STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
SICA Electrical & Maintenance Corp.	:	DECISION DTA No. 813706
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, 1986 through February 28, 1989.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on January 14, 1997 with respect to the petition of SICA Electrical & Maintenance Corp., 150-22 Tahoe Street, Ozone Park, New York 11417. Petitioner appeared by Lawrence R. Cole & Associates, Inc. (Lawrence R. Cole, C.P.A.). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (James Della Porta, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception and a reply brief. Petitioner filed a brief in opposition. Oral argument, at the Division of Taxation's request, was heard on September 10, 1997 in New York, New York.

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

ISSUES

I. Whether sales tax erroneously collected by petitioner from its customers for materials used in capital improvement services, and remitted to the State of New York, can now be claimed as a refund by petitioner and credited against petitioner's use tax liability.

II. Whether the Division of Taxation's audited computation of petitioner's use tax liability, which resulted in the issuance of a Notice and Demand for Payment of Sales and Use Taxes Due, was a valid issue to be addressed by the Administrative Law Judge in her determination, where petitioner signed a consent agreeing to finally and irrevocably fix the tax.

III. If it is determined that the audit computation was a valid area of inquiry for the Administrative Law Judge, whether the Division of Taxation has proved that there was a rational basis in the audit workpapers to support petitioner's use tax liability.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "2" through "7," "10," "11" and "14" which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

During the period March 1, 1986 through February 28, 1989, petitioner performed services as an electrical service contractor providing both capital improvement and repair and maintenance services.

We modify finding of fact "2" of the Administrative Law Judge's determination to read as follows:

> In 1989, the Division commenced a sales and use tax field audit of petitioner's records, initially for the period March 1, 1986 through November 30, 1988. Petitioner was advised during the audit that its available records were adequate and sufficient to warrant the utilization of its records for the audit. However, in lieu of utilizing petitioner's entire set of records for such period, petitioner's representative, Gloria Sica, executed a consent to a test period audit covering the audit period March 1, 1986 through November 30, 1988. The field audit report revealed that petitioner's sales and purchase records were adequate. Purchases per records were in substantial agreement with purchases reported on petitioner's Federal income tax returns, and gross sales according to petitioner's records were found to be in substantial agreement with sales reported on its Federal income tax returns and sales tax returns. Petitioner maintained a sales tax accrual account and all recorded tax was properly reported.
>
> Ultimately, petitioner was assessed additional tax in the amount of $43,870.39 on the basis of such audit, which was comprised in part of tax due on the purchase of fixed assets and tax due on certain expense purchases, in addition to tax due on the purchase of materials. With the inclusion of penalty and interest, the Division issued a Statement of Proposed Audit Adjustment, dated May 31, 1989, in a total amount of $64,874.27. Petitioner's representative, Gloria Sica, consented to such amount on behalf of the corporation by her June 8, 1989 signature, and made payment to the Division in the amount of $64,874.27 on June 12, 1989. However, the auditor's log notes reveal that after the case was closed for all practical purposes, the file was returned to the auditor by her group chief to revise the portion of material purchases that were subject to tax. According to the audit report, on July 20, 1989 the Division's auditor informed Mrs. Sica by

telephone and in writing that the audit was on hold and that the consent she signed on June 8, 1989 was revoked.[1]

We modify finding of fact "3" of the Administrative Law Judge's determination to read as follows:

> The Division then undertook additional review of the materials purchased by petitioner for use in its capital improvement jobs. The field audit disclosed that transactions petitioner had classified on sales tax returns as taxable and on which it had collected sales tax from its customers were in fact capital improvement jobs. The Division determined that use tax was due on certain material purchases which were incorporated into such capital improvement projects. The Division obtained the amount of purchases of construction materials from petitioner's general ledger for the period June 1, 1986 through November 30, 1988. A later addition for the amount of materials purchased for the period December 1, 1988 through February 28, 1989 was also listed on the workpaper. The total of purchases utilized in the Division's computation was $1,528,726.00. This amount was divided into quarterly purchases of construction materials for the sales tax quarters beginning June 1, 1986 through February 28, 1989. The Division applied a factor of 78% to petitioner's purchases per books which were charged to construction jobs as the amount of purchases used in capital improvement jobs. Thus, it was determined that $1,192,406.28 ($1,528,726.00 x 78%) was the amount paid for materials used in capital improvement jobs resulting in tax due on materials of $98,373.54. When added to tax due on expense purchases and fixed asset purchases in the amounts of $1,908.50 and $4,665.06, respectively, the total tax due totalled $104,947.10. Mr. Cole and Mr. Hartman, petitioner's representatives, testified at the hearing in this matter. Mr. Cole testified that he remembered attending several meetings with the auditor to discuss the audit methodology, but he had little or no memory of what took place at these meetings. His answers to specific questions were, variously, "[i]t's all a blur," "[a]nything could have been discussed," and "I don't recall what happened six years ago" (tr., pp. 84-86). In any event, a second (and final) Statement of Proposed Audit Adjustment dated March 12, 1990 for the period June 1, 1986 through February 28, 1989 asserted tax in the amount of $104,947.10, plus interest of $15,762.17, for a total due of $120,709.27. On such Statement of Proposed Audit Adjustment it was noted that payment of $64,874.27, received on June 12, 1989, would be applied to the amount due as stated above. Mr. Cole and Mr. Hartman admit that they had an opportunity to review this Statement of Proposed Audit Adjustment and that they and their client were aware that the auditor used the 78% ratio in arriving at the tax due prior to petitioner signing the consent (tr., p. 89). Gloria Sica, on behalf of petitioner, consented to have the tax fixed by her signature on

---

[1] We modified finding of fact "2" of the Administrative Law Judge's determination to clarify, in the last sentence thereof, that the auditor notified Mrs. Sica by telephone and in a letter that the original consent to tax had been revoked.

March 16, 1990. Preceding Mrs. Sica's signature is the following inscription on the Statement of Proposed Audit Adjustment:

> "[t]he Tax Law provides that a taxpayer is entitled to have tax due finally and irrevocably fixed by filing a signed consent with the Commissioner of Taxation and Finance. 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."[2]

We modify finding of fact "4" of the Administrative Law Judge's determination to read as follows:

> The Division issued a Notice and Demand for Payment of Sales and Use Taxes Due dated March 20, 1990 to SICA Electrical & Maintenance Corp. in the amount of $104,947.10, plus interest, for a total amount due of $120,709.27 for the period June 1, 1986 through February 28, 1989. The former payment of $64,874.27, received on June 12, 1989, was again noted. Petitioner paid the remaining tax in accordance with the March 12, 1990 Statement of Proposed Audit Adjustment on or before April 25, 1990.[3]

We modify finding of fact "5" of the Administrative Law Judge's determination to read as follows:

> An internal memorandum between Division employees appearing as part of the field audit report workpapers provides the following relevant details pertaining to the audit of petitioner:
>
> > "[o]n 6/12/89 we received a consent for tax of $43,870.39, plus penalty and interest of $21,003.88, on the above vendor for the period 3/1/86 - 11/30/88. We received full payment of $64,874.27 and deposited it under S8906120009Q.
> >
> > "Upon final review, it was noted that there was an omission of tax collected by vendor on materials used in

---

[2] We modified finding of fact "3" of the Administrative Law Judge's determination to incorporate a portion of the substance of finding of fact "14" and to more accurately reflect the record.

[3] We modified finding of fact "4" of the Administrative Law Judge's determination by deleting material that is irrelevant to this matter.

> C/I jobs and we notified the vendor in writing that we were revoking the consent. Eventually the audit was resolved with the resulting adjusted tax due of
>
> $104,947.10. As we have revoked the consent and did not have a waiver to cover the period 3/1/86 - 5/31/86, that period was lost, however our revised audit now covers the period 6/1/86 - 2/28/89."[4]

We modify finding of fact "6" of the Administrative Law Judge's determination to read as follows:

> As noted earlier, petitioner's representatives, present at the audit, were consulted about the audit methodology during the audit process and reviewed the workpapers which included the 78% allocation before executing the consent to the Statement of Proposed Audit Adjustment. While petitioner's representatives admitted attending meetings at which purchase ratios were discussed, neither could remember anything specifically discussed at those meetings. Petitioner's representatives admitted that both they and petitioner were aware of the 78% figure before Mrs. Sica signed the consent (tr., pp. 88-89, 92). Neither petitioner nor its representatives, Mr. Cole and Mr. Hartman, presented the auditor with any proof that the purchase ratio figure was less than the 78% used by the Division. In fact, Mr. Cole does not recall ever raising the issue of the 78% figure being too high with the auditor (tr., p. 88).[5]

We modify finding of fact "7" of the Administrative Law Judge's determination to read as follows:

> The Division provided the testimony of Daniel O'Sullivan, who was responsible for reviewing petitioner's refund claim for the audit period in question. He reviewed the audit workpapers prepared by Maria Stanley, the field auditor in this matter, who retired from State service in April 1994. Mr. O'Sullivan identified the major area of adjustment in petitioner's audit as that pertaining to purchases subject to use tax and incorporated into capital construction projects. Petitioner's representative met
>
> with Mr. O'Sullivan on several occasions in regard to his review of the refund application. Mr. Cole testified that he did not discuss the 78% allocable amount of purchases to capital improvements with Mr. O'Sullivan. Mr. Cole also testified that he never provided Mr.

---

[4] We modified finding of fact "5" of the Administrative Law Judge's determination by deleting irrelevant material.

[5] We modified finding of fact "6" of the Administrative Law Judge's determination to more accurately reflect the record.

O'Sullivan with any proof in support of the refund claim to show that the purchase ratio figure was less than 78% (tr., p. 94). Petitioner's representatives admitted that Mr. O'Sullivan never refused to consider any of petitioner's records or information that might tend to show that the capital improvement ratio was less than 78% (tr., p. 93).

Mr. O'Sullivan testified that if petitioner had established during the refund process that purchases attributable to capital improvements were less than 78%, he would have first reviewed invoices, petitioner's cost accounting system and billings to become certain that proper amounts of tax were paid and remitted in accordance with the tax law. If petitioner's representatives had substantiated that the sales attributable to capital improvements were less than 78%, Mr. O'Sullivan stated he would have then made a favorable adjustment.

Mr. O'Sullivan was asked if he could determine from the file how the figure of 78% was arrived at or which invoices were disallowed to come up with a percentage equivalent to the 78%. After some discussion, Mr. O'Sullivan admitted that there is not a direct tracing from the 78% calculation through the audit method. In fact, the audit papers do not reference the 78% other than in the application of such percentage to the construction cost materials account. The audit report merely states:

> "78% of vendor's purchases per books charge to construction jobs were assessed. 12% were estimated as used in repair jobs, where vendor charges tax to his customers.[6] Materials were assessed in the amount of $1,192,406.00. Tax due on this is $98,373.54."[7]

On March 12, 1992, petitioner filed a refund claim (Claim No. 203530) seeking a refund of $98,373.52 plus interest (the tax due on material purchases only) of the tax paid in accordance with the audit. The refund claim was premised on the following:

> "[v]endor was audited and assessed $98,373.54 plus interest for nonpayment of Use tax on materials purchased on completed jobs. The vendor charges sales tax on the retail value of materials used. The Department of Taxation and Finance assessed the vendor on the cost of materials purchased. The State has collected the tax twice - once at the retail level and once at cost and has been unjustly enriched. SICA paid

---

[6] The audit report does not provide additional explanation pertaining to the remaining 10% of purchases.

[7] We modified finding of fact "7" of the Administrative Law Judge's determination to more accurately reflect the record.

> sales tax during the normal course of business. SICA was also required to pay Use tax on the same items.
>
> "Use tax is merely complimentary to sales tax and the State cannot collect both. Regulation Section 531.1 states in part that compensating use tax is imposed on every person for use within New York State except to the extent they have been or will be subject to sales tax.
>
> "There is also an issue of an invalid test period agreement."

On November 4, 1993, the Division issued a refund denial letter to petitioner denying in full its claim for refund of sales tax in the amount of $98,373.52. The denial letter in pertinent part states as follows:

> "[t]his refund claim was denied in light of Section 538.8 p 165-176b where it states the following '. . . a refund of such erroneous collected tax is allowable to the purchaser of the non-taxable service or capital improvement. The vendor or contractor is liable for and will be assessed any tax due which he failed to pay on his purchase of tangible personal property used as the ultimate consumer in performing a non-taxable service or capital improvement . . . .'
>
> "This determination denying your claim shall, by Law, be final and irrevocable unless you complete the attached Form TA-9.1 and submit same to the Tax Commission for a hearing within 90 days of the date of this letter in accordance with the provisions of Section 1139(B) of the Tax Law."

We modify finding of fact "10" of the Administrative Law Judge's determination to read as follows:

> Petitioner filed a request for a Bureau of Conciliation and Mediation Services ("BCMS") conference in response to the refund denial letter. A conference was held on August 26, 1994 and, on February 17, 1995, a BCMS conciliation order was issued sustaining the refund denial. A timely petition was filed with the Division of Tax Appeals on April 5, 1995.[8]

We modify finding of fact "11" of the Administrative Law Judge's determination to read as follows:

> Petitioner bought supplies and materials from vendors paying no sales tax at the time of purchase. In using its supplies in capital improvement projects, petitioner itemized sales tax on the invoices it presented to its customers for whom it was performing capital

---

[8] We modified finding of fact "10" of the Administrative Law Judge's determination to clarify that the petition referred to was filed with the Division of Tax Appeals.

> improvement services. Specifically, petitioner collected sales tax on the marked up cost of materials used in its capital improvement jobs. The tax was not itemized as a cost under the materials along with the other costs of the job, but rather listed after the subtotal for material and labor (a below-the-line charge). There was no evidence presented by petitioner that it repaid its customers the sales tax collected on its capital improvement jobs. There is also no evidence that petitioner ever informed its customers that they might be entitled, and should apply for, a refund of taxes erroneously charged by petitioner. However, the Division concedes that no vendor connected to petitioner requested a refund before such requests became time-barred.[9]

In correspondence dated March 20, 1990 to the Division, petitioner's representative requested that the penalty be abated for the period June 1, 1986 through February 28, 1989 because "the taxpayer misinterpreted the law." The correspondence further states "the taxpayers charge tax and remit tax on material sales sold separately without labor. They did not pay tax at the source."

The Division points out that since reported taxable sales on petitioner's sales tax returns filed for the period in issue include the receipts on capital improvement jobs on which petitioner erroneously collected sales tax, the ratio of reported taxable sales to reported gross sales is not an accurate reflection of the actual taxable to gross sales ratio as suggested by petitioner during the hearing.

We modify finding of fact "14" of the Administrative Law Judge's determination to read as follows:

> No officer or employee of petitioner appeared or testified at the hearing.[10]

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

---

[9] We modified finding of fact "11" of the Administrative Law Judge's determination by deleting material that was in the nature of argument.

[10] We modified finding of fact "14" of the Administrative Law Judge's determination by incorporating portions thereof in earlier findings.

The parties agreed that petitioner performed some capital improvement work during the period at issue and petitioner, as the retail purchaser, was liable for tax due on the purchase of materials incorporated into such improvements.

The Administrative Law Judge first addressed the issue of whether petitioner had erroneously collected sales tax from its customers for its capital improvement work. The Administrative Law Judge noted that petitioner presented its customers with invoices indicating the charges for materials, plus a fee for labor, to reach a subtotal. Thereafter, a tax on materials (computed on the materials being charged to the customer) was added to the subtotal, to result in a final total bill. The sales tax was computed on the marked-up materials and presented on the invoice as though petitioner was collecting sales tax from its customer. The Administrative Law Judge concluded that this practice is not in accordance with the sales tax law pertaining to capital improvement projects and petitioner's collection of the tax was erroneous.

The Administrative Law Judge concluded further that even if erroneously collected or collected in excess of the amount as due (both of which took place herein), the Tax Law requires petitioner in this instance to remit the taxes collected to the Division (Tax Law § 1137[a]), which it did.

The Administrative Law Judge then addressed whether petitioner can recover such erroneously collected taxes or receive a credit therefrom.

Tax Law § 1139 requires refund applications be timely filed and also contains a restriction as to when a vendor may claim a refund or credit of sales tax collected from a customer. The Administrative Law Judge pointed out that section 1139 provides that no refund or credit of tax shall be made to any person for taxes erroneously collected from a customer until he has first established to the Division that he has repaid such tax to the customer. The Division will, however, upon timely application, refund erroneously collected tax to the customer from whom it was collected. The Administrative Law Judge concluded that petitioner was not entitled to a refund or credit of erroneously collected tax, since there is no proof that petitioner had refunded such taxes to its customers.

Petitioner next argued that it waited the statutory period before filing a refund claim to ensure that the Division could not be "out of pocket" by claims from both petitioner and its customers. Petitioner claims the Division has unjustly enriched itself by assessing petitioner a use tax in addition to retaining the sales taxes petitioner erroneously collected from its customers for capital improvements. Petitioner urges that to avoid double collection of tax by the Division on the same materials, petitioner should be allowed an offset of its use tax liability by the amounts it erroneously collected from its customers.

The Administrative Law Judge concluded, based on the Court of Appeals holding in ***Matter of Darien Lake Fun Country v. State Tax Commn***. (68 NY2d 630, 505 NYS2d 58), that such erroneously collected taxes can be credited or refunded only to the "customer" entitled to it. Accordingly, the Administrative Law Judge concluded that the Division properly determined that petitioner's use tax liability may not be offset by the previously remitted sales tax erroneously collected from its customers, since it has not refunded such funds to its customers (***see***, Determination, conclusion of law "C").

The Administrative Law Judge then addressed the issues she perceived relating to the audit.

Tax Law former § 1138(c) describes the type of consent represented by Mrs. Sica's signature on the March 12, 1990 Statement of Proposed Audit Adjustment as follows:

> "[a] person liable for collection or payment of tax (whether or not a determination assessing a tax pursuant to subdivision (a) of this section has been issued) shall be entitled to have a tax due finally and irrevocably fixed prior to the ninety-day period referred to in subdivision (a) of this section, by filing with the tax commission a signed statement in writing, in such form as the tax commission shall prescribe, consenting thereto."

The Administrative Law Judge noted that by signing the Statement of Proposed Audit Adjustment, petitioner finally and irrevocably fixed the tax, but this did not preclude an application for credit or refund within the time frame allowed by law (Tax Law § 1139). She then concluded that such provision allows a petitioner the right to raise issues pertaining to the audit computation in conjunction with proving entitlement to a refund.

The Administrative Law Judge acknowledged that petitioner had adequate books and records and that the Division properly obtained petitioner's signed consent to utilize a test period audit. The Administrative Law Judge noted that if records are available from which an exact amount of tax can be determined, estimated procedures adopted by the Division become arbitrary and capricious and lack a rational basis (***citing Matter of Chartair, Inc. v. State Tax Commn***., 65 AD2d 44, 411 NYS2d 41). From this premise, the Administrative Law Judge continued, the Division is not shielded from establishing a rational basis for its tax computation merely because petitioner signed a consent to tax. The Administrative Law Judge concluded that petitioner could raise questions pertaining to the audit and tax computation which is the subject of its claim for refund.

The Administrative Law Judge then addressed petitioner's consent to the test period. Petitioner, she noted, consented to the use of a test period audit on the basis of an audit method election form setting forth the audit period as March 1, 1986 through November 30, 1988. Subsequently, the Division added another sales tax quarter to the end of the audit period. The Administrative Law Judge noted that petitioner was not advised of the addition of this quarter. Accordingly, the Administrative Law Judge cancelled the tax asserted for sales tax quarter December 1, 1988 through February 28, 1989 (***citing Matter of Adamides v. Chu***, 134 AD2d 776, 521 NYS2d 826, ***lv denied*** 71 NY2d 806, 530 NYS2d 109).

The Administrative Law Judge then turned to the issue of whether the 78% ratio allocated in the audit to purchases for capital improvement jobs was proper and/or substantiated by the Division. The Division argued that petitioner's consent to the audit results is justification for the use of the audit method. The Division's witness could not trace the 78% to any computation made in the audit workpapers. The Administrative Law Judge concluded that the fact that the 78% ratio amount could not be linked to petitioner's books and records indicates that the Division sought an external index to apply to this construction materials account. The Division, the Administrative Law Judge stated, cannot simply ignore a taxpayer's records and use an indirect method of estimating tax due, especially where the books and records are deemed

adequate, if the taxpayer's records are readily available and provide an adequate basis on which to determine the amount of tax due (***citing Matter of Christ Cella, Inc. v. State Tax Commn.***, 102 AD2d 352, 477 NYS2d 858; ***Matter of Chartair, Inc. v. State Tax Commn., supra***). The Administrative Law Judge went on to note that case law requires that an audit record must contain information identifying any external index used by the Division to establish a rational basis for the audit methodology (***citing Matter of Fashana***, Tax Appeals Tribunal, September 21, 1989). The Administrative Law Judge acknowledged that the Division does not have an affirmative burden to articulate a rational basis for its assessment where a petitioner fails to make any inquiry into the audit methodology or calculation (***citing Matter of Atlantic & Hudson, Ltd. Partnership***, Tax Appeals Tribunal, January 30, 1992). The Administrative Law Judge noted, however, that where a petitioner has made such inquiry, the Division must at hearing be able to respond as stated above (***Matter of Burns***, Tax Appeals Tribunal, April 28, 1994; ***Matter of Basileo***, Tax Appeals Tribunal, May 9, 1991). Petitioner raised the audit methodology and computation of tax due at hearing, the Administrative Law Judge stated, and the Division had ample opportunity through repeated questions posed at hearing to describe the specifics of the computation. The Administrative Law Judge concluded that since the Division was unable to provide any explanation pertaining to calculation of the 78% ratio, the audit is without rational basis and unreasonable. Accordingly, the Administrative Law Judge granted petitioner's refund of use tax in the amount of $98,373.52.

ARGUMENTS ON EXCEPTION

Petitioner did not file an exception. Therefore, the Administrative Law Judge's conclusions that petitioner erroneously collected sales tax from its customers for materials incorporated into capital improvement jobs and that petitioner was not entitled to a refund or to offset these erroneously collected amounts against its use tax liability stand (***see***, Determination, conclusion of law "C"). The Division, in turn, did not take exception to that portion of the Administrative Law Judge's determination that cancelled the tax for sales tax quarter ending

February 28, 1989 (***see***, Determination, conclusion of law "E"). Accordingly, neither of those issues are before us.

The Division takes exception to that portion of the Administrative Law Judge's determination that concluded that the Division had failed to show a rational basis for its assessment of use tax and granting petitioner's refund claim for use taxes paid.

Petitioner argues that the Notice and Demand for Payment of Sales and Use Taxes Due issued to petitioner was properly cancelled by the Administrative Law Judge because the 78% ratio employed by the auditor was not supported by the audit workpapers or testimony, resulting in a failure by the Division to establish a rational basis for the notice.

The Division, in turn, asserts that the 78% ratio employed in the audit was an agreed-upon figure between the parties and that petitioner's refund claim did establish that its use tax liability is less than that agreed to in accordance with the Statement of Proposed Audit Adjustment. The Division argues further that petitioner's estimate of tax due is insufficient to support petitioner's refund claim. The Division also argues that petitioner is precluded from raising issues which were not raised in its refund application, i.e., that the purchases attributable to capital improvements are less than the Division claims were agreed upon during the audit.

OPINION

The issue to be addressed on exception is whether petitioner is entitled to a refund of use tax, which was made fixed and final upon its executing the consent to tax, where the Division fails at hearing to establish a rational basis for the tax set forth in that signed consent.

Tax Law former § 1138(a)(1) provides for the Division's issuance of a notice of determination when a taxpayer owes additional sales and use tax. Said section goes on to provide that a taxpayer, receiving such a statutory notice of determination, may protest that notice within 90 days of its issuance,[11] but that failure to do so leaves such determination finally and irrevocably fixed, with the taxpayer losing any right to challenge the same.

[11]A protest may be made by filing a request for a conference with the Division's Bureau of Conciliation and Mediation Services or by filing a petition with the Division of Tax Appeals.

Tax Law former § 1139(c), dealing with refunds, carries over and applies the above general rule by its first sentence, which provides that a "person shall not be entitled to a refund or credit . . . of a tax, interest or penalty" which has been asserted pursuant to section 1138 by issuance of a notice of determination "where all opportunities for administrative and judicial review . . . have been exhausted with respect to such determination." However, Tax Law former § 1139(c) goes on to carve out an exception, under certain circumstances, to this general rule prohibiting challenges to fixed and final assessments. Tax Law former § 1139(c) permits the filing of a refund claim challenging the amount of tax assessed, as follows:

> "[h]owever, a person filing with the commissioner of taxation and finance a signed statement in writing, as provided in [section 1138(c)] . . . , before a determination assessing tax pursuant to [section 1138(a)] . . . is issued, shall, nevertheless, be entitled to apply for a refund or credit pursuant to subdivisions (a) and (b) of this section, as long as such application is made . . . within two years of the date of payment of the amount assessed . . . but such application shall be limited to the amount of such payment."

Finally, Tax Law former § 1138(c) provides, in pertinent part, as follows:

> "[a] person liable for collection or payment of tax (whether or not a determination assessing a tax pursuant to subdivision (a) of this section has been issued) shall be entitled to have a tax due finally and irrevocably fixed prior to the ninety-day period referred to in subdivision (a) of this section, by filing with the tax commission a signed statement in writing, in such form as the tax commission shall prescribe, consenting thereto."

The language in the Statement of Proposed Audit Adjustment is such a consent. The above statutory provisions set forth the Division's power to issue determinations of tax as well as a taxpayer's right to either challenge the same within 90 days or lose the right to do so (Tax Law § 1138[a]). In addition, the above provisions also provide for a taxpayer to agree and consent to the amount of a tax liability (sections 1138[c] and former 1139[c]), thereby obviating the requirements of the issuance of a notice of determination and the 90-day protest waiting period thereafter, i.e, a taxpayer may consent to an assessment as was done in this matter. By agreeing to the amount of tax and consenting to an assessment, a taxpayer gives up its right to protest such assessment, except as provided by Tax Law former § 1139(c); to wit, the taxpayer may

protest by payment of the amount assessed and by filing a claim for refund of any such amount so paid within two years of the date of payment thereof.

We look now to the facts of this case. Petitioner agreed to the tax and signed a consent to tax after first being fully apprised of both the audit methodology and the opportunity to review the audit workpapers. Petitioner paid the tax and filed a refund application. The refund application does not challenge the audit method, but does challenge the assertion of tax for the additional period. Primarily, however, the refund claim is based on petitioner's claim that the State of New York is unfairly collecting the tax twice. At hearing, however, petitioner raised the audit method used at arriving at the tax computation as a means to prevail on its refund claim.

The Administrative Law Judge noted that petitioner had adequate books and records and the Division obtained petitioner's written consent to conduct a test period audit. The Administrative Law Judge then analyzed this case as one coming within the purview of Tax Law § 1138(a) and noted that if records at audit are available from which an exact amount of tax can be determined, estimated procedures adopted by the Division become arbitrary and capricious and lack a rational basis (***citing Matter of Chartair, Inc. v. State Tax Commn., supra***). From this premise, the Administrative Law Judge held that the Division is not shielded from establishing a rational basis for its tax computation at audit merely because petitioner signed a consent to tax. The Administrative Law Judge concluded that petitioner could challenge the underlying audit and tax computation in order to prevail on its refund claim.

We agree with the Administrative Law Judge that a taxpayer can sign a consent to tax, pay the sales or use tax due and still challenge the amount of tax asserted. Having said that, however, we are constrained to point out that no notice of determination was issued in this matter, so the Administrative Law Judge's analysis of this case as falling within the purview of Tax Law § 1138(a) was in error. We reverse the Administrative Law Judge on this issue for the reasons stated below.

The amount of use tax determined due upon audit on petitioner's material purchases incorporated into capital improvement projects was based on an allocation of 78% of material purchases to capital improvement jobs. Petitioner's representatives were present at the audit, admit that they were consulted regarding the audit methodology (which included the disputed 78% ratio) and admitted reviewing the audit workpapers before signing the Statement of Proposed Audit Adjustment, i.e., the consent to tax. There is no indication in this record that either of petitioner's representatives made any inquiry or objection regarding the audit method or the ratio used prior to having their client sign the consent to tax. Indeed, it appears to have been raised for the first time to the Division of Tax Appeals.

Tax Law former § 1138(c) describes the type of consent represented by Mrs. Sica's signature on the March 12, 1990 Statement of Proposed Audit Adjustment as follows:

> "[a] person liable for collection or payment of tax (whether or not a determination assessing a tax pursuant to subdivision (a) of this section has been issued) shall be entitled to have a tax due finally and irrevocably fixed prior to the ninety-day period referred to in subdivision (a) of this section, by filing with the tax commission a signed statement in writing, in such form as the tax commission shall prescribe, consenting thereto."

The Statement of Proposed Audit Adjustment (Exhibit "J") provides, in part:

> "[t]he Tax Law provides that a taxpayer is entitled to have tax due finally and irrevocably fixed by filing a signed consent with the Commissioner of Taxation and Finance. Such consent, subject to review and approval, waives the ninety (90) day period for fixing tax due but does not does not waive the taxpayer's right to apply for a credit or refund within the time limit set forth by law."

Having signed the Statement of Proposed Audit Adjustment, the tax asserted became finally and irrevocably fixed. Therefore, a notice of determination under section 1138(a) was not required to be issued and no notice was issued in this case. We conclude that the signature on the consent to tax rendered the use tax fixed and final (***Matter of BAP Appliance Corp***., Tax Appeals Tribunal, May 28, 1992; ***Matter of Rosemellia***, Tax Appeals Tribunal, March 12, 1992) and established the rational basis for the assessment. Having signed the consent, the audit method and audit computation ceased being an issue. Further, the threshold issue of "rational basis" that might otherwise be present in an audit case under Tax Law § 1138(a) was

no longer present. The Division was relieved of the burden of showing a rational basis because petitioner's signature on the consent established that there was a rational basis.

We agree with the Administrative Law Judge that petitioner, even after signing the consent and paying the tax, still has the opportunity to prove it is entitled to a refund. However, in order to be entitled to a refund, petitioner must demonstrate by clear and convincing evidence that the tax asserted is erroneous (***Matter of Surface Line Operators Fraternal Org. v. Tully***, 85 AD2d 858, 446 NYS2d 451), i.e., petitioner's actual tax liability was less than that set forth in the signed consent (***Matter of BAP Appliance Corp., supra; Matter of Rosemellia, supra; Matter of Philipp Bros.***, Tax Appeals Tribunal, June 4, 1992).

Once a taxpayer or a taxpayer's representative is provided an opportunity to review the audit papers and proposed consent to tax and, thereafter, signs a section 1138(c) consent, the burden of going forward and of proving that the tax is erroneous and a refund is due shifts to the taxpayer. A petitioner, under the facts here, can prevail upon a refund claim only by proof that the correct amount of tax is less than the amount set forth in the consent to tax.

In this case, petitioner offered no evidence at hearing to show that its actual tax was less than that set forth in the signed consent. That being the case, petitioner has failed to carry its burden of showing entitlement to a refund.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted;

2. The determination of the Administrative Law Judge is reversed with respect to conclusions of law "D," "E," "F" and "G," but is otherwise sustained;

3. The petition of SICA Electrical & Maintenance Corp. is denied; and

4. The Division's refund denial dated November 4, 1993 is sustained.

DATED: Troy, New York
February 26, 1998

Donald C. DeWitt
President

Carroll R. Jenkins
Commissioner

Joseph W. Pinto, Jr.
Commissioner