STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
SLIFORD RESTAURANT, INC. D/B/A EMERALD STONE	:	DECISION DTA No. 807301
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 June 1, 1980 through February 28, 1983.	:	

Petitioner Sliford Restaurant, Inc. d/b/a Emerald Stone, 610 8th Avenue, New York, New York 10010 filed an exception to the determination of the Administrative Law Judge issued on January 25, 1991 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 June 1, 1980 through February 28, 1983. Petitioner appeared by Stewart Buxbaum, CPA. The Division of Taxation appeared by William F. Collins, Esq. (Robert J. Jarvis, Esq., of counsel).

Both parties filed briefs on exception. Oral argument was not requested.

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

ISSUES

I. Whether petitioner, pursuant to Tax Law § 1139(c), was entitled to file a refund for sales taxes where such sales taxes were paid pursuant to a consent executed approximately one year after the sales tax had become irrevocably fixed.

II. Whether the Division of Taxation should be estopped from asserting a defense that the refund claim was untimely on the grounds that it failed to mail a copy of the statutory notice to petitioner's representative.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Petitioner, Sliford Restaurant, Inc., operates a bar and grill known as the Emerald Stone near the Port Authority in Manhattan. On February 11, 1983, a sales tax audit of petitioner was commenced which took 161½ audithours over a period of 14 months, and on August 27, 1984 resulted in the issuance of a Notice of Determination and Demand for Payment of Sales and Use Taxes Due of $27,405.05 plus interest for the period June 1, 1980 to February 28, 1983 pursuant to Tax Law § 1138. This statutory notice was mailed to petitioner at its business address.

Petitioner's representative asserted that a copy of the notice was not mailed to Bernard Brown, petitioner's representative at the time of the audit. However, petitioner failed to introduce any evidence, such as a copy of a power of attorney executed by petitioner, to establish Mr. Brown's alleged status. Nor did petitioner present Mr. Brown's testimony or an affidavit from Mr. Brown to support its position. On the other hand, the auditor's log, which shows contacts during the course of the audit, does include numerous references to Mr. Brown as petitioner's accountant.

Petitioner did not file either a Request for Conciliation Conference or a petition for formal hearing within 90 days of the issuance of the notice of determination.

Nonetheless, on December 17, 1985, approximately a year after the issuance of the statutory notice, the Division of Taxation granted petitioner a so-called "courtesy conference" which resulted in the recommendation by a sales tax auditor (other than the auditor who conducted the audit) that an adjustment be made reducing petitioner's tax from $27,405.05 plus interest to $22,311.63 plus interest.

On January 9, 1986, petitioner by its president, John Clancy, executed a "Consent to Fixing of Tax Not Previously Determined and Assessed."[1]

About a month later, the Division of Taxation issued a Notice of Assessment Review dated February 11, 1986 which set forth the reduced amount of sales tax due of $22,311.63 plus interest.

On February 25, 1986, petitioner paid $33,698.41, the total amount of tax and interest due.

On February 2, 1988, petitioner filed a claim for refund of the total amount paid. Petitioner's refund claim asserted that the auditor utilized erroneous markups in estimating petitioner's sales during the audit period, and that the auditor failed to take into consideration that the selling price of liquor and beer sold at the bar included tax.

About a month later, the Division of Taxation denied the refund claim by the letter of L. Clark, Central Sales Tax Section, who wrote, in part, "[s]ince you did not protest the assessment, the tax due was fixed and properly collected."

In response to the denial of its refund claim, on March 10, 1988, petitioner timely filed a Request for Conciliation Conference wherein petitioner noted that the original audit was erroneous, and "proper notification was not given to the taxpayer, officers and power of attorney."

The conferee, after reviewing information submitted at a conference held on March 7, 1989, sent a letter dated May 8, 1989 to petitioner's representative, Stewart Buxbaum, proposing the further reduction of sales tax due from $22,311.63 plus interest to $8,032.89 plus interest

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[1]It is observed that, in fact, the tax had been previously determined and assessed on November 25, 1984, which was 90 days after the issuance of the statutory notice on August 27, 1984. Consequently, this consent form was used in error. Further, the form included the following misleading, preprinted advice to petitioner:

> "The Tax Law provides that a taxpayer is entitled to have tax due finally and irrevocably fixed by filing a signed consent with the [former] State Tax Commission. Such consent waives the ninety (90) day period for fixing tax due but does not waive the taxpayer's right to apply for a credit or refund within the time limit set forth in the statute" (emphasis added).

(which would result in a refund to petitioner of $14,278.74 plus interest). The conferee enclosed consent forms with his proposed adjustment.

On May 15, 1989, petitioner by its president, John Clancy, executed a consent agreeing to the terms suggested by the conferee.

However, by a letter dated June 9, 1989, the conferee reneged on his proposal:

> "I regret to inform you that upon a final review of the matter I have discovered a flaw in reasoning which had led to a determination contrary to the Tax Law.
>
> * * *
>
> In this instant matter the Consent to Fixing of Tax was filed subsequent to the issuance of the Notice of Determination and Demand.... The Audit Division erred in its issuance of a Consent to Fixing of Tax covering taxes which had been previously determined and assessed....
>
> ...[S]uch an error shall not entitle the taxpayer to rights that it would ordinarily not have if the error had not been made.
>
> ...Because Sliford Restaurant, Inc. failed to avail itself to [sic] the remedies therein [Tax Law § 1139(c)] provided, i.e., the determination was not timely petitioned, it is not entitled to a refund" (emphasis in the original).

The conferee then issued a Conciliation Order dated July 21, 1989 which sustained the statutory notice.

The copy of the Field Audit Record, which is the auditor's log of his "contacts and comments of all audit actions", discloses that from the very start of the audit the auditor had numerous contacts with Bernard Brown, petitioner's accountant. However, the auditor also had numerous direct contacts with John Clancy, petitioner's president. In fact, the last few entries in May 1984 disclose that the auditor was phoning Mr. Clancy to discuss the matter, and Mr. Clancy was contacting the auditor directly.

OPINION

The Administrative Law Judge, relying on Matter of Multi Trucking (Tax Appeals Tribunal, October 6, 1988), determined that a taxpayer's representative must be served with a

statutory notice. However, since petitioner failed to prove that Mr. Brown was its representative at the time of the audit, the Division of Taxation's (hereinafter the "Division") failure to serve Mr. Brown with a copy of the statutory notice did not toll the 90-day period for the filing of a petition protesting the notice of determination. The Administrative Law Judge determined that petitioner did not timely file a petition protesting the notice of determination and that the tax became irrevocably fixed pursuant to Tax Law § 1138(a)(1).

The Administrative Law Judge determined that petitioner and the Division entered into a Consent to Fixing of Tax after the notice of determination had been issued and the tax became irrevocably fixed. Thus, the consent did not preserve petitioner's right to file for a refund of taxes as provided for in section 1139(c). The Administrative Law Judge determined that the use of the wrong form by the Division for the Consent did not estop the Division from asserting the statute of limitations as a defense.

On exception, petitioner asserts that the Administrative Law Judge erred in determining that Mr. Brown was not petitioner's authorized representative. Petitioner's apparent logic is that the secrecy provisions of the Tax Law, coupled with the Division's regulations, require that a representative have on file with the Division a properly executed power of attorney in order to appear before or be recognized by the Division concerning the audit of petitioner's taxes (Tax Law § 1146; 20 NYCRR 600.1). Further, the audit log indicates clearly that there were frequent contacts between the Division and Mr. Brown; thus, Mr. Brown must have filed a proper power of attorney. Therefore, petitioner concludes that the Division was required to serve Mr. Brown and that its failure to do so tolled the 90-day period for the filing of a petition protesting the notice of determination and, accordingly, petitioner timely filed its application for refund.

Petitioner excepts generally to the determination of the Administrative Law Judge which it finds inconsistent with the charge to the Division of Tax Appeals, pursuant to section 2000 of the Tax Law, to provide a just and equitable system for the resolution of disputes between taxpayers and the Department of Taxation and Finance.

The Division asserts that there is insufficient evidence in the record to establish that Mr. Brown was petitioner's representative and that even if the record showed that Mr. Brown had filed a power of attorney with the Division to represent petitioner during the audit process, the Division is not required to serve a copy of the notice of determination on Mr. Brown since the audit process is not a "proceeding" within Executive Law § 168 or the Division's regulations (20 NYCRR 600). The basis of the Division's position is that Executive Law § 168 and the regulations (20 NYCRR 600.3) contain similar language, with each providing that copies of all notices to and communications with a party should be forwarded to the party's representative, if a notice of appearance is filed in a proceeding. The Division asserts that "[i]t is quite clear from the definitions of 'proceeding' contained in Executive Law § 168(2)(b) and 20 NYCRR §600.2 that the requirement for providing copies to the taxpayer's representative does not arise until after a Notice of Determination has been issued" (Division's brief on exception, p. 7).

The Division also asserts that petitioner's reliance on the Tribunal decision in Matter of Multi Trucking (supra) is misplaced because the parties in that case entered into a stipulation which precluded the need for the Tribunal to decide the issue of service to the taxpayer's representative. Finally, the Division asserts that in any event Matter of Bianca v. Frank (43 NY2d 168, 401 NYS2d 29) is not applicable since in the current case there was no "appearance" by petitioner's representative in a "proceeding" as those terms are defined in the Executive Law or the Division's regulations.

We affirm the determination of the Administrative Law Judge.

Tax Law § 1138(a)(1) provides that a notice of determination of additional sales tax due:

> "shall finally and irrevocably fix the [sales] tax due unless the person against whom it is assessed, within ninety days after giving of such determination, shall apply to the division of tax appeals for a hearing."

Tax Law § 1139(c) provided for the years at issue that:

> "[a] person shall not be entitled to a refund or credit under this section of a tax, interest or penalty which had been determined to

> be due pursuant to the provisions of section eleven hundred thirty-eight where he has had a hearing, or an opportunity for a hearing, as provided in said section, or has failed to avail himself of the remedies therein provided" (emphasis added).

Tax Law § 1139(c) also provided an exception to the rule cited for persons who file, with the Commissioner of Taxation and Finance, a statement of Consent to Fixing of Tax Not Previously Determined and Assessed. Petitioner, here, concededly did not file a timely petition protesting the notices issued by the Division. Therefore, unless there is some intervening reason to preclude application of the ninety-day period of limitations in section 1138(a)(1), petitioner's tax liability was irrevocably determined by the notice of determination and petitioner is not entitled to apply for a refund of such taxes.

Petitioner, relying on Matter of Bianca v. Frank (supra), asserts that the period of limitation was tolled because its representative at the audit was not served by the Division. We find petitioner's reliance on Bianca misplaced because petitioner has not provided sufficient evidence by testimony or otherwise to show that Mr. Brown was petitioner's representative at any point during the process. Petitioner's sole measure of proof on Mr. Brown's status as its representative is the contact sheet of the audit report which indicates contact by the auditor with a Mr. Brown. Petitioner's argument, however, relies wholly on the implication that the contact referred to in the audit report indicates that Mr. Brown must have been petitioner's representative because the Division could not otherwise deal with him due to the secrecy provisions of Tax Law § 1146. It was petitioner's burden to introduce evidence that Mr. Brown had filed a power of attorney, and the party upon whom the burden of proof rests, loses if no evidence is offered on the fact at issue (see, Matter of Grace & Co., Tax Appeals Tribunal, September 13, 1990). No such evidence was produced here.

In view of this determination we need not address the Division's assertion that even if petitioner proved that Mr. Brown was its representative, the Division was not required to serve a

copy of the notice on Mr. Brown (but see, Matter of Multi Trucking, Tax Appeals Tribunal, October 6, 1988).

We deal next with petitioner's assertion that the doctrine of estoppel should be applied to the Division.

We affirm the determination of the Administrative Law Judge.

Petitioner, relying on Matter of Harry's Exxon Serv. Sta. (Tax Appeals Tribunal, December 6, 1988), asserts that "[i]f a Power of Attorney was not submitted, Bernard Brown should still be recognized as the authorized representative by the application of estoppel to avoid manifest injustice to this taxpayer" (Petitioner's brief on exception, p. 1). Petitioner goes on to assert that the Administrative Law Judge's "decision is incorrect in that it is contrary to [Matter of Kayton Specialty Shop, Tax Appeals Tribunal, January 17, 1991] where it was found that one of the basic tenets of an equitable system of tax administration is the establishment of clear effective communication with taxpayers informing them of their rights and liabilities. Every action of the Audit Division, Conciliation Section and Law Bureau representative is contrary to this philosophy . . ." (Petitioner's brief, p. 2).

The apparent gist of petitioner's assertions is that the Division's use of the consent form misled petitioner into consenting to and paying tax, actions which petitioner would not otherwise have taken had it known it would not be able to apply for a refund. The culprit is the use of the wrong form by the Division and the preprinted statement on the form which indicated "[t]he Tax Law provides that a taxpayer is entitled to have tax due finally and irrevocably fixed by filing a signed consent with the (former) State Tax Commission. Such consent waives the ninety (90) day period for fixing tax due but does not waive the taxpayer's right to apply for a credit or refund within the time limit set forth in the statute" (Exhibit D).

We find no merit in petitioner's position. In order for the doctrine of estoppel to be applicable, petitioner must show that the Division made representations to petitioner, which

petitioner had the right to rely upon and did rely upon to its detriment (Matter of Harry's Exxon Serv. Sta., supra).

The notice of determination which resulted from the audit of petitioner's business was issued to petitioner on August 27, 1984. Petitioner did not file a petition protesting the notice within the ninety-day period prescribed in section 1138. Petitioner has not established any facts which indicate in any way that failure to timely protest the notice was due to actions of the Division. Having failed to timely protest the notice, the tax was irrevocably fixed pursuant to section 1138 of the Tax Law and having become irrevocably fixed, petitioner was precluded from applying for a refund under the provisions of section 1139(c).

On December 17, 1985, petitioner was granted a "courtesy" conference by the Division which resulted in a proposed adjustment reducing the liability asserted against petitioner. On January 9, 1986, petitioner, by its president, executed the "Consent to Fixing of Tax Not Previously Determined and Assessed" for the reduced deficiency. On February 25, 1986, petitioner paid the tax and interest. On February 2, 1988, petitioner filed a claim for refund which was denied. Petitioner apparently asserts that it relied on the preprinted statement on the consent form in deciding to consent to the tax and to pay it. We have no reason to doubt that assertion. However, it does not answer the question: What was the detriment to petitioner in so relying on the statement?

Clearly, petitioner, at the time of the consent, had no legal recourse to protest the Notice of Determination. Just as clearly, the Division had the authority to proceed to collect the notice. In essence, then, petitioner consented to and paid the tax which was, by statute, already irrevocably fixed. We can find no detriment to petitioner in that result. Accordingly, we conclude that petitioner has failed to show the facts necessary to require the application of the doctrine of estoppel.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner Sliford Restaurant, Inc. d/b/a Emerald Stone is denied;

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

3. The petition of of Sliford Restaurant, Inc. d/b/a Emerald Stone is denied; and

4. The Notice of Determination dated August 27, 1984 is sustained, except to the extent modified by the Notice of Assessment Review dated February 11, 1986, and the denial of petitioner's refund claim is also sustained.

DATED: Troy, New York
October 10, 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