

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
RONALD BOWEN	:	DECISION
D/B/A RON'S DISCOUNT LIQUOR	:	DTA No. 808168

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, 1982
through May 31, 1985.

Petitioner Ronald Bowen d/b/a Ron's Discount Liquor, 684 East 92nd Street, Brooklyn, New York 11236, filed an exception to the determination of the Administrative Law Judge issued on April 22, 1993. Petitioner appeared by Norman R. Berkowitz, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Michael B. Infantino, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation responded with a brief and petitioner filed a reply to the response. The reply brief was received by the Tax Appeals Tribunal on August 25, 1993 and began the six-month period for the issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

- I. Whether the Notice of Determination issued by the Division of Taxation to petitioner was jurisdictionally defective and therefore invalid.
- II. Whether petitioner filed a timely request for a conciliation conference.

FINDINGS OF FACT

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

Ronald Bowen ("petitioner") operated a retail liquor store known as Ron's Discount Liquor at 474 Flatbush Avenue, Brooklyn, New York during the period in question.

Following an audit of petitioner's business, which took place between 1985 and 1988, the Division of Taxation ("Division") issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated December 20, 1988 asserting additional tax due of \$64,152.66, plus penalty and interest of \$32,076.33 and \$48,471.17, respectively, for a total amount due of \$144,700.16 for the taxable period September 1, 1982 through May 31, 1985.

The notice provided the following explanation:

"The following taxes have been determined to be due in accordance with Section 1138 of the Tax Law and are based on an audit of your records."

The notice reflects the assessment of tax for 11 separate sales tax quarters indicating an equal amount of tax due of \$5,832.06 for each of the quarters, totalling \$64,152.66. In addition, a 50% penalty for each quarter, plus interest, was assessed as described above.

Petitioner executed a consent extending the period of limitation for the assessment of sales and use taxes on May 2, 1988. Such consent indicated that for the taxable period September 1, 1982 through August 31, 1985 the tax could be determined any time on or before December 20, 1988.

Petitioner filed a request for a conciliation conference on February 27, 1990, as is evidenced by a copy of an envelope mailed to the Bureau of Conciliation and Mediation Services ("BCMS") stamped by the U.S. Postal Service on February 27, 1990, having been received by BCMS on March 5, 1990. Among the claims made by petitioner in his request for conciliation conference he states that the notice of determination, though dated December 20, 1988, was not mailed to petitioner by certified mail until January 19, 1990. He enclosed a copy of an envelope showing such date with his request.

On May 4, 1990, BCMS issued a Conciliation Order dismissing petitioner's request for conciliation conference indicating that since the notice was issued on December 20, 1988, but

the request was not received until March 5, 1990, or in excess of 90 days, the request was deemed late filed. Petitioner thereafter filed a timely petition with the Division of Tax Appeals.

The Division issued an answer in this matter on September 9, 1991 indicating that the Division had conducted an audit of petitioner's sales and use tax liability for the period in issue. The Division further stated by its answer that it "estimated the sales tax liability of the petitioner from the information available including claimed resale and tax exempt certificates."

Jeannie Chan, a tax auditor with the New York City Department of Finance, was assigned to perform the sales tax audit in this matter. Ms. Chan summarized her findings and the method of performing her audit in her field audit report which was submitted into evidence as part of a substantially complete audit file. According to the field audit report, gross sales per taxpayer's records could be reconciled with sales tax returns and Federal income tax returns. A reconcilable difference was attributed to nontaxable sales for which the auditor requested sales invoices, and resale and exempt certificates. Initially, petitioner indicated he had not been maintaining such records; however, about six weeks later, petitioner informed the auditor that he had located sales invoices and exempt certificates and produced the same. The auditor issued sales confirmations to the customers whose names were provided by petitioner on such documents. According to the auditor's testimony, of the nine confirmations issued, the five returned to the auditor all revealed that such sales had never occurred and, in some cases, names appearing on some certificates were fictitious. Nontaxable sales of \$777,608.43 totalled from petitioner's sales invoices were disallowed by the auditor resulting in additional tax assessed in the amount of \$64,152.66. Ms. Chan's testimony indicated that she added together all of the claimed nontaxable sales and then divided by the total number of quarters in the audit period to arrive at additional taxable sales. She thereafter applied the 8 $\frac{1}{4}$ % tax to arrive at additional tax due. Thus, each of the taxable quarters listed on the notice reflected the same amount of tax due in spite of the fact that the actual tax due per quarter was available from the information provided by petitioner's sales invoices. Ms. Chan testified that her original purpose for preparing the schedule which was ultimately used as the basis for the tax assessed was to

attribute to each alleged tax-exempt organization a total amount of sales. Having attained a total amount of tax due, she did not thereafter prepare a tax schedule which indicated a breakdown of taxes per quarter.

On July 3, 1986 (after she received back the sales confirmations), Ms. Chan referred this matter to the New York City Department of Finance's Investigative Unit. The file was maintained by the Investigative Unit between that time and (at the earliest date) October 21, 1988 when an intradepartmental memorandum was prepared by fraud investigator Donald Ashman. The intradepartmental memorandum prepared by Mr. Ashman indicated that the investigative unit had contacted 10 tax-exempt organizations whose names were provided by petitioner and to whom petitioner alleged having sold liquor on a tax-free basis. The sales purportedly made to these organizations during the audit period exceeded \$777,000.00. The contact by the Investigative Unit revealed that the organizations had not conducted business transactions with petitioner's liquor store. The memorandum indicates that petitioner was interviewed by two fraud investigators at his place of business. The result of such interview was stated as follows:

"When questioned about the responses from the ten organizations that claimed to have done no business with his store, the taxpayer had no answer. The only statement made by the taxpayer is that, he considers himself an absentee store owner, and has been one for the last 10 years. At no time did the taxpayer attempt to justify or explain the denial of sales between the 10 organizations and his place of business."

Petitioner provided a brief amount of testimony in this matter. He indicated that the first time he was aware that there was a claimed discrepancy in his sales tax liability was when he was informed by his accountant. However, petitioner did not indicate when that occurred. Petitioner testified that the State placed a levy on his bank account at Manufacturers Hanover Trust and petitioner introduced into evidence a Tax Compliance levy bearing a warrant number corresponding to the notice of determination at issue herein for an unpaid balance of tax in the amount of \$64,152.66, plus statutory additions, dated October 25, 1989. He testified that he never received a notice of determination when it was purportedly mailed. Petitioner introduced into evidence a photocopy of an envelope addressed to him at his business address bearing a

U.S. Postal Service stamp of January 19, 1990 with an indication that it was sent by certified mail, bearing certified mail number 917992. By his testimony, petitioner stated that in this envelope was a copy of the notice of determination and his receipt of that copy was the first time he had received it.

During 1988, in particular on or about the date the notice of determination was purportedly issued, petitioner was not in his liquor store on a daily basis. In fact, he was not at the store location even as often as once a month. He testified that his daughter was maintaining the business operations of the store at that time.

The store location encompasses three retail units: petitioner's liquor store, a grocery story and a beauty parlor, physically located together at 474 Flatbush Avenue. Someone must be present to accept the delivery of mail, otherwise it is placed under the door. Mr. Bowen testified that oftentimes the grocery store operator would be the recipient of his mail until someone opened the liquor store. Although the liquor store was scheduled to open generally at 10:00 A.M., petitioner testified to an unpredictable schedule of opening by his daughter at "10:30, 11:00, and when the mood hit her." With regard to the envelope introduced into evidence date stamped January 19, 1990, petitioner surmised that his daughter was the recipient of such delivery (at the liquor store) since he was not present at the business on a regular basis.

A brief examination of petitioner was conducted by the Administrative Law Judge as follows:

ADMINISTRATIVE LAW JUDGE: "Did Ms. Chan ever indicate to you or to you through Mr. Fitzpatrick [petitioner's accountant] that the books weren't complete enough or that she was unable to make some computations on the basis of the books?"

MR. BOWEN: "No. We produced some non-taxable sales and my understanding, the only understanding of anything wrong from Ms. Chan is that she had problems in verifying those sales, wasn't getting a correlation from the people. Trying to contact the people that made the purchases and she had trouble in contacting them and that was the only discrepancy I ever was told that was going on." (Tr., p. 94-95.)

The sworn affidavit of Jeannie Chan was introduced into evidence by the Division detailing the steps taken to create and mail the notice of determination at issue herein. Ms. Chan executed such affidavit on November 8, 1991 and its contents are reproduced in their entirety below:

"1. That I am an Associate Tax Auditor employed by the New York City Department of Finance, Sales Tax Division, at 345 Adams Street, Brooklyn, New York 11201, and have so been employed for 7 years.

"2. That from August 1, 1985 through November 14, 1988, I performed a sales tax audit of Ronald Bowen d/b/a Ronald Bowen (Discount Liquors), located at 474 Flatbush Avenue, Brooklyn, New York 11225.

"3. That attached hereto and made a part hereof are copies of the following documents from the audit file in this matter, which were prepared by me in the regular course of my duties: Field Audit Report, DO-1637 (1 page); Sales Tax Audit Worksheet (1 page); Notice of Determination and Demand for Payment of Sales and Use Taxes Due (1 page); Tax Field Audit Record (5 pages); and, Certified Mail Record (1 page).

"4. That my regular duties then included and do still include, the preparation of Notices Of Determination And Demand For Payment Of Sales And Use Taxes Due.

"5. That on October 28, 1988, at the conclusion of this audit, I prepared the attached Sales Tax Audit Worksheet, and signed it.

"6. That the file was then reviewed by Associate Tax Auditor Larry Brandwein who determined the date for the proposed Notice of Determination (12/20/88), and wrote it upon the Sales Tax Audit Worksheet.

"7. That Mr. Brandwein selected that date, (12/20/88), in keeping with the policy of my office, which was to date Notices of Determination with the next date that was 20 days after the closing of the current sales tax quarter (9/1/88 - 11/30/88).

"8. That, as was the practice of my office at the time, Mr. Brandwein then transferred the Sales Tax Audit Worksheet to Elaine Lockit, a clerk typist who then, as part of her regular duties: assigned a Notice Number to the worksheet, and wrote it thereon; transferred the information from the worksheet to a New York State Department of Taxation and Finance from [sic], and thereby created the attached Notice of Determination and Demand for Payment of Sales and Use Taxes Due; and, prepared by typing the petitioner's name and address on an envelope for certified mailing by the U.S. Postal Service.

"9. That as part of my regular duties, I thereafter verified the information on the newly created Notice of Determination and Demand for Payment of Sales and Use Taxes Due with that of the address on the envelope and the Sales Tax Audit Worksheet, folded the Notice of Determination and inserted, it in the envelope, and then delivered the filled envelope to the certified mail receptacle in the mail room of my office building.

"10. That employees of the mail room, as part of their regular duties, then affixed the appropriate amount of metered postage to the envelope; affixed a certified mail tag to the envelope and sealed it; and, prepared the attached certified mail record (PS Form 3877). (Portions have been redacted to protect the confidentiality of other taxpayers.)

"11. That among other things, the certified mail record contains the following information: 'Name and Address of Sender'; indication of 'Certified' mail; postage fees; and, 'Total Number of Pieces Listed by Sender' (4). It should be noted that the 'Name and Address of Sender', which is typed denotes the 'Bureau of Tax Collection'; this is the designation used by the mail room for all outgoing pieces of certified mail listed on N.Y.C. Dept. of Finance certified mail records.

"12. That, in addition to writing by hand, the above information on the certified mail record, the mail room employee then assigned to each article a 'Number of Article' from a list of certified mail numbers, supplied by the post office, and wrote these in the appropriate left-hand column of the sheet; the article numbers were then written on the certified mail tags attached to the corresponding items of sealed mail.

"13. That on November 14, 1988, an employee of the mail room then delivered these 4 articles of sealed mail and the certified mail record to the local United States Post Office in Brooklyn, where they were checked and matched against the names, addresses and article numbers on the certified mail record by a postal employee, who then accepted these pieces of mail, noted the 'Total Number of Pieces Received at Post Office', signed his name to the certified mail record, and affixed the branch's 'date stamp', indicating receipt.

"14. That thereafter, employees of the mail room as is their regular practice picked up the certified mail record from the post office and delivered it to me; I then placed it in the audit file, as is my regular practice.

"15. That, a search of the audit file indicates, at no time was the Notice of Determination returned to my office as 'refused' or otherwise 'undelivered'.

"16. That, based upon the foregoing, my experience as an auditor, and my familiarity with the practices and procedures of the New York City Department of Taxation and Finance, I am certain that the subject Notice of Determination (Notice Number S881220920K) was delivered to and received by the United States Postal Service, in Brooklyn, New York, for certified mailing, on November 14, 1988."

After the preparation of her affidavit, Ms. Chan was requested to appear personally and provide testimony about her involvement with petitioner's sales tax audit. She indicated by her testimony that in reviewing the affidavit there were two items with which there was a slight discrepancy. The first was in Item "12" of her affidavit, where she had stated that "article numbers were then written on the certified mail tags attached to the corresponding items of sealed mail." She corrected such information by stating that the certified mail number was

written directly on the envelope and no mail tag actually existed. In addition, in Item "16" of the affidavit she makes reference to the "New York City Department of Taxation and Finance" and corrects the agency name so it is properly reflected as New York City Department of Finance.

Ms. Chan was cross-examined by petitioner's representative in approximately 100 pages of transcript on this four-page affidavit and the procedures enumerated therein. The only additional slight discrepancy noted by Ms. Chan was with reference to Item "14" where she indicated receipt of the certified mail record after it is stamped by the Post Office. What Ms. Chan actually receives for her audit file is a copy of the certified mail record, including the page on which a particular taxpayer's name appears. It is that copy that she placed in her file.

Additional testimony was provided by Chandra Panchmia, who acted as the auditor's section head during the audit in question. Mr. Panchmia independently confirmed that it is common practice for the notice of determination to be sent out before the section head or team leader "signs off" on the field audit report. Mr. Panchmia expressed no surprise that the notice of determination in this matter, dated December 20, 1988, was purportedly mailed on November 14, 1988. He explained that until sometime in the latter part of 1989 his office routinely computed the interest up to the 20th day of the current tax quarter and mailed the notice "whenever appropriate". He indicated that if interest was in fact overpaid, the Division would refund the same. Mr. Panchmia additionally confirmed all of the pertinent steps of the preparation and mailing of the notice as set forth by Ms. Chan in her affidavit.

Petitioner introduced into evidence two certified mail logs, each bearing U.S. Postal Service stamps dated November 14, 1988. Each page indicates a mailing to Ronald Bowen. The first of the two documents, bearing article number 932995, indicates a document was mailed by the New York City Department of Finance to Ronald Bowen d/b/a Ronald Bowen (Discount Liquors) at 474 Flatbush Avenue, Brooklyn, New York. The total number of pieces of mail listed by the sender (New York City Department of Finance) was stated to be "4". The

Postal Service thereafter indicated that the total number of pieces received at the Post Office was the same number and a scribbled signature appears in the "Postmaster" box.

The second document indicates three pieces of mail listed by sender and the same number of pieces received at the Post Office, with the same Postmaster signature. That document indicates that article number 932994 was sent to Mr. Ronald Bowen on November 14, 1988 at his home address of 684 East 92nd Street, Brooklyn, New York. Both forms indicated that the documents described thereon were sent by certified mail.

Petitioner introduced into evidence two pages from a publication described as the Domestic Mail Manual. Section 912.1 of each of the two issues of the Domestic Mail Manual (Issue 22, dated 1/22/87, and Issue 39, dated 6/16/91) contains information regarding certified mail procedures. The section noted by petitioner is 912.1(b) indicating the following:

"Mailers may be authorized to use specially designed and privately printed Forms 3800 [receipt for certified mail]. The certified mail endorsement block must be printed in green using the same size and format. The certified number must begin with the letter P . . ."

OPINION

The Administrative Law Judge first concluded that the assessment at issue was not based on an estimate, but was instead based on actual records of claimed nontaxable sales that petitioner could not substantiate. The Administrative Law Judge noted that the "notice was somewhat inaccurate as to the tax deficiencies on a quarterly basis because of improper averaging over the entire audit period . . ." (Determination, conclusion of law "A"); however, because the assessment was not based on an estimate, the Administrative Law Judge concluded that petitioner was not entitled to be apprised of an estimated audit methodology pursuant to section 1138(a)(1) of the Tax Law. Even if petitioner were entitled to such notice, the Administrative Law Judge concluded that the omission of the notice did not in itself invalidate the assessment and that petitioner did not establish that he was prejudiced by the omission.

With respect to the timeliness of petitioner's request for a conciliation conference, the Administrative Law Judge concluded that the Division had established that it properly mailed

the Notice of Determination to petitioner on November 14, 1988 through: the affidavit of Jeannie Chan, the credible testimony of Ms. Chan and her supervisor Chandra Panchmia at the hearing, and the submission of Postal Service Form 3877. The Administrative Law Judge stated that petitioner's "overzealous" cross examination of Ms. Chan only lent more credence to her testimony as to office procedure and that the failure of the numbers on the certified mailing record to be preceded by a "P" was not sufficient to undermine the mailing proof offered by the Division. Concluding that petitioner's petition was untimely whether measured from November 14, 1988 or December 20, 1988, the Administrative Law Judge dismissed the petition.

On exception, petitioner first requests that all findings of fact relating to the merits of the case be deleted because the Administrative Law Judge by letter dated June 8, 1992 stated that the sole issues to be decided were the timeliness and jurisdictional questions. We have taken no action in response to petitioner's request because the facts found by the Administrative Law Judge with respect to the merits were necessary to resolve the jurisdictional question raised by petitioner (Tr., p. 13), i.e., that the Notice of Determination was required to indicate that the taxes were estimated. The facts found by the Administrative Law Judge were necessary to support her conclusion that the taxes had not been estimated but were, in fact, based on an audit of petitioner's actual records.

Next, petitioner again asserts that the Notice of Determination was jurisdictionally defective because it did not contain a statement that the tax was estimated. We affirm, for the reasons stated in the Administrative Law Judge's determination, the Administrative Law Judge's conclusion that the tax at issue was not estimated and that the Notice of Determination was correct in not so stating. Further, we agree with the Administrative Law Judge's conclusion that petitioner's reliance on this Tribunal's decision in Matter of Cheakdkaipejchara (Tax Appeals Tribunal, April 23, 1992) is misplaced. As the Administrative Law Judge held, even if the tax at issue was estimated, Cheakdkaipejchara and Matter of A & J Parking Corp. (Tax Appeals Tribunal, April 9, 1992) hold that the failure of the notice to state that the tax was estimated will

only invalidate the notice if it is shown that the petitioner was actually prejudiced by the omission. In this case, petitioner has shown no prejudice.

Next, petitioner challenges the Administrative Law Judge's conclusion that the Division proved that it mailed the Notice of Determination on November 14, 1988. Specifically, petitioner attacks the Administrative Law Judge's finding that the testimony of Ms. Chan was credible. We have consistently held that we will defer to an Administrative Law Judge's evaluation of the credibility of a witness because the Administrative Law Judge has the opportunity to view the witnesses and is in the best position to evaluate the truthfulness and accuracy of their testimony (*see, Matter of American Express Co.*, Tax Appeals Tribunal, April 23, 1992, *affd Matter of American Express Co. v. Tax Appeals Tribunal*, 190 AD2d 104, 597 NYS2d 485). Although we are not absolutely bound by an Administrative Law Judge's assessment of credibility, we see nothing in the record that would justify setting aside the Administrative Law Judge's evaluation in this case (*see, Matter of Stevens v. Axelrod*, 162 AD2d 1025, 557 NYS2d 809). Accordingly, we affirm the Administrative Law Judge's determination that the Division established mailing of the Notice of Determination on November 14, 1988 for the reasons stated in her determination.

Finally, we repeat the Administrative Law Judge's observation that petitioner's petition was untimely whether one measures from November 14, 1988 or from December 20, 1988.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Ronald Bowen d/b/a Ron's Discount Liquor is denied;
2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of Ronald Bowen d/b/a Ron's Discount Liquor is dismissed.

DATED: Troy, New York
January 20, 1994

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

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