

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JOSEPH N. BASILE, OFFICER OF WALT'S SUBMARINE SANDWICHES, INC.	:	DECISION DTA NO. 808811
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 December 1, 1986 through February 29, 1988	:	

Petitioner Joseph N. Basile, officer of Walt's Submarine Sandwiches, Inc. (hereinafter "Walt's Sandwiches"), 67 Mordella Road, Albany, New York 12205 filed an exception to the determination of the Administrative Law Judge issued on January 9, 1992 with respect to his 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 December 1, 1986 through February 29, 1988. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel).

Petitioner submitted a brief on exception. The Division of Taxation submitted a brief in response. Petitioner's request for oral argument was denied.

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

ISSUES

I. Whether the Division of Taxation correctly concluded that Walt's Sandwiches had insufficient records for the audit period, thereby justifying the imposition of sales tax on the excess of sales reported on Federal tax returns less sales reported by Walt's Sandwiches on its sales tax returns.

II. Whether the Division of Taxation properly disallowed certain tax-exempt sales claimed by Walt's Sandwiches based upon the company's failure to substantiate their tax-exempt status.

III. Whether petitioner should be bound by the results of the audit when he was not contacted by the auditor during the course of the audit.

IV. Whether petitioner is personally liable for sales tax determined due from Walt's Sandwiches for the period December 1, 1986 through February 29, 1988 as a person required to collect tax under Tax Law§ 1131(1), and, if so, whether penalty and that portion of interest exceeding the minimum interest should be cancelled.

Findings of Fact

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

The Division of Taxation issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated September 11, 1990 against petitioner, Joseph N. Basile, as officer¹ of Walt's Sandwiches, assessing sales tax (plus penalty and interest) for the following five sales tax quarters:

<u>Quarter (Period) Ending</u>	<u>Tax Assessed</u>
February 28, 1987	\$1,507.82
May 31, 1987	2,447.65
August 31, 1987	2,236.58
November 30, 1987	1,774.44
February 29, 1988	<u>1,782.97</u>
Total	<u>\$9,749.46</u>

On the notice, under the subheading "Explanation", was a checked box next to the following statement printed in bold type:

"The tax assessed has been estimated in accordance with the provisions of section 1138(a)(1) of the Tax Law. If the box above is checked see additional information on back of this notice."

¹The notice noted that petitioner was "liable individually and as an [sic] pres. of Walt's Submarine Sandwiches Inc. under Sections 1131(1) and 1133 of the Tax Law...."

The following explanation of "audit methods for estimated taxes" was on the back of the notice:

"Section 1138(a)(1) of the Tax Law provides that if necessary, the tax due may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors."

During the period at issue, Walt's Sandwiches operated several submarine sandwich shops, known as Big Dom's, in the Albany area. In the late 1960's, Walter Austin had started Walt's Sandwiches. According to petitioner's testimony, his brother, Dominic Basile, joined Walter Austin in the business, and a year later, in 1968,² Dominic Basile asked petitioner to come into the business with him:

"I [petitioner Joseph Basile] came into the business with him [brother Dominic Basile] with \$6,000 and we bought Walt Austin's shares out. Dominic retained his initial shares plus half of Walt Austin's shares. I got the other half of Walt Austin's shares."

United States corporation income tax returns for Walt's Sandwiches for 1987 and 1988 show Dominic Basile as owner of 67.5% of the corporation's stock and petitioner owning 32.5%.

THE AUDIT OF WALT'S SANDWICHES

The audit, which took 86.25 hours, covered the period December 1, 1986 through February 28, 1990, including the shorter period involved herein of December 1, 1986 through February 29, 1988. The Division of Taxation has not asserted that petitioner is personally liable for sales tax determined due from Walt's Sandwiches for the eight sales tax quarters included in the period March 1, 1988 through February 28, 1990, but only for sales tax determined due for the five sales tax quarters included in the period December 1, 1986 through February 29, 1988, as detailed above.³

²The audit report completed in 1990 noted that Walt's Sandwiches had been in business for 21 years, which would mean it commenced business in 1969. This minor variance in dates is unexplained.

³A notice of determination dated September 11, 1990 was issued against Walt's Sandwiches for the entire period consisting of the 13 sales tax quarters. However, the corporation is in bankruptcy proceedings, and it does not appear that the Division of Taxation has pursued the corporation. A notice of determination dated September 11, 1990 was issued against petitioner's brother, Dominic Basile, for the eight sales tax quarter included in the period March 1, 1988 through February 28, 1990.

A summary schedule of additional tax due, by sales tax quarter, which is included in the auditor's workpapers, shows the following for the period at issue herein:

<u>Quarter Ended</u>	<u>Total Additional Tax Due on Sales</u>	<u>Total Additional Tax Due on Capital</u>	<u>Total Additional Tax Due on Expenses</u>	<u>Total Additional Tax Due</u>
2/28/87	\$1,384.00	\$ 58.80	\$ 65.02	\$1,507.82
5/31/87	2,329.00	88.20	30.45	2,447.65
8/31/87	1,969.00	29.40	238.18	2,236.58
11/30/87	1,427.00	251.16	96.28	1,774.44
2/29/88	1,634.00	--	148.97	<u>1,782.97</u>
Total				\$9,749.46

The auditor's initial appointment letter, dated February 6, 1990, to Walt's Sandwiches at its corporate address scheduled a field audit and set an appointment date of March 1, 1990. The following corporate records were requested:

"All books and records pertaining to your Sales and Use Tax liability for the period under audit [12/1/86 to 11/30/89 according to this letter] are to be available on the appointment date. This would include journals, ledgers, sales invoices, purchase invoices, cash register tapes, federal income tax returns, and exemption certificates."

According to the auditor's log, the appointment date of March 1, 1990 was postponed at the corporation's request because "their bookkeeper [sic] just left them". As a result, a second appointment letter dated April 4, 1990 was sent to the corporation scheduling the commencement of the field audit for April 24, 1990. The request for records, as detailed above, was made again. The audit report discloses that the following records were made available for the entire audit period: sales tax returns, Federal and State income tax returns, sales journal, cash receipts journal, check disbursements journal, general ledger, and monthly bank statements. However, cash register tapes were not made available, and only some exemption certificates were produced.

The field audit report summarized the auditor's findings covering the 13 sales tax quarters (the longer period of December 1, 1986 through February 28, 1990) as follows:

	<u>Reported</u>	<u>After Audit</u>
Gross sales	\$5,971,291	\$6,067,529
Taxable sales	5,746,252	5,940,057
Purchases subject to use tax	-0-	26,263

The audit report noted that "gross sales per records were not found to be in substantial agreement with sales reported per FITR [Federal income tax returns] and sales tax returns" (emphasis added). Gross sales from the home office were not included on the sales tax returns. As a result, greater gross sales of \$28,226.00 were reported on the 1987 Federal return, of \$42,904.00 on the 1988 Federal return, and of \$20,089.00 on the 1989 Federal return. The auditor used this variance to increase the corporation's gross sales per quarter as follows:

Year

1987	Federal gross sales	\$2,019,750
	Gross sales per sales tax returns	<u>1,991,524</u>
	Difference	\$ 28,226

4 quarters per year therefore \$28,226 divided by 4 = \$7,056
 Additional gross sales for 1987 per quarter \$7,056

1988	Federal gross sales	\$1,826,761
	Gross sales per sales tax returns	<u>1,783,857</u>
	Difference	\$ 42,904

4 quarters per year therefore \$42,904 divided by 4 = \$10,726
 Additional gross sales for 1988 per quarter \$10,726

A similar calculation was done for 1989 which resulted in additional gross sales for 1989 of \$20,089.00, or \$5,022.00 per quarter. (\$5,022.00 was also used as an estimate for the one quarter ending February 28, 1990, which was included in the longer audit period.)⁴

The auditor also increased Walt's Sandwiches' sales subject to sales tax for exempt sales which the corporation could not substantiate. Four pages of schedules included in the auditor's workpapers show substantiated exempt sales for the audit period of 13 sales tax quarters. The total amount of these invoices, which were substantiated as tax exempt, is \$18,671.45. \$9,923.00 of this total amount were apparently tax-exempt sales shown on invoices with dates during the period at issue.

⁴As noted above, the auditor determined gross sales of \$6,067,529.00 after audit. The difference between such audited gross sales and reported gross sales of \$5,971,291.00 is \$96,238.00. The detailed analysis of the auditor's calculation noted above totals \$96,241.00. The \$3.00 discrepancy was unexplained.

A schedule included in the auditor's workpapers showing how the auditor computed the amounts per quarter for total additional tax due on sales, as noted above, is shown in Appendix A attached hereto.

Of the remaining sales tax assessed against petitioner of \$1,006.46 (\$9,749.46 less \$8,743.00), \$427.56 was additional tax due on purchases of assets and \$578.90 additional tax due on recurring expenses. The auditor's workpapers include schedules which detail the asset purchases (including equipment purchases) and recurring expenses (including rubbish and snow removal) which the auditor determined were subject to tax.

PETITIONER'S CHANGING ROLE IN WALT'S SANDWICHES

As noted above, in the late 1960's, petitioner joined his brother, Dominic Basile, in the ownership and operation of Walt's Sandwiches. Petitioner testified that in the succeeding years he helped build up Walt's Sandwiches from a two-store chain to nine stores. According to petitioner's testimony, conflict with his brother "came to a head" in October 1986 when his brother removed⁵ petitioner as president of the corporation. Petitioner testified he did not know what brought the conflict "to a head". However, it seems clear that petitioner's conflict with his brother became heightened at or near the time his brother hired Norman Tillman as an advertising director and subsequently expanded Mr. Tillman's role in the business operations. Petitioner testified that he "turned him [Norman Tillman] down three times". Nonetheless, he came to the office one day and "was told that Norman Tillman was hired by [his] brother". At the time of the audit herein, February to September 1990, Norman Tillman, as general manager of Walt's Sandwiches, assisted in the audit. Petitioner, who was no longer involved in the business, was not contacted by the auditor during the audit for his assistance or for any information he might have concerning the business. From October 1986 until early 1988, when

⁵Petitioner introduced into evidence a letter dated October 15, 1986 of attorney Walter J. Breakell III who was a member of the board of directors of Walt's Sandwiches. Mr. Breakell wrote to Dominic Basile advising him that he was "giving serious consideration to tendering [his] resignation" because of Dominic Basile's removal of petitioner as president. It appears that Dominic Basile's decision to remove petitioner as president was retracted perhaps in response to this letter, or, at the least, was ignored by petitioner.

petitioner was, in his words, "physically taken out of the [corporate] office", petitioner's business relationship with his brother was far from tranquil:

"The fact that he [Dominic Basile] told me that I was no longer president I did not accept immediately. The reason why there are still items⁶ with my signature on it was because

I bit and clawed and scratched in order to keep my position as president. This was not successful on my part and I was physically removed from the office, from the premises under threat of being arrested...somewhere in December or January of '88."

Petitioner's testimony is that, although he remained with the corporation from October 1986, when his brother "fired" him as president, until his physical removal from the corporate offices in January 1988, he was only a "figurehead":

"[T]he employees in the office were told not to pay any attention to me; what I had to say was not the final word. The final word was Norman Tillman and Dominic Basile."

Petitioner's testimony that after October 1986 he did not have a corporate title conflicts with his letter dated March 31, 1987 to the Taxpayer Assistance Bureau of the Division of Taxation which the Division introduced into evidence. This letter, which advised the Taxpayer

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The Division of Taxation introduced into evidence photocopies of the bottom halves of eight sales tax returns filed by Walt's Sandwiches for the months of December 1986, January 1987, February 1987, March 1987, April 1987, May 1987, June 1987, and August 1987, only. These returns showed the following taxable sales, respectively: \$184,434.00; \$129,046.43; \$438,202.00; \$141,171.79; \$178,387.00; \$481,950.00; \$165,012.00; and \$512,402.00. The amounts shown on the returns filed for February 1987, May 1987 and August 1987 would appear to be totals for the three-month sales tax quarters ending on the last day of such months. None of these returns appear to have been signed. At least the photocopies in evidence do not contain signatures. However, some of the photocopies of checks on the business checking account of "Big Dom's, Division of Walt's Submarine Sandwich, Inc.", which were apparently remitted with the tax returns, show either petitioner's signature or his signature stamp as follows:

<u>Date of Check</u>	<u>Signature or Signature Stamp</u>
January 20, 1987	signature
February 20, 1987	signature
March 19, 1987	signature stamp
April 17, 1987	signature stamp
May 19, 1987	signature stamp
June 19, 1987	signature stamp
July 17, 1987	signature
September 18, 1987	signature

The "items" referred to above are these checks with either petitioner's signature or his signature stamp.

Assistance Bureau that Walt's Sandwiches closed its Troy, New York store effective March 1, 1987, was signed by petitioner as president. Further, the Federal income tax returns of Walt's Sandwiches for 1987 and 1988 list petitioner as an officer with the corporation at a salary for the respective years of \$33,125.00 and \$13,750.00.

In April 1988, a couple of months after his physical removal from the corporate premises, petitioner sued his brother and the corporation for "either dissolution of the corporation or to force him [Dominic Basile] to buy my shares."

Petitioner described his duties during the period October 1986 to January 1988, in response to questioning by the Administrative Law Judge, as follows:

"ALJ: Now, what were your duties with regard to the running of the Walt Submarine Sandwiches after you were fired, as you say, as president, until you were physically removed in January of 1988?"

JOSEPH BASILE: Just basically I went around and examined the stores, made sure the help was straightened out. Things that I did previous to that were taken away from me.

ALJ: You say you went around and examined the nine stores?

JOSEPH BASILE: Yes.

ALJ: So what would your average day be like? You would come into the corporate headquarters on Exchange Street. What did you do?

JOSEPH BASILE: I usually picked up the deposits from each store in the morning -- or four or five stores, brought them to the office, and previous to October of '86 I would would [sic] over the paperwork for a couple of hours and then go out on the circuit. After October '86 I was anxious to get out of the office and out on the circuit because of the climate.

ALJ: So you would pick up the receipts from some of the stores on a daily basis?

JOSEPH BASILE: Yes.

ALJ: And bring it to the office?

JOSEPH BASILE: Put it all together and make a deposit out.

* * *

ALJ: So after you would bring the receipts from four or five stores on a daily basis you would then head out again and visit the stores?

JOSEPH BASILE: And make sure employees had hats on, proper uniforms, stores were clean, windows clean, general housekeeping- type things."

Later in the hearing, the following testimony was elicited with regard to petitioner's signing of checks on behalf of Walt's Sandwiches during the period at issue:

"ALJ: [I]ncluded in Exhibit F, are these photocopies of checks and payments of certain sales tax amounts due and some of these checks have dates such as January 1987 where you have signed, February 1987, now March 1987. Is that your signature?"

JOSEPH BASILE: It's a stamp.

ALJ: Did you authorize that this stamp be used on these checks?

JOSEPH BASILE: No, I did not. I tried to get that stamp back and I still don't have it. It's still in the office.

ALJ: When did you try to get that stamp back?

JOSEPH BASILE: Around that same period of time. I knew that they were stamping my signature on items, a number of checks were stamped.

ALJ: April of 1987 it seems to be stamped, and you are saying that you did not authorize the use of this stamp for this. Is that what you are saying?

JOSEPH BASILE: Exactly.

ALJ: And May of 1987 has a stamp; June of 1987?

JOSEPH BASILE: Correct.

ALJ: Is that your signature on the July 1987 check?

JOSEPH BASILE: Yes, sir. Perhaps they were on vacation. There were times when no one else was available that I signed the checks.

ALJ: In September of 1987?

JOSEPH BASILE: I think that was the last one."

The narrative portion of the audit report concludes with the following so-called "vendors reaction":

"Vendor was cooperative.... The general manager [Norman Tillman] agrees with the asset and expense results but not sales. Sales were not agreed because the general manager believes milk should be exempt and that he also sells bulk meats which he is unable to prove...."

OPINION

In the determination below, the Administrative Law Judge held that the auditor made two explicit requests for books and records, including cash register tapes and sales invoices, and that the failure of Walt's Sandwiches to produce the cash register tapes or any other original sales documents, such as guest checks, justified the auditor's determination that the corporation's records were incomplete. The Administrative Law Judge, in finding that the assessment was rational, also held that the auditor's treatment of the excess sales reported on the Federal returns as additional sales subject to sales tax was reasonable, and since no evidence was introduced by petitioner to substantiate any other exempt sales, the auditor properly limited exempt sales to those he detailed in his workpapers. The Administrative Law Judge further held that there is sufficient evidence in the record to conclude that petitioner was a person or officer under a duty to act for Walt's Sandwiches during the period at issue herein which consists of only five sales tax quarters of the 13 actually audited. The Administrative Law Judge found petitioner's testimony that he was not in control of the corporation to be equivocal and not entitled to much weight. Finally, the Administrative Law Judge held that petitioner offered no evidence to prove the existence of reasonable cause for failing to pay the taxes due and the lack of willful neglect, thus, the imposition of penalty and interest was sustained.

On exception, petitioner argues that the audit (April 4, 1990) took place long after he claims to have been removed from office (October 5, 1986) and alleges that the records requested on audit were not made available only because he was not present. Petitioner further alleges that since he was not there he could not prove or disprove figures shown in a summary of quarters from February 28, 1987 to February 29, 1988, whether or not gross sales were in agreement with actual sales reported, and whether there were increased sales subject to sales tax for exempt sales which the corporation could not substantiate. Petitioner questions how he can be charged for sales tax on a piece of equipment purchased when he was no longer present at Walt's Sandwiches and argues it was a mistake on his part to have signed a letter and some checks in 1987. Petitioner also argues that if he could not get in the office and could not get at

any books and records, how could he prove that the Division of Taxation (hereinafter the "Division") was right or wrong. Petitioner further takes exception to the penalty issue. Finally, petitioner submits, with his exception, a written statement of Walter J. Breakell III referred to by the Administrative Law Judge at footnote 7 of his determination.

In response, the Division argues that petitioner has not met his burden of proof to show that the audit method or the amount of tax assessed was erroneous and to show in addition that he was not a person required to collect sales tax during the period December 1, 1986 to February 29, 1988. The Division further argues that petitioner has not met his burden of proof to show that his failure to properly report and pay sales tax was due to reasonable cause and not due to willful neglect. Finally, the Division argues that the submission by petitioner, on exception to the Administrative Law Judge's determination, of an affidavit by Walter Breakell should be disallowed by the Tax Appeals Tribunal and the notice of determination issued to petitioner should be sustained.

We find no basis in the record before us for modifying in any respect the determination of the Administrative Law Judge.

However, we must address petitioner's attempt to place before this Tribunal additional evidence in the form of an affidavit which is not part of the record below.

As we held in Matter of Schoonover (Tax Appeals Tribunal, August 15, 1991):

"[i]n order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing. Further, the submission of evidence after the closing of the record denies the adversary the right to question the evidence on the record. For these reasons we must follow our policy of not allowing the submission of evidence after the closing of the record" (Matter of Schoonover, *supra*; see also, Matter of Oggi Rest., Tax Appeals Tribunal, November 30, 1990; Matter of International Ore & Fertilizer Corp., Tax Appeals Tribunal, March 1, 1990; Matter of Ronnie's Suburban Inn, Tax Appeals Tribunal, May 11, 1989; Matter of Modern Refractories Serv. Corp., Tax Appeals Tribunal, December 15, 1988).

As previously stated, we find no basis in the record before us for modifying the Administrative Law Judge's determination in any respect. Therefore, we affirm the determination of the Administrative Law Judge for the reasons stated in said determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner Joseph N. Basile, officer of Walt's Submarine Sandwiches, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Joseph N. Basile, officer of Walt's Submarine Sandwiches, Inc. is denied; and
4. The Notice of Determination and Demand for Payment of Sales and Use Taxes due dated September 11, 1990 is sustained.

DATED: Troy, New York
July 2, 1992

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

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