STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
SANDRICH FOODS, INC. AND RICHARD A. FREEDMAN, AS OFFICER	:	DECISION DTA No. 810067
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 June 1, 1985 through November 30, 1987.	:	

Petitioners Sandrich Foods, Inc. and Richard A. Freedman, as officer, P.O. Box 1161, Melville, New York 11747, filed an exception to the amended determination of the Administrative Law Judge issued on January 21, 1994. Petitioners appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Michael B. Infantino, Esq., of counsel).

Petitioners filed a brief in support of their exception. The Division of Taxation filed a letter brief in opposition. Petitioners filed a reply brief, received on May 16, 1994, which date began the six-month period to issue this decision. Petitioners' request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Was it proper for the Division of Taxation to resort to an external index to determine sales tax liability?

II. Was use of a rent factor an unreasonable audit methodology?

III. Was the refusal to provide petitioner with a copy of the publication a ground for cancelling the assessments?

IV. Was the audit unreasonable because it did not allow nontaxable sales?

V. Was a portion of the assessment barred by the statute of limitations?

VI. Whether a portion of the assessment should be cancelled because the Division did not put into evidence the sales tax returns of certain quarterly periods?

VII. Whether the notices should be cancelled due to the failure of the Division of Taxation to issue a Conciliation Order within thirty days after the conclusion of the proceedings?

VIII. Should the assessments for September 1, 1987 to November 30, 1987 be cancelled because business ceased in early September?

IX. Was there sufficient grounds to support the cancellation of penalties?

X. Are petitioners entitled to the return of funds collected by warrant prior to the commencement of the Division of Taxation proceedings?

XI. Did the Division of Taxation's representative engage in unethical conduct?

XII. Was the Administrative Law Judge correct in excluding evidence submitted after the record was closed?

FINDINGS OF FACT

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

The Division of Taxation ("Division") issued to petitioner Sandrich Foods, Inc. ("Foods") two notices of determination and demands for payment of sales and use taxes due, each dated September 1, 1989. The first notice assessed sales and use taxes in the amount of $155,987.99 for the period June 1, 1985 through November 30, 1987, plus penalty and interest. The second notice assessed penalties only in the amount of $15,598.81 for the same period. On the same date, two notices, assessing identical amounts of tax, penalty and interest for the same periods were issued to Richard A. Freedman, as an officer of Sandrich Foods, Inc.

Following a conciliation conference in the Bureau of Mediation and Conciliation Services ("BCMS") and the issuance of a Conciliation Order dated March 1, 1991, the Division issued two notices of assessment review, reducing the tax assessed to $124,441.35 plus penalties pursuant to

Tax Law § 1145(a)(1)(i) and omnibus penalties in the amount of $12,444.14 pursuant to Tax Law § 1145(a)(1)(vi). Proof offered at the conciliation conference established that the restaurant operated by Foods did not begin doing business until August 1985. Consequently, tax assessed for the period June 1, 1985 through August 31, 1985 was reduced from $18,459.54 to $3,7111.46. In addition, the Division conceded that a timely sales tax return was filed for the period ending May 31, 1986, rendering the assessment for that period untimely under the three year statute of limitations set forth at Tax Law § 1147(b). The tax assessed for that period in the amount of $16,493.76 was cancelled.

The assessments were issued as the result of a sales tax field audit. The auditor, Marilyn Bainson, was assigned the audit of Sandrich, Inc. d/b/a Bruce's Yogurt. On September 3, 1987, she went to the Woodbury Common Shopping Center, where Bruce's Yogurt had been doing business and found that it was no longer in operation. She was told that the business had moved across the street to what had formerly been a Swenson's restaurant. She went to that location and found that it was a full service restaurant operated as the Cafe. In her handwritten log, she described the Cafe as a restaurant that also served tofutti, yogurt and ice cream and stated that the menu featured burgers, chicken, salads and complete dinners. On September 3rd, she met with Richard Freedman who identified himself as the owner of both Sandrich, Inc. and Foods. Mrs. Bainson left an audit appointment letter dated September 3, 1987 with Mr. Freedman and scheduled a follow-up meeting at the Cafe on September 23, 1987. The appointment letter is addressed to Sandrich, Inc. and not to Foods.

On September 23, 1987, the auditor returned to the Cafe where she was met at the door by Mr. Freedman. He told her that the Cafe was no longer in operation because Foods had been evicted by the landlord for nonpayment of rent. She informed Mr. Freedman that the audit would continue and gave him until October 30, 1987 to produce the books and records of both Sandrich, Inc. and Foods. Records requested in the appointment letter of September 3rd included a general ledger, a cash receipts journal for the audit period, sales tax returns and worksheets for the audit period, purchase invoices, and guest checks and register tapes. Mrs. Bainson testified that these

records were requested for both corporations. The auditor also asked for a Cafe menu, but Mr. Freedman chose not to give her one. On October 29, 1987, Mrs. Bainson telephoned Mr. Freedman to confirm their appointment and was informed that he was in the process of hiring an accountant to represent both Sandrich and Foods on audit. Thereafter, the auditor received a power of attorney appointing Mark S. Goldfarb, C.P.A. to represent Foods in connection with the sales tax audit. On December 3, 1987, Mrs. Bainson and her supervisor went to Mr. Goldfarb's office to review Foods' books and records, but none were provided.

The Division contacted Foods' landlord, Kabro Associates of Woodbury, and asked for information regarding the amount of rent paid by Foods for the premises occupied by the Cafe and the length of the Cafe's period of operation. Kabro informed the Division that Foods assumed the Swenson's lease on July 24, 1985 and that the landlord repossessed the property on September 17, 1987. Kabro could not verify the day Foods began to do business. It stated that the monthly base rent for the premises occupied by Foods was $5,499.90 and the total rent (including all additional charges) was $8,327.64.

On September 22, 1988, the Division served a subpoena on Foods and Richard Freedman demanding the following:

> "All records of Sandrich Foods Inc., for the period required to be kept by 20NYCRR533.2 [sic] including but not limited to general ledgers, sales and purchase journals, sales and purchase invoices, sales tax returns & worksheets, federal income tax returns, payroll records, guest checks, cash register tapes, and a description of the accounting system used, now in your custody, power or control, and all other books, papers, writings and things which you have in your custody, power or control relative to this matter."

In response to the subpoena, Mr. Goldfarb and Mr. Freedman came to the Division's offices on October 7, 1988, bringing certain records with them. At that time, Mrs. Bainson made a list of the records presented as follows: some payroll records, bank statements, checkbook stubs and some tax returns, including sales tax returns and withholding tax returns. There were no cash register tapes, guest checks, purchase invoices or other original records of sales.

The Division determined that the records provided were wholly inadequate for the purpose of verifying Foods' sales and resorted to an external index to determine sales and tax due. The Division decided to employ a rent factor because Foods' monthly rent was the only independently verified figure available. The base rent figure of $5,500.00 per month was equated to 7.1 percent of sales based on the National Restaurant Association's Restaurant Industry Operations Report for 1984, published by Laventhol & Horwath. The report provides a number of charts and tables showing the ratio of income and expenses to total sales expressed as a percentage. The chart selected by the auditor is for restaurants serving food only (no alcoholic beverages). The chart is broken down into five menu themes: American; sandwiches/ hamburgers; steak and seafood; pizza; and all others. The rent factor of 7.1 was taken from the figures for restaurants with a menu theme of sandwiches and hamburgers. The 7.1 percent figure is from the upper quartile of the range and of those expressed is the percentage most favorable to Foods. Application of the rent factor to annual rent of $66,000.00 resulted in the computation of gross annual sales of $929,577.00, or $232,395.00 per quarter. Sales for the quarter ended November 30, 1987 were estimated to be $17,876.00 based on three weeks of operation in the month of September. For the period June 1, 1985 through November 30, 1987, audited sales were determined to be $2,109,422.00. Reported sales were subtracted from audited sales to determine additional sales of $1,933,854.00, with a tax due on this amount of $155,987.00.

The Division placed in evidence several worksheets generated by its computerized recordkeeping system. It lists, among other things, the tax returns filed by Foods for the audit period. It shows that five returns were filed late as shown below:

Period Ending	Period Code	Date Filed
August 31, 1985	186	October 16, 1986
November 30, 1985	286	October 16, 1986
February 28, 1986	386	October 16, 1986
February 28, 1987	387	September 3, 1987
May 31, 1987	487	May 31, 1987

The Division entered in evidence original copies of the first two sales tax returns shown above and a photocopy of the third return. The first two bear the date "8/7/86" on the vendor's signature line, and the third bears the date "3/19/86" on the same line. Each of them bears a date stamp of October 16, 1986 for the "Mineola Office Tax Compliance".

OPINION

In the determination below, the Administrative Law Judge found that petitioners failed to provide the Division with adequate books and records for the purpose of verifying their taxable sales. The Administrative Law Judge, relying on Matter of Vebol Edibles v. State of New York Tax Appeals Tribunal (162 AD2d 765, 557 NYS2d 678, lv denied 77 NY2d 803, 567 NYS2d 643), found that bank statements and summary worksheets prepared by petitioners' accountant were not independently verifiable records of taxable sales. In the absence of necessary records, the Administrative Law Judge found the Division was authorized to resort to an external index to determine petitioners' sales tax liability with the burden on petitioners to show that the audit methodology was unreasonable (Matter of Meskouris Bros. v. Chu, 139 AD2d 813, 526 NYS2d 679).

The Administrative Law Judge further determined that petitioners have not established that the particular rental factor selected was not appropriate to the business conducted by Foods. The Administrative Law Judge was not swayed by petitioners' argument that the Cafe was a new business and that it was not a financial success while the restaurants used to calculate the chart had a profit margin of 17.4%. Citing Matter of Markowitz v. State Tax Commn. (54 AD2d 1023, 388 NYS2d 176, 177, affd 44 NY2d 684, 405 NYS2d 454), the Administrative Law Judge noted that exactness is not required where the taxpayer's own failure to maintain records prevents a precise calculation.

The Administrative Law Judge found that the Division's failure to provide petitioners with a complete copy of the 1984 Restaurant Industry Operations Report did not deny petitioners due process and does not provide a ground for cancelling the assessments. The

Administrative Law Judge, citing Matter of Framapac Delicatessen (Tax Appeals Tribunal, July 15, 1993), found it sufficient that the Division entered the chart and information sufficient to identify the source of the chart into evidence.

The Administrative Law Judge also found that the Division was not required to estimate nontaxable sales because petitioners presented no credible evidence that Foods had nontaxable sales. The Administrative Law Judge stated that the testimonial evidence presented by petitioners was neither credible nor detailed. The Administrative Law Judge concluded that clear and convincing evidence requires more than the mere assertion that the Cafe had some nontaxable sales.

The Administrative Law Judge determined there was no evidence to support petitioners' contention that the statute of limitations had run. The Administrative Law Judge found that petitioners failed to come forward with any affirmative evidence of their own on this issue. Petitioners needed to establish receipt or mailing after the limitations period expires, but failed to do so (Matter of Tides Inn, Tax Appeals Tribunal, April 2, 1992). Relying on Matter of Schoonover (Tax Appeals Tribunal, August 15, 1991), the Administrative Law Judge also found that petitioners could not submit an affidavit on the statute of limitations issue after the closing of the record.

The Administrative Law Judge further noted that it was of no consequence that the records submitted by the Division to show the amount of sales tax reported by petitioners were not original. The Administrative Law Judge also stated it was not significant that all of the returns were not placed into evidence.

With regard to petitioners' contention that the Conciliation Order was not issued within thirty days, the Administrative Law Judge, relying on 20 NYCRR NYCRR 4000.5(c), found that petitioners are incorrect in contending that a proceeding is concluded 30 days from the date of a conciliation conference. The Administrative Law Judge noted that after the conferee

reviews the material submitted at the conference, the conferee serves a proposed resolution on the requester. The requester then has 15 days to accept the resolution and return the consent. If the consent is not returned within 15 days, "the conciliation conference will be deemed concluded" and the conferee will have 30 days to issue a Conciliation Order (20 NYCRR 4000.5[c][3][iii]).

To establish that the Conciliation Order was not timely, the Administrative Law Judge found that petitioners should have established the date on which the consent to tax was received or mailed by the conferee. Without this, it is impossible to determine if the Conciliation Order was timely issued.

The Administrative Law Judge also determined that petitioners failed to present any evidence that the Cafe went out of business before September 17, 1987. As a result, there was no basis for reducing the sales tax any further.

The Administrative Law Judge also found unpersuasive the assertion that many of petitioners' books and records were lost upon eviction and/or in a car fire. The Administrative Law Judge noted that petitioners failed to establish that they ever maintained books and records required pursuant to Tax Law § 1135(a)(1). As a result, the Administrative Law Judge concluded there was no reasonable cause presented for the abatement of penalties.

On exception, petitioners make the same assertions raised below and addressed by the Administrative Law Judge, in addition to several issues not previously raised. The first new issue is petitioners' assertion that the Best Evidence Rule requires the submission of original writings and that it was incorrect for the Division to rely on copies of petitioners' tax returns. Further, petitioners argue the Best Evidence Rule requires the Division to lay a foundation as to why the originals were not produced. Petitioners also contend that they were denied due process by the unethical conduct of the State via what petitioners assert is a "pattern" of activity on the part of the State's attorneys. As a result of the alleged unethical conduct, petitioners' request that the Tax Appeals Tribunal find on their behalf. Petitioners also request that the

assessment be cancelled because of what petitioner Freedman argues is the improper seizure of his income tax refunds. He contends the refunds were seized in order to collect what the Division argues is the sales tax due. Finally, petitioners argue the Administrative Law Judge abused her discretion in not admitting the affidavit submitted by petitioners after the close of the record.

The Division, on exception, urges the determination of the Administrative Law Judge be affirmed in all respects. The Division presents no substantive arguments on exception, but refers us to its brief filed with the Administrative Law Judge. Further, the Division's representative takes strenuous objection to petitioners' charges that he acted unethically.

We affirm the determination of the Administrative Law Judge.

We turn first to the issues that were not raised at hearing.

Petitioners are incorrect in their contention that the Best Evidence Rule applies to the administrative proceedings of the Division of Tax Appeals.

Section 306 of the State Administrative Procedure Act states, in part:

> "1. Unless otherwise provided by any statute, agencies need not observe the rules of evidence observed by courts . . . .
>
> "2. All evidence, including records and documents in the possession of the agency of which it desires to avail itself, shall be offered and made a part of the record, and all such documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference (State Administrative Procedure Act § 306 1, 2)".

20 NYCRR Section 3000.10(d) which addresses Administrative Hearings states, in part:

> "(d) Conduct of hearing . . . . Technical rules of evidence will be disregarded to the extent permitted by the decisions of the courts of this State, provided the evidence offered appears to be relevant and material to the issues" (20 NYCRR 3000.10[d]).

As provided by the above referenced statute and regulation, there is no requirement that evidence submitted to an administrative law judge be an original (see, Matter of Flanagan v. New

York State Tax Commn., 154 AD2d 758, 546 NYS2d 205; Matter of Murphy, Tax Appeals Tribunal, March 17, 1994).

We next address petitioners' claim that counsel for the Division engaged in a series of unethical actions denying petitioners their due process rights which, they argue, should result in the sanction of Division's counsel. Petitioners contend that one example of such conduct is the Division's failure to provide petitioners with a copy of the Restaurant Industry Operations Report relied on by the Division to determine sales tax owed. Petitioners also cite the introduction into evidence of only a portion of the report after the original was allegedly lost by the Division. Petitioners further refer to a January 20, 1994 letter from the Division's counsel to the Administrative Law Judge regarding the failure of the Administrative Law Judge to consider petitioners' reply brief in the determination. Petitioners argue that counsel for the Division urges the Administrative Law Judge to "disregard" the reply brief. Finally, petitioners point to the Division's introduction of copies of documents into evidence as opposed to originals as deprivation of due process.

We have carefully reviewed the record in this matter and find no basis for the assertion that the Division's counsel acted improperly.

Our Rules of Practice, 20 NYCRR 3000.5(a), allow an Administrative Law Judge or the Tax Appeals Tribunal to order discovery upon a showing of good cause. In the instant case, the Administrative Law Judge denied petitioners' motion for discovery of the entire report. As a result, the Division was not required to provide petitioners with a copy of the report they sought to introduce.

With regard to the partial introduction of the report into evidence, this issue was correctly treated by the Administrative Law Judge and we decline to address it again. We also need not deal with the introduction of copies of originals here as we have already addressed this issue supra. Concerning the Division's letter to the Administrative Law Judge, we do not find it has the same meaning petitioners have placed on it. We interpret the letter as having no greater

significance than requesting the Administrative Law Judge not to change the substance of her determination.

We next turn to petitioner Freedman's request that the Tax Appeals Tribunal cancel the sales tax assessment because of improper seizure of his tax refunds. It has been held that a taxpayer is entitled to a prompt post-levy hearing if the Division has issued a warrant before the hearing process is completed (Arthur Treacher's Fish & Chips v. New York State Tax Commn., 69 AD2d 550, 419 NYS2d 768). In the instant case, however, petitioner Freedman has failed to introduce evidence to show his income tax refunds are being applied to the assessment at issue here. As a result, we are unable to address his claim.

With regard to petitioners' claim that the Administrative Law Judge abused her discretion in not admitting into evidence an affidavit submitted after the closing of the record, we find this issue was adequately resolved below. The Administrative Law Judge, relying on the Tax Appeals Tribunal's decision in Matter of Schoonover (supra), notes that to allow the submission of evidence after the closing of the record, there could be no definition nor finality to the hearing. We find the Administrative Law Judge did not abuse her discretion and correctly relied on our decision in Schoonover.

The remaining assertions made by petitioners are the same as those made at hearing. The determination of the Administrative Law Judge dealt fully and correctly with these issues and we affirm for the reasons stated in the determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Sandrich Foods, Inc. and Richard A. Freedman, as officer, is denied;

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

3. The petition of Sandrich Foods, Inc. and Richard Freedman, as officer, is denied; and

4. The notices of determination and demand for payment of sales and use taxes due, as modified by the Conciliation Order dated March 1, 1991, are sustained.

DATED: Troy, New York
September 22, 1994

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

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