STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JORGE G. CHAVEZ D/B/A LORIS OLD FASHIONED ICE CREAM FOUNTAIN	:	DECISION DTA NO. 813879
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 March 1, 1990 through August 31, 1992.	:	

Petitioner Jorge G. Chavez d/b/a Loris Old Fashioned Ice Cream Fountain, 37A Main Street, East Hampton, New York 11937-2701, filed an exception to the determination of the Administrative Law Judge issued on July 17, 1997. Petitioner appeared by Louis F. Brush, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (James Della Porta, Esq., of counsel).

Petitioner did not file a brief. The Division of Taxation filed a brief in opposition to petitioner's exception. Oral argument was not requested.

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

ISSUES

I. Whether the Administrative Law Judge failed to render his determination in this matter within the six-month time frame set forth in Tax Law § 2010(3).

II. Whether petitioner has shown error in the Division of Taxation's calculation of additional tax due herein.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and make additional findings of fact. The Administrative Law Judge's findings of fact and the additional findings of fact are set forth below.

On November 15, 1993, following an audit, the Division of Taxation ("Division") issued to petitioner, Jorge G. Chavez d/b/a Loris Old Fashioned Ice Cream Fountain, a Notice of Determination of sales and use taxes which assessed a total amount due of $70,032.73 for the period March 1, 1990 through August 31, 1992. This total amount due was comprised of $38,402.71 in tax, plus penalty and interest in the respective amounts of $19,476.80 and $12,153.22.

Petitioner was the sole proprietor of a business known as Loris Old Fashioned Ice Cream Fountain located at 37A Main Street, East Hampton, New York. Petitioner's business sold hard and soft-serve ice cream and yogurt by the cone and dish. Petitioner also sold pints and quarts of ice cream and yogurt for off-premises consumption, as well as a relatively small amount of baked goods, candy and coffee. The business was open from noon to 10:00 P.M. seven days a week. Most of petitioner's sales occurred in the summer months.

The Division began the audit by requesting the production of all of petitioner's books and records related to his sales tax liability from the start of his business to August 31, 1992. This request was made by letter dated August 19, 1992. At the time the Division's request was made, the Division was in possession of a notification of bulk sale dated March 20, 1990 which listed petitioner as one of two individuals purchasing the business located at "37[sic] Main Street, East Hampton, New York." The bulk sale notification also indicated August 31, 1990 as the seller's

last day of business. However, the auditor concluded, based on petitioner's purchase records, that petitioner started his business in May 1990.

In response to the Division's request for records, petitioner produced worksheets indicating taxable and nontaxable sales, purchases, operating expenses, selling prices, markup ratios and net profits. Petitioner also produced his purchase invoices for the audit period and, except for two months of the audit period, his monthly bank statements. Petitioner did not produce any records of individual sales (i.e., receipts, guest checks, or cash register tapes). Petitioner also did not produce a sales journal or general ledger, or any Federal income tax returns for the years at issue.

Petitioner did not file sales tax returns for any quarter in the audit period.

Petitioner did not register as a vendor for sales tax purposes until June 1992. Petitioner was thus operating without a Certificate of Authority to collect sales tax from May 1990 until June 1992.

Petitioner's worksheets calculated petitioner's sales by taking the number of cans of hard and soft-serve ice cream and yogurt purchased during the audit period and converting that number into gallons. The worksheets indicate that some brands were purchased by petitioner in 3 gallon cans and others in 2½ gallon cans. With respect to purchases of soft-serve ice cream and yogurt the worksheets increased the number of liquid gallons purchased by a 25% "air overrun" factor to reach a total "saleable product" gallonage figure. Total gallons of both hard and soft-serve ice cream and yogurt were then multiplied by 128 to arrive at total number of ounces available for sale. From these totals certain adjustments were made for waste, free samples and employee consumption. Petitioner's worksheets also set forth percentages of hard

ice cream/yogurt sales versus soft-serve ice cream/yogurt sales and taxable (cones and dishes) versus nontaxable (pints and quarts) sales. Petitioner's worksheets also indicated that petitioner's taxable sales were made in six and nine ounce portions and that 80% of such sales were six ounce portions. The worksheets also listed petitioner's selling prices for the six and nine ounce portions. The worksheets listed monthly totals of petitioner's taxable and nontaxable sales from May 1990 through August 1992.

Upon review of the purchase invoices and worksheets and after a brief observation, the auditor accepted the accuracy of the taxable sales figures as set forth in the worksheets. He thus calculated additional tax due on petitioner's sales for the audit period based directly on taxable sales as listed in the worksheets. The additional tax due on sales totaled $38,027.71.

As noted previously, petitioner purchased his ice cream business in a bulk sale transaction. The bulk sale notification indicated that furniture, fixtures, equipment and supplies valued at $5,000.00 were sold to the purchasers as part of the bulk sale. No sales tax was paid on these assets at the time of the bulk sale. Accordingly, on audit the Division asserted tax due of $375.00 on petitioner's purchase of this $5,000.00 of assets.

We find the following additional facts:

> At the conclusion of the hearing in this matter, a briefing schedule was set by the Administrative Law Judge. Petitioner's brief was due on June 3, 1996, the Division's brief was due on July 3, 1996 and the reply by petitioner was due on July 19, 1996 (***see***, Tr., pp. 90-91).
>
> On May 31, 1996, petitioner requested an extension of time within which to file his brief due to the fact that he had not received a copy of the transcript. Accordingly, petitioner suggested a revised briefing schedule whereby his brief would be due on July 15, 1996, the Division's brief would be due on August 15, 1996

and the reply by petitioner would be due on August 29, 1996. This revised schedule was adopted and approved by the Administrative Law Judge by his letter dated June 3, 1996.

On November 6, 1996, the parties informed the Administrative Law Judge that they were pursuing settlement discussions and requested that no determination be rendered by the Administrative Law Judge within the next 30 days.

On December 18, 1996, the Administrative Law Judge wrote to the parties indicating that he had not heard anything further from them concerning the issue of settlement. Therefore, he inquired as to the status of the settlement negotiations between the parties.

On December 31, 1996, the Office of Counsel informed the Administrative Law Judge that settlement papers were, in fact, drafted and were in the possession of petitioner.

On February 6, 1997, the Office of Counsel informed the Administrative Law Judge that the parties would not be settling the matter and, thus, the case need not be held in abeyance any further.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

As stated by the Administrative Law Judge, the Division calculated additional tax due on sales based upon the sales figures set forth in petitioner's own worksheets. However, petitioner disagreed with the calculations because he claimed that the Division improperly calculated the amount of hard ice cream and yogurt available for sale by volume rather than by actual weight. The Administrative Law Judge determined that petitioner's position was without merit. The Administrative Law Judge stated that, as established by petitioner's workpapers, the calculations showed purchases of cans of hard ice cream and yogurt converted to gallons and, further, to ounces in a gallon. The Administrative Law Judge noted that these workpapers reflected that petitioner sold his products by volume in portions of six and nine ounces. The Administrative Law Judge rejected petitioner's contention that this reflected that he sold his ice cream and

yogurt by actual weight rather than by volume. Therefore, the Administrative Law Judge found that there was no basis upon which to make any adjustment to the tax as assessed by the Division.

Furthermore, the Administrative Law Judge stated that petitioner raised several additional issues in his petition which he failed to raise at hearing, i.e., that the assessment was arbitrary and was made without a review of his records, that his books and records were complete and accurate, that any additional tax due was not the result of negligence, that the interest rate should be reduced to the minimum, that the assessment was erroneous as a matter of law and that he was not a responsible person liable for the tax due. Since these issues were not raised either at the hearing or in petitioner's brief to the Administrative Law Judge, the issues were deemed abandoned (***see***, ***Matter of Bello v. Tax Appeals Tribunal***, 213 AD2d 754, 623 NYS2d 363). Accordingly, the Administrative Law Judge denied the petition and sustained the Notice of Determination issued to petitioner.

ARGUMENTS ON EXCEPTION

Petitioner contends that the determination rendered by the Administrative Law Judge was not issued within six months of August 29, 1996 which was the date that the Administrative Law Judge had set for the final deadline for all briefs and submissions. Petitioner further asserts that the determination was not issued within six months of December 6, 1996 which was the date requested by the Office of Counsel, in its November 6, 1996 letter to the Administrative Law Judge, for the Administrative Law Judge to reserve his determination in this matter while the parties discussed settlement.

With respect to the merits of the case, petitioner argues that the exhibits at the hearing establish the weight of the hard ice cream and yogurt sold by him. Petitioner asserts that the workpapers as originally submitted were accepted by the auditor and the corrected workpapers used the same methodology and computations except that weight was used rather than volume. Therefore, petitioner contends that the evidence, the testimony of the auditor and, by taking notice of the manner in which yogurt is customarily purchased and sold, the re-computation submitted at the hearing should have been accepted as correct by the Administrative Law Judge.

In opposition, the Division argues that although petitioner states that the evidence in the record establishes that the ice cream and yogurt were sold by weight, petitioner does not specify which exhibits support this conclusion. The Division asserts that the only documentation submitted by petitioner consisted of revised worksheets recalculating the sales tax liability based upon the premise that the ice cream and yogurt were sold by weight. The Division alleges that the revised worksheets are unsupported by any testimony or other corroborating evidence in the record.

With respect to petitioner's request that the Administrative Law Judge take notice that hard ice cream and yogurt are customarily sold by weight, the Division argues that this fact is irrelevant. The Division contends that the issue is the manner in which petitioner operated his business and not how other businesses operated. The Division states that it is significant that the auditor testified that he did not know whether petitioner sold ice cream and yogurt by weight (***see***, Tr., p. 72). Moreover, the Division asserts that petitioner cannot point to one piece of evidence supporting his claim that the ice cream and yogurt, in fact, were sold by weight.

In addressing petitioner's argument that the Administrative Law Judge failed to issue his determination within six months, the Division states that even if the determination was late, there is no authority for such determination to be reversed due to the fact that it was untimely issued.

OPINION

Although petitioner asserts that the Administrative Law Judge's determination in this matter was issued later than the six-month time frame provided by statute, he nonetheless fails to indicate what remedy he is entitled to if, in fact, it is found that the determination was issued outside the six-month deadline. We find that the issue of timeliness in this matter is not whether the determination was issued within the required six months, but whether the Administrative Law Judge had the authority to issue it after the passing of the time limit and what remedy is available to this petitioner.

Tax Law § 2010(3) provides that:

> [a]n administrative law judge shall render a determination after a hearing, within six months after submission of briefs subsequent to completion of such a hearing or, if such briefs are not submitted, then within six months after completion of such a hearing. Such six month period may be extended by the administrative law judge, for good cause shown, to no more than three additional months. If the administrative law judge fails to render a determination within such . . . period . . . the petitioner for such hearing may institute a proceeding under article seventy-eight of the civil practice law and rules to compel the issuance of such determination.

This same time limit is reiterated in the Tax Appeals Tribunal's Rules of Practice and Procedure at 20 NYCRR 3000.15(e).

The record reflects that the determination was not issued in compliance with the rules set forth in the statute or regulation. However, the statute in question is one which merely imposes a

time limitation within which an administrative determination is to be made (***see***, ***Eclipse Disco v. New York State Liq. Auth.***, 155 AD2d 304, 547 NYS2d 589; ***Matter of Paino v. Webb***, 152 AD2d 699, 544 NYS2d 159; ***Matter of Clifford v. New York State Employees Retirement Sys***., 123 AD2d 1, 510 NYS2d 277). The further inquiry which must be made "involves a consideration of the statutory scheme and objectives to determine whether the requirement for which dispensation is sought by the government may be said to be an 'unessential particular' . . . or . . . relates to the essence and substance of the act" (***Matter of Janus Petroleum v. New York State Tax Appeals Tribunal***, 180 AD2d 53, 583 NYS2d 983, 984). Those cases which involve a time limitation like the one in Tax Law § 2010(3) fall into the former category of "unessential particular." This is especially true in cases where the Legislature has not included a specific consequence of the administrative agency's failure to act within a prescribed time limit (***see, Matter of Janus Petroleum v. New York State Tax Appeals Tribunal***, ***supra***). Tax Law § 2010(3) provides that a taxpayer's only remedy in cases where a determination is not issued in a timely manner is to bring an Article 78 proceeding to compel issuance. No other specific consequence is provided and no statutory scheme or objective is apparent which would indicate that the act to be performed is anything other than merely directory (***Matter of Janus Petroleum v. New York State Tax Appeals Tribunal***, ***supra***).

In a recent case, the Appellate Division rejected a petitioner's contention that the Tax Appeals Tribunal's decision was a nullity because it was not rendered within the time limits set by statute. The Court said:

> There being no statutory or regulatory limitation on the Tribunal's ability to act in the event that it does not render a determination within six months of oral argument, the six-month time limit

> outlined in [the] Tax Law . . . is directory only . . . . Only upon a showing of substantial prejudice, wholly absent on this record, would noncompliance with this discretionary limitation have any consequence [citation omitted] (Matter of Bray Terminals v. New York State Tax Appeals Tribunal, ___ AD2d___, 669 NYS2d 752, 755).

Finally, we are mindful of the extraordinary facts of this matter, to wit: the requests by the parties to hold this matter in abeyance; the representations made to the Administrative Law Judge concerning the impending settlement of the case; and the failure of the parties to keep the Administrative Law Judge informed of the status of the settlement negotiation. However, as we said in ***Matter of Swanson*** (Tax Appeals Tribunal, November 4, 1993): "[t]his Tribunal regards the time limitations of sections 2010(3) and 2006(7) (the latter imposing a six-month limitation on the issuance of Tribunal decisions) as requirements to be satisfied in every case."

Without attempting to hamstring the flexibility of the hearing and settlement process before Administrative Law Judges in the Division of Tax Appeals, we continue to believe that the taxpayers of this State are best served by strict adherence to the time limitations set forth in the Tax Law and that every effort must be made to so comply.

However, in the present matter, petitioner has not argued or demonstrated substantial prejudice. In addition, in its exception, petitioner has not requested any relief whatsoever for the Administrative Law Judge's failure to issue the determination in accordance with the provisions of Tax Law § 2010(3). In light of the above discussion, we conclude that petitioner is deserving of no relief for the untimely issuance of the determination.

In turning to the merits of this case, petitioner makes the same argument on exception that he presented to the Administrative Law Judge below. Since the Administrative Law Judge dealt

adequately and completely with this issue, we affirm his determination for the reasons set forth therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Jorge G. Chavez d/b/a Loris Old Fashioned Ice Cream Fountain is denied;

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

3. The petition of Jorge G. Chavez d/b/a Loris Old Fashioned Ice Cream Fountain is denied; and

4. The Notice of Determination dated November 15, 1993 is sustained.

DATED: Troy, New York
June 11, 1998

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner