

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>CHRISTIAN BLEISTEIN</b>	:	DECISION
<b>OFFICER OF SECOND STREET DELI, INC.</b>	:	DTA No. 808747
	:	
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,	:	
1985 through August 31, 1988.	:	

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Petitioner Christian Bleistein, officer of Second Street Deli, Inc., 356 Indian Head Road, Commack, New York 11725, filed an exception to the determination of the Administrative Law Judge issued on October 7, 1993. Petitioner appeared by Louis F. Brush, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

Both petitioner and the Division of Taxation filed briefs. The six-month period to issue this decision began on February 24, 1994, the date by which petitioner could submit a reply brief. Oral argument was not requested.

The Tax Appeals Tribunal renders the following decision per curiam.

***ISSUES***

I. Whether the execution of a Statement of Proposed Audit Adjustment pursuant to Tax Law § 1138(c) bars petitioner from challenging the accuracy of the sales tax audit.

II. Whether certain periods were barred by the statute of limitations because the consents to extend the statute of limitations were executed pursuant to an invalid power of attorney.

III. Whether the Division of Taxation properly determined petitioner's sales and use tax liability.

IV. Whether penalties and interest in excess of the minimum, which were imposed against petitioner, should be waived.

***FINDINGS OF FACT***

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

Second Street Deli, Inc. ("Deli") was a delicatessen which was located in a busy business district. It had 12 tables, two cash registers and a long counter. There were four or five people who worked behind the counter. Petitioner, Christian Bleistein, was Deli's president.

On September 7, 1988 an auditor called petitioner and told him that the delicatessen was going to be audited for a three-year period. Petitioner replied that his accountant, Mr. Forman, should be contacted.

On September 8, 1988 the auditor called Mr. Forman and explained that the Deli was being audited for sales tax. The auditor gave Mr. Forman an overview of the books and records that would be required for the audit.

In a letter dated September 8, 1988, the Division of Taxation (hereinafter the "Division") advised Mr. Forman that the audit of the Deli's sales and use tax returns was scheduled on October 11, 1988. The cover letter requested all of the Deli's books and records pertaining to its sales tax liability for the period under audit including journals, ledgers, sales invoices, purchase invoices, cash register tapes, Federal income tax returns and exemption certificates. The second page of the letter set forth an extensive list of records requested for the audit. Among other items, the Division asked for guest checks and cash register tapes for the period "[t]o be determined".

On October 11, 1988, the auditor and Mr. Forman met at the Nassau District Office. During their meeting, the auditor and the accountant reviewed the Deli's general ledger, Federal tax returns, purchase invoices and deposit slips. In addition, the accountant left the auditor with purchase invoices that covered a two-month period. However, the accountant did not produce any cash register tapes or a day book which listed the Deli's sales and sales invoices. The

Division concluded that petitioner's records were inadequate to conduct a detailed audit since there was no substantiation of the sales figures.

In the course of its examination, the Division compared the Deli's sales shown on its Federal income tax return with the sales recorded on its books. For the period ending in December 1987, the sales reported on petitioner's books exceeded the sales reported on the Federal income tax returns by \$6,811.76. The Division also found that during the entire audit period, the sales reported on the books exceeded the sales reported on the returns by \$2,122.28.

On October 13, 1988 the Division received a power of attorney form which appointed Mr. Forman to appear on behalf of the Deli. The box designated for the signature of a corporate officer bears petitioner's signature, his corporate title and the date of October 3, 1988. Mr. Forman placed his name in a box for the signature of a witness and entered the date of October 4, 1988. The other box for the signature of a witness was left blank. He also signed the form as a notary public and entered the same date. Mr. Forman signed the bottom of the form as the appointed representative and checked the box stating he is a public accountant enrolled with the New York State Education Department.

Initially, the Division considered performing a markup test. In accordance with this plan, the Division examined purchase invoices for April 1987 and October 1988. The examination revealed that the purchase records for April 1987 were adequate. However, the October 1988 purchase invoices were \$20,000.00 less than that recorded in the general ledger. The inadequacy of the purchase invoices caused the Division to decide to perform an observation test.<sup>1</sup>

Prior to conducting the audit, the Division went to the Deli and obtained the prices of every taxable item that was sold. The prices were either posted on a board or were obtained from Mr. Blestein. During this meeting, petitioner told the auditor that the Deli did not close any days during the year.

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<sup>1</sup>It is noted that the field audit report contains a checkmark in a box which states that the purchase records were adequate. This box was checked because the person who wrote the report was not familiar with the case.

Before the observation test was performed, petitioner was told that if he disagreed with the results of the observation because the day selected was not representative, the Division would perform a second unannounced observation test on a different day of the week. The results of the first observation test would then be averaged with the results of the second observation test.

The observation test was performed on Monday, April 3, 1989. At the hearing the auditor explained that the Division does not usually conduct observation tests on a Monday because, in its experience, sales are commonly lower in the beginning of the week than the end of the week.

April 3, 1989 started out as a rainy day. Later the sky was overcast. The temperature was in the 50's.

The observation test was conducted by two auditors who were at the store at the same time for most of the day including the busy periods. However, one auditor started and finished earlier than the other auditor. By recording sales as they occurred, the auditors found total taxable sales of \$1,373.39<sup>2</sup> and gross sales of \$2,096.59.

At the conclusion of the observation, the auditor discussed the findings, including the tax, with petitioner. Petitioner responded that it was a representative day and that he agreed with the audit findings. At another juncture he said it was a slow day because of the rain. In addition, petitioner and Mr. Forman were offered an opportunity for a second observation test. Petitioner responded that he was not interested in a second observation test.

The Division divided the total taxable sales by the gross sales which were found during the observation test, in order to calculate a taxable ratio of 65.53 percent. The taxable ratio was used to examine what petitioner was reporting. It was not used to calculate the tax due.

In order to calculate the amount of taxable sales, the Division initially multiplied the taxable sales found during the observation test by seven to determine the amount of taxable sales during a week. The Division proceeded on the premise that the Deli was open seven days a week because petitioner stated that it was open for this period. Later, petitioner's accountant

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<sup>2</sup>The workpapers erroneously use the figure of \$1,373.99.

requested that the tax be recalculated as if the business was open six days a week since the Deli does not have as much business on a weekend as it does during the week. The Division agreed to this request and recalculated the amount of tax due. It then advised Mr. Forman of the result.

In response to the Division's proposal, Mr. Forman mailed a letter dated April 15, 1989 to the auditor which requested adjustments pertaining to delivery equipment and a leasehold expense. Mr. Forman also stated:

"I discussed the matter of days open to business with the taxpayer. This business is located in a business district. There is no reason to be open past the afternoon on Saturdays. I feel you should use a 5½ day week, not a 6 day week.

"Will you kindly recompute the tax giving the taxpayer credit for the above, and mail the corrected bill to me."

In order to recompute the amount of tax due, the Division projected the amount of taxable sales over a five and one-half day period and then multiplied that figure by 13 to calculate the amount of taxable sales in a quarterly period. The amount of taxable sales in a quarterly period was multiplied by four to calculate the amount of taxable sales in a year. The annual taxable sales were then multiplied in two successive steps by 95 percent in order to allow for a five percent inflation rate for the prior two years.<sup>3</sup> On the basis of this procedure, the Division calculated total taxable sales, without catering, of \$1,120,922.39.

The Division asked for the Deli's books and records on catering. Petitioner provided the auditor with a catering menu. However, no catering records were available.

The Division concluded that, since the business had menus for catering, approximately 10 percent of the Deli's taxable sales arose from catering. The 10 percent estimate was based on office experience and on the auditor's experience in examining delicatessens.

Total audited taxable sales were obtained by adding the audited taxable sales from the Deli and the catering sales. The total audited taxable sales were then reduced by the reported taxable sales to determine the additional taxable sales. The Division divided the additional taxable sales by the reported taxable sales to calculate an error ratio of 262.22 percent.

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<sup>3</sup>The auditor's notes indicate that the United States Department of Labor reported an inflation rate of 3.3% in 1986, 5.1% in 1987 and 4.1% in 1988.

Thereafter, the Division, in succession, multiplied the reported taxable sales by the error rate and the tax rate to determine that tax was due in the amount of \$71,560.55.

The Division also determined that tax was due on the purchase of fixed assets on which no taxes were paid resulting in tax due of \$351.99. The amount of tax due was based on a detailed examination of petitioner's records which showed that no tax was paid for a computer which cost \$3,299.30 and that an invoice for \$1,100.00 was missing.

The Division concluded that omnibus penalty was due because the amount of tax found due on audit was 25 percent greater than the amount of tax reported.

The Division determined that petitioner was responsible for the taxes due from the Deli. The Division reached this conclusion because petitioner was the sole officer of the Deli, held himself out as president and signed the Federal tax returns. The Division also considered the fact that petitioner operated the business and was at the business premises on a daily basis. Further, petitioner signed checks and, as president, he signed the power of attorney form.

On June 15, 1989, the Nassau District Office received a signed Statement of Proposed Audit Adjustment. At the top of the page the statement was addressed to "Second St. Deli., Inc. c/o Mr. Joseph Forman, 77-05 220th St., Bayside, N.Y. 11364. The statement was dated May 1, 1989. Below the address, the statement contained the following explanation:

"The statement of Proposed Audit Adjustment is based on the information indicated by the box checked above. If you agree that a sales and/or use tax as detailed below is due and payable to the State Tax Commission, please sign one copy of this statement and return it to this office within 30 days. Appropriate penalty and/or interest will continue to accrue until full payment is made.

"If you DISAGREE with this statement, please return one copy of this statement along with a precise explanation of your disagreement, to this office within 30 days.

"Failure to either agree or disagree to this Statement of Proposed Audit Adjustment within 30 days of the statement date will result in the issuance of a Notice of Determination and Demand for Payment of Sales and Use Taxes Due."

The document next listed a series of quarterly periods which ended November 30, 1985 through August 31, 1988, inclusive, and set forth the amount of tax due for each respective period. At the bottom of the column, the total tax of \$71,912.54 was listed. A line bracketed each of the quarterly tax amounts and contained the statement "Penalty & Interest To Be

Computed". Beneath the column setting forth the asserted amount of tax, the statement contained the following paragraph:

The Tax Law provides that a taxpayer is entitled to have tax due finally and irrevocably fixed by filing a signed consent with the State Tax Commission. Such consent, subject to review and approval, 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 by law. The agreement to and signing of this statement constitutes such a consent. YOU MAY CONSIDER AN APPROVAL OF THIS MATTER FINAL IF YOU ARE NOT NOTIFIED TO THE CONTRARY WITHIN 60 DAYS FROM THE DATE THE SIGNED CONSENT IS RECEIVED BY THE DEPARTMENT. (Emphasis in original.)

At the bottom of the page, there are boxes for signature, title and date. The box for signature bears an "X" and petitioner's signature. The title is listed as "Pres." and the document is dated May 10, 1989. On June 15, 1989, the Division received a second Statement of Proposed Audit Adjustment, which was signed by petitioner as president. This statement was identical to the first one except that only penalty was listed across from the corresponding periods. In addition, the box for dating the signature was left blank.

The records of the Division show that, on June 15, 1989, the Division received a check dated June 12, 1989 which was drawn on the account of Second Street Deli, Inc. The check was signed by petitioner and made payable to the order of the "N.Y.S. Sales Tax Bureau" in the amount of \$35,000.00.

On the basis of the foregoing audit, the Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated June 26, 1989, to petitioner, as president of Second Street Deli., Inc., for the period September 1, 1985 through August 31, 1988. The notice assessed tax of \$71,912.54 plus penalty of \$19,757.69 and interest of \$20,684.65 for a total amount due of \$112,354.84.

In the course of its audit, the Division received a series of consents to extend the period of limitation for assessment of sales and use taxes. The first consent was signed by petitioner on November 25, 1988. It permitted the assessment of sales and use taxes for the period September 1, 1985 through December 31, 1985 until on or before March 20, 1989. The second consent was signed by Mr. Forman on February 10, 1989 and permitted the assessment of sales

and use taxes for the period September 1, 1985 through February 29, 1986 until on or before June 20, 1989. On June 10, 1989 Mr. Forman signed a consent which permitted the assessment of sales and use taxes for the period September 1, 1985 through February 29, 1987 at any time on or before September 20, 1989.

During the audit period, the Deli reported the following taxable sales:

<u>Quarter Ending</u>	<u>Taxable Sales</u>
November 1985	\$23,116.00
February 1986	25,640.00
May 1986	26,830.00
August 1986	25,940.00
November 1986	28,830.00
February 1987	27,314.00
May 1987	28,550.00
August 1987	27,918.00
November 1987	28,690.00
February 1988	29,418.00
May 1988	31,040.00
August 1988	37,120.00

It is the Division's experience that reported taxable sales increase after the Division contacts a taxpayer about an audit.

At the time of the hearing, petitioner had known Mr. Forman for about eight years. On the basis of a recommendation, petitioner met Mr. Forman just before petitioner became associated with the Deli. Mr. Forman told petitioner that he had a lot of experience with delicatessens. Petitioner has been satisfied with Mr. Forman's services and it was petitioner's wish that Mr. Forman represent him during the audit.

Mr. Forman told petitioner to keep a day book, receipts from bills and receipts from what the Deli pays its drivers. However, Mr. Forman never told petitioner to keep the backup to the day book. It was petitioner's practice to write a figure from the cash register tape into the day book and then destroy the tape.

At the hearing, petitioner testified that on the day that the observation test was conducted, the store's volume was 60% higher than usual. Petitioner explained that the 60% increase was attributable to two factors - Mondays are a busier day because the courts in the area are in



session and, petitioner's main competitor, which was a sandwich shop located around the corner, was closed. Petitioner estimated that of the 60% increase in volume, 20% was due to the fact that it was a Monday and 40% was due to the competition being closed.

Petitioner further testified that beginning in January 1988 and ending during the second week of May 1988 the Deli was completely remodeled. The renovations included a new ceiling, new counters, new tables and a new floor. The renovated store also had a large salad counter and a steam table. In addition, the seating capacity increased from 24 to 48 patrons.

The Deli had to be closed for a certain number of days because of the renovations. However, upon completion, the remodeling resulted in increased volume.

Petitioner also explained that at or about the time of the renovation, new office buildings were built around the corner and a new three-story super structure was built across the street in the other direction. Petitioner contends that the new buildings, the remodeling and the increased seating capacity affected his taxable ratio because more people were coming in for lunch.

Petitioner also testified that the Deli provides catering only to small office parties and that on some weeks the Deli did not do any catering business. On other weeks it might cater two or three events. Petitioner estimated that during the audit period, the Deli averaged \$100.00 a week in catering business.

Lastly, petitioner maintained that by the end of 1989, the recession caused business to fluctuate. Further, petitioner submitted that if there had not been a recession, business would have been better.

### ***OPINION***

In the determination below, the Administrative Law Judge focused on the impact of the Statement of Proposed Audit Adjustment signed by petitioner. The Administrative Law Judge found that petitioner, through his signature, manifested an intention to take advantage of the provisions of Tax Law § 1138(c) and have the tax permanently fixed. The Administrative Law Judge also noted that petitioner had conceded his responsible officer status and, as a result, is

liable pursuant to Tax Law §§ 1131(1) and 1133(a) for the tax due from the Deli. The Administrative Law Judge, relying on Matter of BAP Appliance Corp. (Tax Appeals Tribunal, May 28, 1992), determined that petitioner became bound, through his signature, to the terms of what the Administrative Law Judge determined to be a consent pursuant to Tax Law § 1138(c).

On exception, petitioner argues the power of attorney signed by Mr. Forman is invalid because, pursuant to New York State law, one cannot notarize a signature in which one is also the recipient of the power of attorney. Therefore, petitioner argues that the consent to extend the statute of limitations signed by Mr. Forman is void. Petitioner additionally argues that the power of attorney is invalid because the tax period was not specified on the form. Petitioner also argues that no assessment against the Deli can be made because the Department never issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due within the statute of limitations period. Further, petitioner contends that, since no Notice was issued, petitioner cannot be held liable either, because said liability was predicated on that of the corporation. Petitioner alleges the Statement of Proposed Audit Adjustment is invalid as a consent because it is ambiguous as a matter of law due to its failure to apprise the taxpayer of what rights, if any, are being waived. Next, petitioner argues that even if the consent is considered to be valid, petitioner, in his individual status, has the right to a full and adequate opportunity to challenge the Notice of Determination. Finally, petitioner argues that he filed a timely claim for a refund and that this refund claim cancels the so-called consent.

The Division, on exception, agrees with the Administrative Law Judge that Matter of BAP Appliance Corp. (*supra*) controls and that the signing of the consent to fix tax bars petitioner from a future challenge. The Division further contends that petitioner's argument that the Deli was not issued notice is neither true nor supported by the record. The Division also states that Tax Law § 1139(c) implicitly excludes from refund or entitlement those persons who have filed a consent to fix tax after a determination fixing tax has been issued. As a result, petitioner's claim that the filing of a claim for credit or refund served to withdraw the consent is

flawed. With regard to the power of attorney, the Division, relying upon Matter of Jenkins Covington, N.Y. (Tax Appeals Tribunal, November 21, 1991, affd Matter of Jenkins Covington, N.Y. v. Tax Appeals Tribunal, 195 AD2d 625, 600 NYS2d 281, lv denied 82 NY2d 664, 610 NYS2d 151), argues that the authority of petitioner's representative was not diminished by the defect on the face of the corporate power of attorney.

In light of the Administrative Law Judge's decision to address only the issue of the effect of the Statement of Proposed Audit Adjustment signed by petitioner, we must remand this matter to the Administrative Law Judge for a determination on all of the issues the parties asked him to resolve, e.g., on the issues of the extension of the statute of limitations pursuant to what is argued by petitioner were invalid consents, whether the Division properly determined the corporation's tax liability, and whether penalties and interest, in excess of the minimum, should be waived. The Administrative Law Judge is directed to issue this supplemental determination as expeditiously as possible.

We make this remand because petitioner has a right to an administrative determination on the issues raised before the Administrative Law Judge (Matter of Riehm v. Tax Appeals Tribunal, 179 AD2d 970, 579 NYS2d 228, lv denied 79 NY2d 759, 584 NYS2d 447). This determination should be rendered first by the Administrative Law Judge. (Matter of AGL Welding Supply Co., Tax Appeals Tribunal, April 28, 1994).

We will retain jurisdiction over this case based on the exception already timely filed by petitioner. After the Administrative Law Judge issues his supplemental determination, petitioner will be allowed to add to his existing exception and brief so long as he does so within thirty days of the issuance of the supplemental determination, or requests an extension of time to do so within the thirty-day period. The Division will be given an opportunity to respond to any additional material submitted by petitioner. If the Division wishes to except to any portion of the Administrative Law Judge's supplemental determination, the Division will be required to submit a timely exception to the supplemental determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that this matter is remanded to the Administrative Law Judge for the issuance of a supplemental determination in accordance with the foregoing decision.

DATED: Troy, New York  
August 11, 1994

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

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