

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :

of :

**FERNANDO J. ALTERI** :

DECISION  
DTA NO. 815078

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 September 1, 1988 through May 31, 1993. :

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Petitioner Fernando J. Alteri, 3916 Fountain Street, Clinton, New York 13323, filed an exception to the determination of the Administrative Law Judge issued on October 9, 1997. Petitioner appeared *pro se*. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Brian J. McCann, Esq., of counsel).

The Division of Taxation filed a letter brief in opposition and its post-hearing brief filed below. Petitioner filed a letter in lieu of a reply brief. Petitioner's request for oral argument was denied.

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

***ISSUE*** Whether the Division of Taxation established that its imposition of fraud penalty pursuant to Tax Law § 1145(a)(2) against petitioner was proper.

***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 a Notice of Determination dated June 5, 1995 against petitioner, Fernando J. Alteri, asserting tax due plus a fraud penalty and interest on audited taxable sales as follows:

<u>Period Ended</u>	<u>Taxable Sales</u>	<u>Tax Due</u>	<u>Fraud Penalty</u>	<u>Interest</u>
11/30/88	\$ 37,723.36	\$ 2,640.64	\$ 2,843.66	\$ 3,046.67
02/28/89	31,942.06	2,235.94	2,337.65	2,439.36
05/31/89	34,534.58	2,417.42	2,452.10	2,486.78
08/31/89	34,574.77	2,420.23	2,381.82	2,343.41
11/30/89	34,714.95	2,430.05	2,321.01	2,211.96
02/28/90	36,033.64	2,522.36	2,338.94	2,155.53
05/31/90	38,936.45	2,725.55	2,452.08	2,178.59
08/31/90	38,979.44	2,728.56	2,399.42	2,070.30
11/30/90	40,092.52	2,806.48	2,397.88	1,989.28
02/28/91	43,077.57	3,015.43	2,501.31	1,987.18
05/31/91	42,876.64	3,001.36	2,415.47	1,829.58
08/31/91	35,147.66	2,460.34	1,921.08	1,381.82
11/30/91	33,053.27	2,313.73	1,753.37	1,192.99
02/29/92	37,368.22	2,615.78	1,923.84	1,231.90
05/31/92	38,597.20	2,701.80	1,927.91	1,154.02
08/31/92	35,970.09	2,517.91	1,743.18	968.44
11/30/92	43,401.85	3,472.15	2,332.97	1,193.78
02/28/93	43,567.59	3,485.41	2,273.61	1,061.81
05/31/93	<u>43,646.30</u>	<u>3,491.70</u>	<u>2,209.85</u>	<u>928.02</u>
Totals	\$724,238.16	\$52,002.84	\$42,927.15	\$33,851.42

This notice explained that "[t]he taxes shown have been determined to be due in accordance with section 1138 of the New York State Sales and Use Tax Law and are based on an audit of your records," and that "fraud penalties of 50 percent of the amount of the tax due plus statutory interest have been added pursuant to section 1145(a)(2) of the New York State Sales and Use Tax Law."

The Notice of Determination shows that the Division credited petitioner with the payment of \$52,002.84. However, this payment was allocated by the Division to tax, penalty, and interest

for the earlier periods rather than just to tax due. At the hearing, the Division agreed that it would reallocate this payment entirely to tax due as petitioner had requested.

The Notice of Determination was a by-product of a criminal prosecution of petitioner resulting from his failure to file sales tax returns and to pay over to the State sales tax collected on the restaurant sales made by Alteri's Restaurant, located in the college town of Clinton, New York, and operated by petitioner as a sole proprietor.

Mr. Alteri testified that his restaurant has a bar about 25 feet long, a dining room that seats 80, a back room for meetings which holds 40 and a kitchen. Alteri's Restaurant, which opened on February 14, 1953, serves lunch and dinner specializing in Italian-American food including pizza. The kitchen is run by petitioner's wife, Beverly Alteri, who apparently serves as the restaurant's chef, with assistance from petitioner's "sisters or my daughter [who come in and help] me out once in awhile" (tr., p. 71). The only paid employees are apparently two waitresses and a bartender who has been employed by petitioner for 27 years. Petitioner had testified, earlier in his direct testimony, that his son worked in the restaurant but when he specifically noted the restaurant's paid employees, he did not mention his son. Later in his testimony on redirect examination, petitioner added that his mother and mother-in-law also assisted in the kitchen:

My mother was making homemade macaroni when she was 90 years old for the restaurant (tr., p. 79).

The Division of Taxation conducted a search of its sales tax files for the years at issue and no sales tax returns or a certificate of registration were located. The Division's auditor testified that:

The investigator who handled the case when he interviewed Mr. Alteri was informed that the last time that he could prove that he paid any sales tax was I believe in 1973 (tr., p. 36).

According to the auditor, the State did not seek to collect unpaid sales tax for earlier periods because "We can only go back five years for a criminal case for a felony" (tr., pp. 36-37).

The failure of Alteri's Restaurant to remit sales tax to the State came to light as a result of a special project of the Revenue Opportunity Division within the Department of Taxation and Finance. In early 1993, the Revenue Opportunity Division was conducting a project involving the matching-up of State liquor licenses with sales tax registrations. On April 8, 1993, the Revenue Crimes Unit of the Division's Office of Tax Enforcement located in Syracuse received a referral from the Revenue Opportunity Division concerning possible sales tax evasion by Alteri's Restaurant. A memorandum dated October 27, 1993 prepared by Clinton Woodford, tax enforcement investigator, states that a representative of the Revenue Opportunity Division spoke to petitioner who was unable to secure a valid sales tax number for the business or to provide copies of filed sales tax returns. Further, the only tax registration number Mr. Alteri could provide the Revenue Opportunity Division representative was the restaurant's Federal employer identification number.

By the introduction of (i) the memorandum of Investigator Woodford dated October 27, 1993, (ii) an affidavit of Investigator Woodford dated February 12, 1997, which authenticated three supporting depositions which he made in connection with the criminal proceeding against petitioner, and (iii) the testimony of the auditor who conducted the audit of Alteri's Restaurant, the Division established a detailed description of the events leading up to the criminal prosecution of petitioner and this administrative proceeding.

As noted above, on April 8, 1993, the Revenue Crimes Unit of the Office of Tax Enforcement received a referral from the Revenue Opportunity Division concerning possible sales tax evasion by Alteri's Restaurant. The following day, on April 9, 1993, Investigator Woodford of the Revenue Crimes Unit visited the premises of Alteri's Restaurant where he encountered petitioner and advised him that he was conducting a criminal investigation into possible sales tax violations by the business. At this initial contact, petitioner advised the investigator that he charged sales tax to all customers and had been filing sales tax returns and remitting sales tax to the State on a regular basis. Mr. Alteri informed the investigator that his accountant, Joseph Kaiser, prepares his sales tax returns. On the same day, i.e., April 9, 1993, the investigator interviewed petitioner's accountant. Mr. Kaiser advised the investigator that he prepared all the required sales tax returns over the past years and gave them to petitioner to file. However, he did not know if Mr. Alteri filed the sales tax returns that he prepared.

About two weeks later, on April 22, 1993, petitioner brought his business records to Investigator Woodford's Syracuse office in response to a subpoena served by the investigator on April 9, 1993. On this later date, petitioner admitted to the investigator that he had not filed any State sales tax returns or remitted sales tax monies since the early 1980s, although he could not remember, according to the investigator's deposition, "exactly when he stopped remitting." Petitioner also admitted that he "had no excuse for not doing so," that he "has always charged and collected sales tax from his customers at the restaurant/bar," and that his accountant "prepared sales tax returns over the years and gave them to him, but [he] set the returns aside and never remitted them." Petitioner turned over to the investigator his sales journals in which he kept track of the daily sales of Alteri's Restaurant.

Shortly thereafter, during the summer of 1993, the Division's auditor, Kim Raga, conducted an audit of Alteri's Restaurant and determined that during the audit period consisting of four years and nine months, Alteri's Restaurant had taxable sales of \$724,238.00 as detailed in Finding of Fact "1". Therefore, on an annual basis, the taxable sales of Alteri's Restaurant during the period at issue averaged approximately \$150,000.00. Petitioner has not contested the amount of taxable sales determined by the auditor.

After Ms. Raga's audit, she and Investigator Woodford prepared a memorandum dated October 27, 1993 for the Office of Tax Enforcement's principal attorney, James Zaccaria, recommending that petitioner:

be charged with a violation of Article 37, Sec. 1817(d), Failure to Possess a Certificate of Authority, a misdemeanor, one count; Art. 37, Sec. 1817(a), Willful Failure to File a Return, a misdemeanor, eleven counts; and Section 155.40 of the Penal Law, Grand Larceny in the Second Degree, a Class C felony, one count.

Petitioner was charged in a criminal indictment as recommended by the investigator and auditor except that it appears he was not charged with failing to possess a certificate of authority. On January 31, 1995, petitioner pleaded guilty to petit larceny (Penal Law § 155.25) and one count of willful failure to file a return (Tax Law § 1817[a]). His sentence consisted of a conditional discharge and a fine of \$2,500.00. The conditional discharge was dependent upon petitioner's making restitution of tax of \$52,002.84 by March 28, 1995. The "Information Required on Completion of a Criminal Tax Case" shows that the Division reserved its right to pursue penalty and interest. The audit report indicates that petitioner "made his tax payment of \$52,002.84 at the time of his guilty pleas."

Petitioner did not introduce into the administrative record any independent evidence to contradict the facts as established by the Division through its introduction of the affidavit of the

investigator and the testimony of the auditor. In fact, the only independent evidence introduced by petitioner consists of (1) letters written on his behalf by various prominent individuals in the Town of Kirkland (which includes the Village of Clinton) attesting to Mr. Alteri's good character, readiness to assist people in need, and long-term support of projects for the betterment of the community including the establishment of various athletic programs and (2) a handwritten letter dated March 6, 1996 on the letterhead of petitioner's physician, Dr. Gino A. Trevisani, noting that Dr. Trevisani "treated [Mr. Alteri] for carcinoma of the larynx from February 1984 to June 1984." In Dr. Trevisani's opinion, petitioner was "under a great deal of mental stress and anguish" which "could have impaired his judgement in both his personal and business responsibilities."

In his direct testimony, petitioner indicated that in late 1987, he was diagnosed with throat cancer and became indifferent to "what happened" to his restaurant business (tr., p.45). On cross-examination, when confronted with the note of Dr. Trevisani indicating that he treated petitioner for cancer in 1984, petitioner testified, "That date is wrong" (tr., p. 53). Petitioner did not submit an affidavit of Dr. Trevisani or any other independent evidence to support his position that, in fact, the doctor's note introduced by petitioner into the record was in error.

Much of petitioner's testimony on direct examination consisted of responses to leading questions. Further, on cross-examination, he frequently responded to the Division's questioning by stating that he did not recall or by hedging his responses.

What follows is one example that shows the nature of petitioner's testimony on cross-examination:

Attorney McCann: "When is the last time you recall making a sales tax payment prior to April of 1993?"

Mr. Alteri: "Prior to that? Had to have been in '87."

Mr. McCann: "So you maintain that you paid sales tax in 1987?"

Mr. Alteri: (Nods head)

Administrative Law Judge: "You have to verbalize 'yes' or 'no'. You just can't nod."

Mr. Alteri: "Yes. As far as I know."

Attorney McCann: "Do you have any documentary proof of that?"

Mr. Alteri: "If I do, it would be at the restaurant."

Mr. McCann: "You don't have it here with you today?"

Mr. Alteri: "No." (Tr, pp. 59-60.)

In sum, petitioner was not a forthright witness. In addition, his testimony that he thought his plea in the criminal prosecution settled everything was not believable. Moreover, he failed to present any independent evidence to support his testimony. Dr. Trevisani's note did not support his testimony that he endured treatment for cancer during the period at issue as noted above.

#### ***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge determined that petitioner was subject to the civil fraud penalty, having found clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representations, resulting in deliberate nonpayment or underpayment of taxes due and owing.

The Administrative Law Judge reasoned that petitioner's criminal conviction for petit larceny established willful intent to deprive the State of its property for the entire audit period. Petitioner knowingly failed to remit the tax or file the sales tax returns prepared for him by his



accountant and petitioner admitted that he had no reason for not doing so. Further, petitioner's testimony was found vague, evasive and without any independent evidence in support of it.

The Administrative Law Judge dismissed as irrelevant petitioner's argument that other taxpayers of lesser character than petitioner might have taken advantage of the Division's amnesty program.

### ***ARGUMENTS ON EXCEPTION***

On exception, petitioner argues that fraud penalty should not be imposed because he fully cooperated with the investigators and auditors, providing all information they requested. He states that his records should not be used as the basis of the Division's fraud penalty assessment since the Division has no independent evidence of its own.

Petitioner argues that the doctrine of laches should be applied in this case because the Division should have assessed him as each quarter for which he owed tax came due. Petitioner states that if he had been aware of the taxes as they came due, he would have paid them.

Petitioner contends that his failure to pay the tax was "thoughtless error" and just "an unexplained peculiar idiosyncrasy," not fraud.

Finally, petitioner claims he suffered from severe psychological problems which were the reason for his failure to file tax returns and remit tax.

### ***OPINION***

We affirm the determination below and find that the Administrative Law Judge thoroughly and correctly determined the issue before him based upon all of the facts in the record. However, we will briefly address the issues raised in petitioner's exception.

As the Administrative Law Judge stated in his determination, the Division of Taxation met its burden of proof on the issue of civil fraud, demonstrating each of the requisite elements therefor, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representations, resulting in deliberate nonpayment or underpayment of taxes due and owing (*see, Matter of Cinelli*, Tax Appeals Tribunal, September 14, 1989). Petitioner offered no excuse for his failure to file sales and use tax returns or remit taxes except for an unsubstantiated claim of severe psychological problems and the fact that his failure was nothing more than “thoughtless error” and an “unexplained peculiar idiosyncrasy.” In addition, even these assertions carry little weight since the Administrative Law Judge found petitioner’s testimony lacked credibility. Although we are not absolutely bound by an Administrative Law Judge’s finding of credibility or lack thereof, we defer to the Administrative Law Judge’s assessment of credibility herein, given his opportunity to view the witness first hand and evaluate the relevance and truthfulness of the testimony (*see, Matter of Spallina*, Tax Appeals Tribunal, February 27, 1992). Clearly, petitioner offered no credible proof to challenge each of the established elements of fraud embodied in his criminal conviction.

Further, we find petitioner’s argument that the Division’s assessment of fraud penalty must fail because it is not based on records of the Division but those of petitioner to be without merit. The Division audited petitioner to determine the tax for which he filed no returns and did not pay. After receiving no reason for his failures and a subsequent criminal conviction, the Division assessed fraud penalty. The Division needed no further documentation to establish the elements of fraud.

Also, we do not agree with petitioner that his cooperation with investigators and the Division of Audit should provide a basis for abating fraud penalties. However, as found by the Administrative Law Judge, initially petitioner told an investigator that he collected and remitted taxes regularly. It was only after petitioner's accountant informed the investigator that he prepared the returns and forwarded them to petitioner for filing and remittance that petitioner admitted his failure to file and pay tax. Thus, petitioner's claim that he "cooperated" is disingenuous.

Finally, petitioner raised the doctrine of laches as a defense. In *Matter of Barabash* (31 NY2d 76, 334 NYS2d 890), the Court of Appeals stated:

Laches is defined as such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity (*Id.* at 894).

We do not believe that the doctrine of laches is applicable herein. Where an equitable defense is asserted by a petitioner against the Division, the petitioner must show that its application is necessary to avoid a manifest injustice (*Matter of Sheppard-Pollack v. Tully*, 64 AD2d 296, 409 NYS2d 847; *Matter of Turner Constr. Co. v. State Tax Commn.*, 57 AD2d 201, 394 NYS2d 78). Petitioner has not met its burden on this issue. Where petitioner willfully failed to file returns or remit tax for years, even when the returns had been prepared for him to do so, it cannot be said that the imposition of civil fraud penalty pursuant to Tax Law § 1145(a)(2) was a manifest injustice.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Fernando J. Alteri is denied;
2. The determination of the Administrative Law Judge is sustained;

3. The petition of Fernando J. Alteri is granted to the extent set forth in conclusions of law "H" and "I" of the Administrative Law Judge's determination, but in all other respects is denied; and

4. The Notice of Determination, dated June 5, 1995, as modified in accordance with paragraph "3" herein is sustained.

DATED: Troy, New York  
August 20, 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