

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
LORRAINE K. MURPHY	:	DECISION
D/B/A MURPHY'S LAKE LIQUORS & WINE	:	DTA No. 809598
	:	
for Revision of Determinations or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period June 1, 1983	:	
through May 31, 1988.	:	

Petitioner Lorraine K. Murphy d/b/a Murphy's Lake Liquors & Wine, c/o Lawrence J. Groskin, Esq., Continental Road, Tuxedo Park, New York 10987, filed an exception to the determination of the Administrative Law Judge issued on January 21, 1993. Petitioner appeared by Lawrence J. Groskin, Esq. The Division of Taxation appeared by William F. Collins, Esq. (John O. Michaelson, Esq., of counsel).

Petitioner filed a brief in support of her exception. The Division of Taxation filed a brief in response. Petitioner filed a reply brief which was received on September 27, 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 assessments at issue were timely issued, i.e., whether valid consents extending the period of limitation for assessment were executed by petitioner.

II. Whether the Division of Taxation properly determined additional sales and use taxes due from petitioner for the period at issue.

III. Whether the Division of Taxation illegally obtained information from the Internal Revenue Service about petitioner.

FINDINGS OF FACT

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

Pursuant to an audit of Lorraine K. Murphy d/b/a Murphy's Lake Liquors & Wine ("petitioner") which commenced in March 1986, the Division of Taxation ("Division"), on August 5, 1988, issued two notices of determination and demands for payment of sales and use taxes due as follows:

<u>Period</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
6/1/83 - 11/30/86	\$10,726.03	\$2,829.25	\$5,768.06	\$19,323.34
12/1/86 - 5/31/88	2,932.93	547.43	285.96	3,766.32

Prior to the issuance of the aforesaid notices of determination, the parties executed the following consents extending the period of limitation for assessment of sales and use taxes:

<u>Date Executed</u>	<u>Periods Extended</u>	<u>Date for Assessment</u>
8/28/86	6/1/83 - 11/30/83	3/20/87
3/11/87	6/1/83 - 5/31/84	9/20/87
7/28/87	6/1/83 - 11/30/84	3/20/88
2/29/88	6/1/83 - 8/31/85	12/20/88

While each of the consents contains an original signature of a representative of the Division, the first consent (dated August 28, 1986) and last consent (dated February 29, 1988) appear to be photocopies, i.e., they contain photocopied signatures of petitioner. The second consent (dated March 11, 1987) and the third consent (dated July 28, 1987) contain what appear to be the originals of the signatures of both Lorraine K. Murphy and the representative of the Division.

At the hearing, petitioner's representative raised an issue concerning the validity of petitioner's signatures on the first and last consents since they were photocopies rather than originals of the consents allegedly executed by petitioner. Petitioner did not appear at the hearing to testify as to the signatures in question nor was any evidence presented by petitioner which would indicate that the signatures were forgeries or that petitioner did not sign the consents in question. The Division's representative indicated at the hearing that the originals

were not in the Division's file, but that he would attempt to locate the originals of the consents and submit them into evidence after the hearing. The originals were not provided.

The original auditor in this matter was Caroline Carter who was assigned the case on March 21, 1986. In November 1987, due to the fact that Ms. Carter left the employment of the Division, the case was assigned to Bruce Dawson. The field audit record of Caroline Carter states that a waiver was mailed on August 26, 1986. With respect to the other waiver in question (February 29, 1988), the field audit record of Bruce Dawson contains no entry on or about that date. By virtue of the absence of an entry in the field audit record, Mr. Dawson testified that he must have obtained the waiver by mail.

Ms. Carter mailed an appointment letter to petitioner on March 21, 1986 which requested that all books and records pertaining to her sales tax liability for the audit period (the audit period was listed as 3/1/83 to present). The letter specifically requested journals, ledgers, sales and purchase invoices, register tapes, exemption certificates, as well as Federal returns and bank statements.

At the scheduled appointment (at the place of business), the auditor received no records relating to sales except for a daily listing prepared by petitioner. There were no register tapes or sales invoices provided. The only records provided were Federal income tax returns for 1983 and 1984, purchase invoices for September and October 1985, cancelled checks, monthly bank statements and a day book. The auditor listed the monthly deposits per the vendor's bank statements and per the list of daily sales for the audit period. Purchases per checks were listed for the quarter September 1 through November 30, 1985.

Ms. Carter decided to perform a markup test utilizing purchase invoices for the months of September and October 1985. Cost of purchases for September 1985 was determined to be \$19,950.67 and for October 1985 cost of purchases was \$21,895.06 (total for the two months = \$41,845.73).

To determine the liquor markup, the auditor applied a straight 12% markup (the auditor's report indicated that this percentage was obtained from petitioner). Due to the fact that Ms. Carter left the employ of the Division during 1987, it is unclear where the selling prices (and resulting markup percentage) of wine were derived from. As previously indicated, the auditor's workpapers stated that liquor was marked up 12%. The workpapers also indicated that the markup on wine fluctuated. It is, therefore, unclear whether the selling prices for wine were obtained from petitioner (vendor's price book), from an examination of shelf prices or from some other source.

The selling price for the September 1985 purchases was determined to be \$24,317.72 and \$25,842.48 for the October 1985 purchases (total for the two months = \$50,160.20). The gross profit was found to be \$8,314.47 for these two months (\$50,160.20 selling price - \$41,845.73 cost of purchases). The resulting markup percentage was calculated to be 19.87% (\$8,314.47 gross profit divided by \$41,845.73 total cost). This markup percentage was computed by Bruce Dawson who, after the departure of Caroline Carter, was assigned to the case on November 4, 1987.

When Mr. Dawson was assigned to the case, he contacted petitioner's accountant (Irving Kapp, C.P.A.) to request additional books and records. He was informed by the accountant that the Internal Revenue Service had seized all of the records. In June 1988, he contacted petitioner in order to update the audit. He was told that the records had been released and he made an appointment to review the records. On July 29, 1988, the auditor spoke with petitioner's attorney (Lawrence M. Groskin) who stated that he would not provide any additional books and records due to the fact that petitioner was under criminal investigation. The auditor, therefore, prepared the assessment based upon the records made available to (and the schedules prepared by) the original auditor.

The assessment was arrived at by determining purchases for the same sales tax quarter as was utilized in computing the markup percentage. Since the original auditor had purchase invoices only for the months of September and October 1985, but had checks and bank

statements for those months plus the remaining month (November 1985) in that quarter, purchases per checks were used by Mr. Dawson. Total purchases per the vendor's checks were \$53,539.13 (\$20,846.24 for September, \$23,010.62 for October, and \$9,682.27 for November) for the sales tax quarter September 1 through November 30, 1985. The total purchases were multiplied by the markup percentage (see, above) of 19.87%. The result (\$10,638.23) was added to total purchases per vendor's checks (\$53,539.13) to equal gross sales of \$64,177.36. Petitioner had reported gross sales of \$55,911.00 for the period. Unreported gross sales were, therefore, found to be \$8,266.36 (\$64,177.36 - \$55,911.00). Unreported gross sales were then divided by reported gross sales to arrive at an unreported taxable percentage of 14.78% (\$8,266.36 divided by \$55,911.00).

The unreported taxable percentage (14.78%) was multiplied by gross sales reported for the audit period to arrive at additional gross sales (\$164,422.00). The additional gross sales were then added to gross sales reported which resulted in total taxable sales of \$1,276,868.00 for the audit period. Total tax due was determined to be \$78,289.60. Sales tax paid for the period was \$64,630.64. Additional tax due was, therefore, \$13,658.96 which was the total amount of tax assessed on the two notices of determination issued to petitioner.

Subsequent to the issuance of the assessments, petitioner filed an amended sales tax return for the quarter ended November 30, 1988. Since petitioner's representative claimed that the return was for the preceding three quarters as well, the auditor (Mr. Dawson) made an adjustment for the last two quarters of the audit period (December 1, 1987 through May 31, 1988) resulting in a decrease of \$342.24 for the quarter ended February 29, 1988 and of \$241.15 for the quarter ended May 31, 1988. The total adjustment (\$583.39) thereby reduced total additional tax due to \$13,075.57, plus penalty and interest.

The auditor (Mr. Dawson) testified that he had performed approximately 12 to 15 audits of liquor stores during his 18-year employment as a sales tax auditor. He stated that the retail liquor business is a seasonal business with the largest sales from mid-November through the end of December. After that, sales drop off and then increase somewhat in the summer. The

auditor testified that the sales from the three months of September, October and November would be a fair representative sample of the annual sales.

After the auditor computed the assessment, he met with petitioners' representative (Mr. Groskin) and provided him with copies of all audit worksheets. When Mr. Groskin disagreed with the assessment, the auditor stated that he would be willing to perform a purchase markup audit for another test period if so desired, but that Mr. Groskin indicated that no additional records would be forthcoming.

Despite petitioner's assertions that a substantial amount of shoplifting occurred in her store and that she made nontaxable sales, no substantiation of either was provided to the auditor. The auditor visited the premises, which he described as a small store located in the middle of Greenwood Lake, New York. The audit report indicated that the vendor was a sole proprietor. His recollection of the premises was that the cash register was located near the entrance and that the person operating the register had a clear view of all of the shelves on which the inventory was displayed. No resale certificates or exemption certificates of any kind were provided during the audit. Therefore, no allowances for nontaxable sales or for losses due to shoplifting were given.

The auditor testified that Federal returns were provided by petitioner only for the years 1983 and 1984. Had he been provided with returns through 1987 (as requested), he stated that he could have adjusted the markup to allow for variations in inventory. For 1984, the Federal return revealed a negative ending inventory, the explanation for which was not provided to the auditor.

The auditor admitted at the hearing that purchase invoices were more reliable, in his opinion, than cancelled checks because the invoices indicate purchases for a particular month while checks could reflect payments for liquor orders which were delivered in prior months. Purchase invoices were available, however, only for the months of September and October 1985.

OPINION

The Administrative Law Judge determined that petitioner bore the burden to establish that the consents extending the period of limitations for the period June 1, 1983 through May 31, 1985 were invalid. The Administrative Law Judge noted that petitioner introduced no evidence to establish that she did not sign the consents or that the dates on the consents had been altered. Therefore, the Administrative Law Judge concluded that petitioner had not established a prima facie case that the statute of limitations had expired for the assessment for the period June 1, 1983 through May 31, 1985. Even if petitioner had established a prima facie case, the Administrative Law Judge found that the Division had satisfied its burden of going forward by introducing copies of consents dated August 28, 1986 and February 29, 1988 and originals of consents dated March 11, 1987 and July 28, 1987. Relying on section 306(1) and (2) of the State Administrative Procedure Act and the Tribunal's Rules of Practice and Procedure at 20 NYCRR 3000.10(d)(1), the Administrative Law Judge concluded that it was permissible to receive copies of the consents into evidence. As a result, the Administrative Law Judge determined that valid consents existed and that the assessment was not time barred.

With respect to an allowance for theft and breakage, the Administrative Law Judge concluded that petitioner's reliance on Matter of Shop Rite Wines & Liqs. (Tax Appeals Tribunal, February 22, 1991) was misplaced because, unlike the taxpayer in Shop Rite, petitioner had introduced no evidence as to the actual theft and breakage experience at Murphy's Lake Liquors and Wines. The Administrative Law Judge opined that an article from Beverage Media about theft and breakage in the retail liquor industry generally was not sufficient in itself to require a modification to the audit.

Next, the Administrative Law Judge decided that it was not unreasonable for the auditor to have used invoice amounts for the months of September and October 1985 (which were lower than the amount of checks paid for the same months) to compute the markup percentage and then to use checks to determine additional gross sales. The Administrative Law Judge found that the actual purchase invoices had to be used to calculate the markup because it was

necessary to determine the brands purchased and their selling prices. With respect to the calculation of gross sales, the Administrative Law Judge found that the auditor utilized the test quarter of September 1 through November 30, 1985 and that there was no proof that petitioner provided purchase invoices for the month of November 1985. If the auditor had utilized the average of the September and October invoices, the Administrative Law Judge noted that the calculation of gross sales would have been greater. For these reasons, the Administrative Law Judge concluded that petitioner had not proved the audit methodology unreasonable, nor the amount of the assessment erroneous.

The Administrative Law Judge also concluded that as the sole proprietor of Murphy's Lake Liquors & Wine, petitioner was personally liable for the sales and use tax due from the business and that she had not established reasonable cause for the failure to pay such taxes.

On exception, petitioner contends that it is not fair to rely on the consent dated February 23, 1988 (referred to as the fourth waiver by petitioner) because it was not an original. Petitioner states that the Division should have to explain why the original was not produced. Further, petitioner argues that the fourth waiver is not a copy within the meaning of section 306(2) of the State Administrative Procedure Act because it contains an original signature on behalf of the State Tax Commission. Petitioner states that this document is better characterized as an "altered photographic reproduction of prior waiver signed by the petitioner with an original signature of James T. Pendergast for the State Tax Commission" (Petitioner's brief on exception, p. 7). Petitioner has also submitted an affidavit with her exception with respect to the fourth waiver.

With regard to the computation of the assessment, petitioner asserts that "[c]lear and convincing evidence of theft was submitted at the hearing by receiving in evidence the Beverage Media article Common sense indicates theft occurs in any and all retail stores" (Petitioner's brief on exception, p. 8). Petitioner also states that common sense also requires an allowance for nontaxable sales and that "[j]udicial notice of the propriety of petitioner's changes to the auditor's computation is appropriate" (Petitioner's brief on exception, p. 8).

Finally, petitioner argues that the auditor illegally obtained information from the Internal Revenue Service with respect to petitioner's business. Petitioner alleges a violation of her constitutional rights, but has not cited any case law to support her assertion.

We affirm the determination of the Administrative Law Judge.

As pointed out by the Division in response to petitioner's brief, it is our well established rule that the parties may not introduce additional evidence after the record is closed (see, Matter of Schoonover, Tax Appeals Tribunal, August 15, 1991). Therefore, we will not consider the affidavit submitted by petitioner on exception.

With respect to petitioner's claim that the Division illegally obtained information about petitioner from the Internal Revenue Service, as the Division notes, both Federal (Internal Revenue Code § 6103[d]) and New York State Law (Tax Law § 202.3) permit the exchange of information between the Internal Revenue Service and the Division. In any event, we see no basis in the record for petitioner's contention that the Division obtained any information from the Internal Revenue Service. Instead, the record indicates that the Internal Revenue Service obtained information from the Division about petitioner (see, Tr., pp. 60, 99).

The remaining arguments raised by petitioner were adequately and correctly addressed by the Administrative Law Judge; therefore, we affirm the determination of the Administrative Law Judge on these issues for the reasons stated in the determination.

Accordingly it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner Lorraine K. Murphy d/b/a Murphy's Lake Liquors & Wine is denied;
 2. The determination of the Administrative Law Judge is affirmed;
 3. The petition of Lorraine K. Murphy d/b/a Murphy's Lake Liquors & Wine is denied;
- and

4. The notices of determination and demand dated August 5, 1988, as modified by the Division of Taxation, are sustained.

DATED: Troy, New York
March 17, 1994

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

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