 11233 for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1982 through May 31, 1985. Petitioners appeared by Leonard L. Fein, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioners filed a brief in response. The Division of Taxation's request for oral argument was denied.

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

ISSUES

I. Whether petitioner George Robinson established that the audit methodology utilized by the Division of Taxation was unreasonable.

II. Whether the Administrative Law Judge properly addressed the issue of the possibility of a future hearing to review Robritt Liquor Store, Inc.'s tax liability.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "2" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

Petitioner Robritt Liquor Store, Inc. ("Robritt") operates a small liquor store. It has two adjoining counters protected by bullet-proof glass. The liquor was behind one counter, and the wine behind the other.

Petitioner George Robinson is president of Robritt. He works at the liquor store for only about two or three hours an evening because he is a full-time salesman for Drake's Bakery.

Joseph Copeland is a cousin of Mr. Robinson and an employee of Robritt.

We modify finding of fact "2" to read as follows:

> George Robinson testified that the store deposits all its receipts and that all purchases are paid for by check. Although Robritt had a cash register, it did not keep the register tapes. Its sales tax returns were prepared from deposits. Robritt did have purchase invoices for a five month period covering January 1 to May 31, 1985. Petitioner's accountant at the time was Mr. Mel Schwartzenberg of Monsey, Rockland County.
>
> During the sales tax audit for the period in issue, the Division of Taxation requested all the books and records maintained by Robritt. Robritt's only records consisted of its Federal tax returns for the years 1982 - 1984, the purchase invoices for the five month period, and its bank statements. However, at the hearing below, petitioner submitted a cash disbursement journal and Mr. Schwartzenberg's workpapers which were not available to the auditor at the time of the audit.[1]

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[1]The Administrative Law Judge's finding of fact "2" read as follows:

> "The store deposits all receipts, and all purchases are paid for by check. Though Robritt had a cash register, it kept no tapes. Its sales tax returns were prepared from deposits. Robritt did keep its purchase invoices. Its accountant at the time was Mr. Mel Schwartzenberg of Monsey, Rockland County."

We modified this fact to reflect the record in more detail.

The Federal corporation income tax returns for 1982 reported gross receipts of $308,067.45 and purchases of $274,846.03 (no return for 1983 was available at the hearing). For 1984 Robritt reported gross receipts of $371,371.14 and purchases of $345,854.19; for 1985 it reported gross receipts of $327,220.47 and purchases of $300,244.26.

The purchases as recorded by the Division of Taxation's auditor for 1983 (taken, he asserts, from the Federal tax return) are $60,000.00 higher than those shown on the workpapers of the accountant who prepared that return. The purchases as shown on the 1984 Federal tax return are $80,000.00 higher than those shown on the workpapers of the accountant who prepared that return.

The inventory (as recorded in schedule A of the Federal returns) at the beginning of 1982 was $21,000. The inventory at the end of 1985 was $44,500, an increase of $23,500.

An audit was performed by the White Plains District Office based on purchases and a computed mark up.

The amounts of purchases were taken from schedule A of the Federal income tax returns for 1983 and 1984 ($308,005.00 and $345,854.00, respectively). For 1982, the amount on the return ($274,846.03) was prorated for 7/12 of the year. For 1985, the Federal return was not available so purchase invoices were examined for January through May and the amount of $84,229.34 was arrived at. The total purchases came to $898,415.22.

A mark up on purchases of 25.67% was computed. This was done by listing all purchases for the month of March 1985 with their total costs. These costs totalled $19,529.51.

The prices that were charged per bottle were determined by examining the shelves of Robritt and listing such prices. About 240 items were listed by an assistant auditor, Louis Booth, from a different district office (the Brooklyn District Office). These prices were multiplied by the total bottles purchased to arrive at total sales of $26,567.70. Mr. Joseph Copeland was on duty at Robritt when the auditor came in. As testified to by Mr. Copeland, the auditor spent no

more than an hour on the premises. He asked for prices for about 25 items and Mr. Copeland furnished them. The auditor did not himself inspect the shelves.

An 8.25% sales tax component was taken out of total sales leaving $24,542.91. The difference between this and the computed cost of $19,529.51 was $5,013.40 which is 25.67% of that cost.

So as to give an allowance for waste, this markup was reduced to 23%.

The mark up of 23% was applied to the purchases of $898,415.22 to arrive at a gross profit of $206,635.49 and gross receipts of $1,105,050.60. Reported taxable sales of $826,048.00 were subtracted leaving additional taxable sales of $279,002.60.

Since additional taxable sales were 33.78% more than reported taxable sales, the reported taxable sales for each quarter were increased by that percentage and these figures were used to calculate interest and penalties.

A use tax of $33.00 was added for the quarter ending November 30, 1982 for the purchase of a $400.00 cash register.

A consent extending the period of limitation for assessment of sales and use taxes to March 20, 1986 was signed on September 13, 1985 for the period June 1, 1986 through November 30, 1982.

A consent (Form AU-3) to the fixing of the tax at $22,806.21 plus penalty and interest payable after issuance of a notice and demand was signed by George Robinson on behalf of Robritt and was received by the Division of Taxation's District Office on February 26, 1986.

A Notice and Demand for Payment of Sales and Use Taxes Due (bearing notice number S860512120C) was issued against petitioner Robritt Liquor Store Inc. for the period June 1, 1982 through May 31, 1985 on May 12, 1986 for total tax due of $22,806.21, plus penalty of $5,209.86 and interest of $7,031.44, for a total amount due of $35,047.51.

A Notice of Determination and Demand for Payment of Sales and Use Taxes Due (bearing notice number S860512121C) was issued against petitioner George Robinson for the period

June 1, 1982 through May 31, 1985 on May 12, 1986 for total tax due of $22,806.21, plus penalty due of $5,209.86 and interest of $7,031.44, for a total amount due of $35,047.51.

A conciliation conference was conducted on June 2, 1988. The conferee's order dated August 26, 1988 denied the request and sustained the statutory notices. Its caption specified as under review two notice numbers, S860512120C and S860512121C, these being the notice and demand against Robritt and the notice of determination against Mr. Robinson.

An audit performed for the period June 1, 1985 through November 31, 1987 by Stanley Johnson of the Brooklyn District Office showed a mark up of 16.98%.

Opinion

In his determination below, the Administrative Law Judge determined that the audit conducted was unreasonable. The Administrative Law Judge reasoned that the calculations of the prices and the markup were arbitrary and without foundation in the record since the auditor who made such calculations did not testify at the hearing. The Administrative Law Judge found that such auditor's work was impeached by the very specific testimony of Robritt's employee and that since the auditor did not testify at the hearing, the Administrative Law Judge could not properly evaluate the auditor's credibility. Therefore, the Administrative Law Judge rejected the testimony that related to the purchase-markup audit.

Secondly, the Administrative Law Judge determined that the Division of Tax Appeals lacked jurisdiction to review the tax liability of petitioner Robritt since a consent to fix the tax was executed on behalf of Robritt. The Administrative Law Judge noted that if Robritt paid the assessment owed, it could then apply for a refund of such tax. If the Division of Taxation (hereinafter the "Division") then rejected such refund claim, Robritt would be able to petition its refund denial. Furthermore, the Administrative Law Judge noted that his determination with respect to the liability of petitioner George Robinson would be binding with respect to a subsequent petition filed by Robritt in contesting its liability.

On exception, the Division disagrees with the Administrative Law Judge's conclusion that the calculation of the prices and the markup were arbitrary, that the hearsay evidence in the record is not sufficient to form a basis for such calculation, that the accuracy of the audit workpapers must be rejected and that the calculation of the tax due itself has no rational basis. Furthermore, the Division disagrees with the statement made by the Administrative Law Judge that this Administrative Law Judge's determination with respect to the personal liability of George Robinson, as officer of Robritt, would be binding in regard to the corporation's liability if it filed a refund claim at some future date.

In response, petitioners contend that the Administrative Law Judge was not in error in assuming that the Division was obligated to prove the validity of the sales tax audit. Petitioners argue that "[i]t is the responsibility of the audit division to prove the validity of its audit method" (petitioners' brief, p. 1)[2] and that "the ALJ did not prove the notice had a reasonable basis and New York State failed to show its work papers were credible evidence" (petitioners' brief, p. 2). Further, petitioners maintain that the assistant auditor, Louis Booth, did not obtain the store's selling prices and a witness, Joseph Copeland, testified that Mr. Booth did not obtain the selling prices from the store. Petitioners argue that "[t]o fail to respond to this contention by having Mr. Booth present at the hearing is an act of negligence on the part of New York and shows something is indeed wrong with his report" (petitioners' brief, p. 2). Petitioners also contend that the corporation never agreed to the tax due because the consent to fix tax was signed by the officer who did not realize that he was signing a consent to fix the tax. Petitioners argue that they did prove that the audit method was materially wrong and, thus, they request that the Administrative Law Judge's determination be sustained.

We reverse the determination of the Administrative Law Judge with respect to the audit methodology.

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[2]Since petitioners did not number the pages of their brief, all references to page numbers in their brief correspond to the pages as if they were numbered.

The Division's right to resort to a markup audit to estimate taxes arises from the taxpayer's failure to maintain records adequate to determine that tax has been charged on all taxable items (Matter of Licata v. Chu, 64 NY2d 873, 487 NYS2d 552). Thus, estimates by the Division of a taxpayer's liability are acceptable on the principle that "where the taxpayer's own failure to maintain proper records prevents exactness in determination of sales tax liability, exactness is not required" (Matter of Meyer v. State Tax Commn., 61 AD2d 223, 402 NYS2d 74, 78, lv denied 44 NY2d 645, 406 NYS2d 1025).

In its exception to the Administrative Law Judge's determination below, the Division first contends that the sales tax law regarding estimated sales tax notices is not applicable to the situation herein. The Division argues that George Robinson was not issued an estimated sales tax notice under the provisions of Tax Law § 1138, but rather, he was issued a sales tax notice based on the consent to fix tax form that he executed on behalf of the corporation. The Division argues that:

> "[t]he Consent is equivalent to the filing of a sales tax return. The Corporation has self-assessed itself by the execution of the Consent. This explains why a Notice and Demand was issued to the Corporation . . . . Since the self-assessed tax remains unpaid, the Division was authorized to assess the tax due against all persons required to collect tax on behalf of the Corporation, including petitioner. The fact that a Notice of Determination and Demand was issued to petitioner does not mean that the notice represents an estimated liability or is even a determination by the Commissioner of additional tax due under Tax Law § 1138(a)(1)" (Division's brief, p. 7).

We disagree.

Preliminarily, we note that the Notice of Determination and Demand for Sales and Use Taxes Due, issued to George Robinson, clearly states on its face that the tax assessed was estimated in accordance with the provisions of Tax Law § 1138(a)(1).

Further, we turn to Tax Law § 1138(c) which provides that:

> "[a] person liable for collection or payment of tax (whether or not a determination assessing a tax pursuant to subdivision (a) of this section has been issued) shall be entitled to have a tax due finally and irrevocably fixed prior to the ninety-day period referred to in subdivision (a) of this section, by filing with the tax commission a signed statement in writing, in such form as the tax commission shall prescribe, consenting thereto."

There is no language in the above provision that equates a signed consent to fix tax form and a filed sales tax return. The amount in the consent to fix tax executed by George Robinson was determined based upon an estimate by the Division since the corporation did not maintain adequate books and records. The mere execution of a consent to fix tax does not transform an estimated amount of tax due into an actual amount of sales tax due. Therefore, we reject the Division's argument that petitioner George Robinson's liability was not estimated.

We now focus upon the issue of whether the audit was unreasonable. We reverse the Administrative Law Judge and sustain the markup audit.

Petitioners have the burden to prove by clear and convincing evidence, that the method of audit used or the amount of tax assessed was erroneous (Matter of Meskouris Bros. v. Chu, 139 AD2d 813, 526 NYS2d 679, 681; Matter of Surface Line Operators Fraternal Org. v. Tully, 85 AD2d 858, 446 NYS2d 451, 453). Petitioner George Robinson has not sustained his burden in this case.

To show that the audit was erroneous, petitioner tried to demonstrate, through the testimony of Mr. Copeland, that it was impossible for the assistant auditor to record the eight pages of selling prices that were part of the auditor's report. Although the witness' testimony was credible, the testimony never established that the selling prices were wrong. Moreover, petitioner never introduced any evidence to show that Robritt's selling prices contradicted the selling prices used by the assistant auditor in the audit report (cf., Matter of Basileo, Tax Appeals Tribunal, May 9, 1991 [where the petitioner challenged the auditor's use of two "similar" restaurants for a comparison test audit by distinguishing his restaurant from the two restaurants utilized by the auditor]). Therefore, since the selling prices were not shown to be incorrect, we conclude that

petitioner failed to sustain his burden to demonstrate that the amount of tax assessed was erroneous.

We also disagree with the Administrative Law Judge that the hearsay evidence in the record is not sufficient to form a basis for the calculations of the prices used in the markup audit. "It is settled law, however, that an administrative determination supported by some substantial evidence retains it validity despite the fact that hearsay evidence was admitted and considered" (Matter of Mira Oil Co. v. Chu, 114 AD2d 619, 494 NYS2d 458, 459, lv denied 68 NY2d 602, 505 NYS2d 1026, citing Matter of Ray v. Blum, 91 AD2d 822, 458 NYS2d 105; see also, Matter of Vega v. Smith, 66 NY2d 130, 495 NYS2d 332; Matter of Meskouris Bros. v. Chu, supra).

Next, we must address an argument made by petitioners in their brief in response to the Division's exception. Petitioners state that:

> "[t]he corporation never agreed the tax was due as the consent was nto [sic] signed with any knowledge of what it was. And for repetitive purposes the fact that a consent was signed was considered irrelevant at the hearing by both the ALJ and the New York State attorney. That was the first point I wanted to proceed on in the hearing and was told it's not necessary" (petitioners' brief, p. 3).

In his determination below, the Administrative Law Judge concluded that the Division of Tax Appeals did not have jurisdiction to review the tax liability of Robritt since it executed a consent to fix tax form and such tax had not been paid. Petitioners, by their statement above, appear to object to this conclusion although they did not file an exception within the 30-day time period required by the Tribunal's Rules of Practice and Procedure (20 NYCRR 3000.11[a]), nor did they file a request for an extension to file an exception within such time period. Instead, 91 days after the Administrative Law Judge's determination was issued, petitioners filed a brief with the Tax Appeals Tribunal replying to the Division's brief and attempted to raise for the Tribunal's review an aspect of the Administrative Law Judge's determination not excepted to by the Division.

The Rules of Practice and Procedure do not provide for any exception outside the 30-day time period, unless an extension of this period has been requested. Accordingly, we hold that by failing to file an exception within the 30-day period, or requesting an extension, petitioners waived their right to require the Tribunal to review any portion of the Administrative Law Judge's determination (Matter of Klein's Bailey Foods, Tax Appeals Tribunal, August 4, 1988).

Lastly, we address the Administrative Law Judge's discussion, included in his conclusion of law "B", that refers to a future hearing involving Robritt contesting its liability under the consent to fix tax. The Division argues that the Administrative Law Judge does not have authority to make his determination binding in a future matter even if arising out of the same audit reviewed by the Administrative Law Judge.

We conclude that the issue involving a future hearing was not properly before the Administrative Law Judge in the hearing below. Therefore, we set aside that portion of his determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted;

2. The determination of the Administrative Law Judge is affirmed to the extent that it dismissed the petition of Robritt Liquor Store, Inc., but in all other aspects is reversed;

3. The petition of George Robinson, as officer, is denied; and

4. The Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued to George Robinson, as officer, dated May 12, 1986, is sustained.

DATED: Troy, New York
December 27, 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