STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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| In the Matter of the Petition | : | |
| of | : | |
| **ANTONIO RIZZO AND GIUSEPINA MAUCERI PARTNERS OF TONY AND ORAZIO PIZZERIA** | : | DECISION DTA No. 807398 |
| 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, 1980 through August 31, 1984. | : | |

Petitioners Antonio Rizzo and Giusepina Mauceri, Partners of Tony and Orazio Pizzeria, c/o James H. Tully, Jr., Esq., 90 State Street, Albany, New York 12207-1780, filed an exception to the determination of the Administrative Law Judge issued on July 23, 1992. Petitioners appeared by DeGraff, Foy, Holt-Harris & Mealey, Esqs. (James H. Tully, Jr., Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Arnold M. Glass, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a letter brief in response. This letter brief was received on November 20, 1992 and began the six-month period for the issuance of this decision. Oral argument, requested by petitioners, was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

***ISSUES***

I. Whether the Division of Taxation properly determined additional sales and use taxes due from Tony and Orazio Pizzeria

II. Whether the Division of Taxation requested books and records from petitioners for the period September 1, 1983 through August 31, 1984.

III. Whether penalties assessed against petitioners should be abated.

## *FINDINGS OF FACT*

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

Pursuant to a field audit of Tony and Orazio Pizzeria (the "Pizzeria") which commenced in August 1983, the Division of Taxation, on December 10, 1984, issued to Antonio Rizzo and Giusepina Mauceri, as partners of thePizzeria, two notices of determination and demands for payment of sales and use taxes due as follows:

| Period | Tax | Penalty | Interest | Total Due |
|---|---|---|---|---|
| 9/1/80-8/31/83 | $59,816.63 | $14,515.98 | $22,111.09 | $96,443.70 |
| 9/1/83-8/31/84 | $19,106.02 | $ 2,172.70 | $ 1,475.66 | $22,754.38 |

Previously, petitioner Antonio Rizzo, on behalf of the Pizzeria, executed consents extending the period of limitation for assessment of sales and use taxes as follows:

| Date Executed | Period Extended | Date for Assessment |
|---|---|---|
| 11/11/83 | 9/1/80-2/28/81 | 6/20/84 |
| 6/12/84 | 9/1/80-8/31/81 | 12/20/84 |

On August 17, 1983, the auditor visited the business premises at 336 Knickerbocker Avenue, Brooklyn, New York. She transcribed the prices of the various items sold and left her business card for the accountant to call.

On September 19, 1983, she sent an appointment letter to the Pizzeria's accountant, Irving Grossman, C.P.A., to whom she was referred by the proprietor. This letter requested books and records of the Pizzeria for the period September 1, 1980 through August 31, 1983 and scheduled an appointment to examine the books and records at Mr. Grossman's office on October 7, 1983.

The only records presented to the auditor by the accountant were copies of the Federal partnership returns for 1980, 1981 and 1982 and some purchase invoices from suppliers of the

Pizzeria, C & F Dairy Co., Inc. ("C & F") and Boardwalk Root Beer Co., Inc. ("Boardwalk"). There were no cash register tapes, guest checks or day book presented. The auditor was informed by Mr. Grossman that daily sales records were destroyed, but that weekly figures were recorded.

The purchases from C & F for 1981 totaled $13,964.18 and the purchases from Boardwalk for approximately six months in 1981 amounted to $1,247.00, for a total of $15,111.18. The auditor compared this total with purchases on the Federal return for 1981 ($7,180.00).[1]

Based upon a lack of complete books and records from which taxable sales could be verified, together with a comparison of purchases per invoices and returns and her determination that income from the Pizzeria was far too low ($5,330.00 for 1980, $3,771.00 for 1981 and $5,844.00 for 1982), the auditor determined that external indices would have to be utilized to determine taxable sales for the audit period. The Federal partnership returns also revealed that the cost of rent and utilities exceeded income thereby further causing the auditor to doubt the accuracy of sales reported on the sales tax returns.

Based upon the foregoing, it was decided by the auditor and her supervisor that an observation test would be the best method of determining taxable sales. A "short" observation test was performed on November 17, 1983 from 11:00 A.M. until 2:30 P.M. During the observation (there were two auditors present), the Pizzeria made sales in the amount of $183.55, or approximately $53.00 per hour. The auditor observed two men behind the counter as well as a woman who, apparently, was the wife of the owner. At the time, the soda machine was out of order.

The auditor stated that, on June 12, 1984, she telephoned Antonio Rizzo and Irving Grossman and asked them to come into her office for a conference prior to scheduling another observation of the Pizzeria's business, but they failed to appear. She testified that, while no additional written request was made for books and records (the original audit period ended

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[1]From an examination of the Federal partnership returns, it appears that the auditor compared the purchases to the figure set forth on the 1982 return rather than the 1981 return. Purchases per the 1981 return were reported as $9,882.00.

August 31, 1983), she continued to orally request production of the books and records through the date of this telephone call.

It was thereafter decided to enlarge the scope of the observation test so an additional test was scheduled for October 24, 1988. The auditor described the day as "drizzly". She arrived at the Pizzeria at 10:00 A.M. and another auditor arrived at 3:20 P.M. At 6:08 P.M., the owner became angry and asked the auditors to leave. He stated that he was closing for the day and did, in fact, close the doors. At approximately 7:30 P.M., the auditor's supervisor drove by the premises and noted that it had reopened. During the six hours observed, the Pizzeria made sales of $407.06, or $50.88 per hour. Wall menu prices were utilized in this computation.

The auditor decided to disregard the hourly figure from the November 17, 1983 observation ($53.00) and, instead, utilized only the hourly sales figure from the October 24, 1984 test ($50.88).

The auditor testified that, on December 7, 1984, the head of her unit, Steve Kohilakis, telephoned the Pizzeria at about 4:00 P.M. and spoke to Tony who identified himself as the pizza man. Tony said that he was open until midnight on weekdays and until 1:30 A.M. on Fridays and Saturdays.

The auditor assumed that the Pizzeria was open seven days per week. Total working hours per week were determined to be 101 based upon 14 hours per day Sunday through Thursday (10:00 A.M. until midnight) for a total of 70 hours plus 31 hours (10:00 A.M. until 1:30 A.M.) on Fridays and Saturdays. Based upon that assumption and the hourly sales figure of $50.88 determined during the October 24, 1984 observation test, she determined taxable sales of $66,794.00 per quarter (101 hours x $50.88 = $5,138.00 per week x 13 weeks = $66,794.00). A total of 16 sales tax quarters were assessed, so taxable sales were determined to be $1,068,704.00 for the audit period. Taxable sales of $104,698.00 had previously been reported. Additional taxable sales of $964,006.00 taxed at the applicable rate (8 or 8¼%) resulted in additional tax due of $78,922.65 (the total assessed in both notices of determination).

On June 17, 1985, a conference was held by the former Tax Appeals Bureau. Total tax due was reduced to $66,812.99 (the assessment in the amount of $59,816.63 [Notice No. S841210243K] was reduced to $50,759.16 and the assessment in the amount of $19,106.02 [Notice No. S841210244K] was reduced to $16,053.83). This revision was made as a result of the auditor's having included Sundays in her calculation despite the fact that the wall menu, at the premises, indicated that the Pizzeria was closed on Sunday. Total working hours per week were, therefore, reduced from 101 to 87 with resulting taxable sales per week also being reduced from $5,138.00 to $4,426.56 (or $57,545.28 per quarter).

Petitioner Antonio Rizzo corroborated the auditor's testimony that she was referred to his then-accountant, Irving Grossman, for purposes of conducting the audit. The auditor admitted that Mr. Grossman failed to provide her with a power of attorney but, nevertheless, she went to his office to obtain the Pizzeria's records after having previously sent him an appointment letter (see, above).

Petitioner Antonio Rizzo stated that he and his wife were the owners of the business and that they owned the building at 336 Knickerbocker Avenue in Brooklyn.[2]

He stated that he arrives at the Pizzeria at 11:00 A.M., but he does not open for business until 11:45 A.M. and that he closes at 8:00 P.M.[3] He further testified that he is open six days per week (closed Sunday) and is closed on all major holidays (New Year's Day, Christmas, Thanksgiving, Memorial Day, Independence Day and Labor Day).

Petitioner Antonio Rizzo testified that, because of health code violations, the business declined. As a result thereof, he closed the Pizzeria for approximately five to six months beginning in January 1982 for renovations. Antonio Gicalone testified at the hearing that he

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[2]The 1980 and 1981 Federal partnership returns indicate payments for rent in 1980 and 1981, but no rental payments were claimed as deductions for 1982.

[3]The wall menu observed by the auditor indicated that the business closed at 9:00 P.M. However, the head of the auditor's unit, per a telephone conversation, determined that the business was open until midnight on weekdays and until 1:30 A.M. on Fridays and Saturdays (see, above).

helped Mr. Rizzo with the renovations. Sylvester LaRoussa and Victorio Ferrara, both of whom lived in the neighborhood, testified that the Pizzeria was closed for approximately five months in 1982. Sales reported for the quarters ended February 28, 1982 and May 31, 1982 were considerably lower than sales reported for all other quarters in the audit period.

***OPINION***

The Administrative Law Judge found that no request was made for books and records for the period June 13 through August 31, 1984 and cancelled that portion of the assessment. Further, the Administrative Law Judge determined that the use of external indices was appropriate because petitioners' books and records were insufficient, and that petitioners failed to demonstrate, in a clear and convincing manner, that the audit methodology was erroneous. However, the Administrative Law Judge did conclude that petitioners had shown that some modifications to the assessment were in order. First, the Administrative Law Judge found the testimony of petitioner Antonio Rizzo and other witnesses to be credible regarding the assertion that the business had been closed for five months beginning in January 1982. Therefore, the Administrative Law Judge inferred that the business was closed from January 1, 1982 through May 31, 1982, and cancelled that portion of the assessment. Second, the Administrative Law Judge found the testimony of Antonio Rizzo credible regarding the assertion that the business was closed for six holidays per year. Therefore, the Administrative Law Judge reduced the assessment to reflect the fact that no business was conducted on these holidays.

The Administrative Law Judge rejected petitioners' offering of the analysis of Stewart Buxbaum, C.P.A., which calculated additional tax due to be $19,140.00, because the analysis was not based on petitioners' books and records, it considered only pizza sales to the exclusion of beverages and other foods, and it utilized unsubstantiated pizza prices. Likewise, the Administrative Law Judge rejected petitioner Antonio Rizzo's assertion as to the hours of operation of the business in light of evidence to the contrary, and rejected as unsubstantiated Mr. Rizzo's assertion as to what prices were charged during the earlier years of the audit period.

Finally, the Administrative Law Judge denied the abatement of penalties, finding that: (1) petitioners' filing of returns and remittance of tax for the periods at issue demonstrates that petitioners were aware of their sales tax obligations, and (2) petitioners' limited education and knowledge of the English language, when considered in a light most favorable to their position, amounts to ignorance of the law which is not a valid basis for penalty abatement.

On exception, petitioners assert that their assessment should be adjusted to reflect changes in petitioners' prices over the years at issue. Further, petitioners assert that penalties and interest should be adjusted because of the prejudice caused by the Division of Taxation's (hereinafter the "Division") failure to serve an answer on petitioners until one year after the petition was filed. Petitioners' exact allegation on this point is unclear. In their exception, they assert that interest should be abated to the extent it accrued during the period between the filing of the petition and the service of the answer, some ten months beyond the time frame set forth in the regulations. In their brief on exception, petitioners request that the omnibus penalty be abated and that penalty interest be reduced to simple interest.

In response, the Division relies on the determination of the Administrative Law Judge concerning the soundness of the audit methodology and the resulting assessment. Concerning the abatement of penalties and interest, the Division notes that petitioners' basis for this assertion, i.e., the late-filed answer, is being raised for the first time on exception. Further, the Division asserts that penalty and interest concern the underpayment of tax, and are not related to the timeliness of the answer.

We affirm the determination of the Administrative Law Judge for the reasons set forth below.

Petitioners challenge the assessment resulting from the observation test conducted by the Division. Specifically, petitioners assert that the Administrative Law Judge erred by not reducing the assessment to reflect alleged price changes in petitioners' products over the years under audit.

When estimating sales tax due, the Division need only adopt an audit method reasonably calculated to determine the amount of tax due (Matter of Grant Co. v. Joseph, 2 NY2d 196, 159 NYS2d 150, cert denied 355 US 869); exactness is not required (Matter of Meyer v. State Tax Commn., 61 AD2d 223, 402 NYS2d 74 lv denied 44 NY2d 645, 406 NYS2d 1025; Matter of Markowitz v. State Tax Commn., 54 AD2d 1023, 388 NYS2d 176, affd 44 NY2d 684, 405 NYS2d 454). The burden is then on the taxpayer to demonstrate, by clear and convincing evidence, that the audit method employed or the tax assessed was unreasonable (Matter of Meskouris Bros. v. Chu, 139 AD2d 813, 526 NYS2d 679; Matter of Surface Line Operators Fraternal Org. v. Tully, 85 AD2d 858, 446 NYS2d 451). Petitioners have not done so in this case.

First, petitioners offered the testimony of petitioner Antonio Rizzo regarding price changes. However, the Administrative Law Judge found that this testimony was not credible, in part because of the lack of any documentary evidence to support the asserted price fluctuations.

The credibility of witnesses is a determination best made by the Administrative Law Judge, as he or she has the opportunity to observe the witness (see, Matter of American Express Co. & Am. Express Intl. Banking Corp. (Tax Appeals Tribunal, April 23, 1992). Although not bound by the assessment of an Administrative Law Judge (Tax Law § 2000.6[7]; 20 NYCRR 3000.11[e][1]; Matter of Moss, Tax Appeals Tribunal, November 25, 1992; see, Matter of Stevens v. Axelrod, 162 AD2d 1025, 557 NYS2d 809), we find nothing in the record which would lead us to alter the Administrative Law Judge's conclusions concerning Mr. Rizzo's testimony regarding the pricing differences.

Second, petitioners offered the written analysis of Stewart Buxbaum, C.P.A. (see, Exhibit "2"). However, Mr. Buxbaum's analysis is of limited value because (i) it does not consider all of the products sold by petitioners (Tr., pp. 105-109) and (ii) it is not based upon a review of any written documentation or records setting forth petitioners' prices for the earlier years of the audit; rather, it is simply an analysis of information told to him by petitioner Antonio Rizzo (Tr.,

p. 105). In sum, Mr. Buxbaum's analysis is an estimation of tax liability based upon incomplete and unsubstantiated criteria. This does not rise to the level of clear and convincing evidence showing that the audit methodology or assessment is flawed (Matter of Grant Co. v. Joseph, supra).

Although not raised as an issue at the hearing below, petitioners assert on exception that penalties and interest assessed should be modified because of the prejudice caused by the Division's failure to submit an answer to petitioners' petition until some ten months after the deadline set forth in the regulations of the Tribunal (see, 20 NYCRR 3000.9[a][1]). Preliminarily, we note that this issue is properly before us notwithstanding petitioners' failure to raise it at the hearing below (Matter of Small, Tax Appeals Tribunal, August 11, 1988; see, Matter of Jericho Delicatessen, Tax Appeals Tribunal, July 23, 1992, Matter of Mustafa, Tax Appeals Tribunal, December 27, 1991).

The issue of the failure of the Division to serve an answer within the required time period has been addressed by this Tribunal in Matter of Macbet Realty Corp. (Tax Appeals Tribunal, May 17, 1990) and Matter of Maggin (Tax Appeals Tribunal, March 8, 1990), where we stated:

> "the time period imposed upon an administrative agency for a responsive pleading is directory rather than mandatory (Matter of Geary v. Commissioner of Motor Vehicles, 92 AD2d 38, 459 NYS2d 494, affd 59 NY2d 950, 466 NYS2d 304). This principle was applied explicitly to the rule of the former State Tax Commission which was substantially similar to § 3000.4(a)(1) (Matter of Hamelburg v. Tully, Sup. Ct., Albany County, April 16, 1979, Prior, J.; Matter of Santoro v. State Tax Commn., Sup. Ct., Albany County, January 4, 1979, Conway, J.) . . . . [A]n agency's failure to act within a specified period will not result in dismissal of the agency's action in the absence of a showing of substantial prejudice as a result of the delay (Matter of Cortlandt Nursing Home v. Axelrod, 66 NY2d 169, 495 NYS2d 927, cert denied 476 US 1115 [1986]; Matter of Geary v. Commissioner of Motor Vehicles, supra; Matter of G.H. Walker & Co. et al v. State Tax Commn., 62 AD2d 77, 403 NYS2d 811; Matter of Hamelburg v. Tully, supra; Matter of Santoro v. State Tax Commn., supra; Matter of Dworkin Construction Co., Inc., Tax Appeals Tribunal, August 4, 1988)."

In this case, petitioners do not seek a dismissal of the Division's action. Rather, petitioners request the abatement of penalty and interest, alleging that the Division's delay in filing an answer prejudiced petitioners by allowing additional interest to accrue.

We find that petitioners have not demonstrated substantial prejudice in this matter. First, petitioners have not demonstrated that the Division's delay "significantly and irreparably handicapped" petitioners' efforts to develop their case (Matter of Cortlandt Nursing Home v. Axelrod, supra, 495 NYS2d 927, 934). Rather, petitioners simply assert that penalty and interest should be reduced as a "sanction against the Department for its delay" (Petitioners' brief on exception, p. 7).

In our opinion, interest assessed may be viewed as a quantification of the risk assumed by a taxpayer when appealing an assessment without paying it. The Sales Tax Law sets forth a procedure for the timely remittance of tax and the keeping of proper books and records to substantiate the amounts remitted (Tax Law §§ 1137 and 1135, respectively). Failure to remit tax gives the taxpayer the use of funds which do not belong to him or her, and deprives the State of funds which belong to it. Interest is imposed on outstanding amounts of tax due to compensate the State for its inability to use the funds and to encourage timely remittance of tax due (Tax Law § 1145). In this case, the bulk of the interest has accrued as a result of petitioners' challenge to the assessment. It is not proper to describe interest as substantial prejudice, as it is applied to all taxpayers who fail to remit sales and use tax due in a timely manner. Rather, a more accurate interpretation would be to say that interest represents the cost to the taxpayer for the use of the funds during the period of protest.

Although we conclude that substantial prejudice did not occur in this case, we note, as we did in Matter of Macbet Realty Corp. (supra) and Matter of Maggin (supra), that this Tribunal is charged with the responsibility of "providing the public with a just system of resolving controversies with [the] department of taxation and finance . . . to ensure that the elements of due process are present with regard to such resolution of controversies" (Tax Law § 2000). Failure to

adhere to the procedural requirements set forth by the Tribunal (20 NYCRR 3000 et seq.) inhibits our ability to achieve our statutory objective, and may result in the issuance of a default determination or other appropriate remedy (see, 20 NYCRR 3000.4[a][4]).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Antonio Rizzo and Giusepina Mauceri, partners of Tony and Orazio Pizzeria is denied;

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

3. The petition of Antonio Rizzo and Giusepina Mauceri, partners of Tony and Orazio Pizzeria is granted to the extent set forth in conclusion of law "D" of the Administrative Law Judge's determination, and is in all other respects denied; and

4. The notices of determination dated December 10, 1984, as modified by conclusions of law "B" and "D" of the Administrative Law Judge's determination, are sustained.

DATED: Troy, New York
May 13, 1993

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

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

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