STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
TOPS, INC.	:	DETERMINATION
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, 1979 through May 31, 1982.	:	

Petitioner, Tops, Inc., 60 Dingens Street, P.O. Box 1027, Buffalo, New York 14240, filed a petition 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, 1979 through May 31, 1982 (File No. 801669).

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 65 Court Street, Buffalo, New York, on February 3, 1988 at 9:15 A.M., with all briefs to be submitted by June 22, 1988. Petitioner appeared by Hodgson, Russ, Andrews, Woods & Goodyear (Benjamin M. Zuffranieri, Jr. and Mark S. Klein, Esqs., of counsel). The Audit Division appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUES

I. Whether additional sales taxes are owed by petitioner, Tops, Inc., as a result of the rendering of repair and maintenance services to petitioner by individuals generally employed by T. A. Buscaglia, Inc., petitioner's sister corporation.

II. Whether assessments for sales tax quarters ending February 28, 1982 and May 31, 1982 are barred by the statute of limitations as a result of the Audit Division's failure to properly designate these quarters on the Notice of Determination and Demand for Payment of Sales and Use Taxes Due.

FINDINGS OF FACT

1. Petitioner, Tops, Inc. ("Tops"), is a wholly-owned and wholly-controlled subsidiary of Niagara Frontier Services, Inc. ("NFS"). Tops owns and operates retail supermarkets in the Buffalo, New York area.

2. T. A. Buscaglia, Inc. ("TAB") is also a wholly-owned and wholly-controlled subsidiary of NFS. TAB is engaged in new store construction, equipment installation and maintenance of Tops stores and Tops equipment.

3. On audit, the Audit Division reviewed certain TAB invoices for repair and maintenance work performed in petitioner's stores during the audit period. These invoices charged petitioner for labor and materials in respect of services performed in petitioner's stores. The invoices

charged sales tax on the materials set forth thereon, but did not charge sales tax on labor.

4. The Audit Division was subsequently advised by petitioner that, although all of its repair and maintenance services were recorded on TAB invoices, many of the services in question were actually performed by Tops employees. The Audit Division then determined that, while services provided by Tops employees should not be subject to sales tax, services performed for petitioner by employees of TAB were properly subject to tax.

5. The Audit Division then determined the deficiency herein by review of TAB invoices representing work performed for petitioner during the audit period.[1] Petitioner also provided the auditor with a list of individuals on its payroll during the audit period. The auditor reviewed the invoices and compared the name of the serviceman listed on each invoice with the payroll list. If the serviceman's name was not on the payroll list, the Audit Division determined that the serviceman was a TAB employee and therefore that his services were properly subject to tax.

6. On October 5, 1984, following the audit described above, the Audit Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due which assessed $83,293.44 in total tax due plus minimum interest for the period March 1, 1979 through May 31, 1982.

7. The notice of determination listed a schedule of the deficiency for the quarterly sales tax periods comprising the audit period. The final two periods were incorrectly listed on the notice as the periods ended 2/28/81 and 5/31/81. These two periods should correctly have been listed as 2/28/82 and 5/31/82. The "period designators" listed next to the incorrect dates of 2/28/81 and 5/31/81 were 382 and 482, respectively, which correspond with the correct calendar dates of 2/28/82 and 5/31/82. Additionally, prior to the issuance of the notice, petitioner had been provided with copies of Audit Division workpapers which listed tax due for the periods ended 2/28/82 and 5/31/82. The amounts listed as tax due for the last two periods on the notice of determination corresponded with the amounts listed as due on workpapers provided to petitioner for the periods ended 2/28/82 and 5/31/82.

8. As stated previously, both petitioner and TAB were wholly-owned subsidiaries of NFS. Together, the three corporations operated a unitary food service corporation. NFS's function included control of the financial and administrative activities of both petitioner and TAB. NFS provided accounting services for both petitioner and TAB and paid vendors who submitted bills to both subsidiaries. Of the three corporations, only NFS had a cash disbursing checking account. Only NFS had check-writing authority. Additionally, NFS borrowed and invested on behalf of both subsidiaries. Only NFS provided financing to petitioner and TAB. All year-end profits earned by NFS's subsidiaries were transferred to NFS for its benefit.

9. NFS paid the employees of both petitioner and TAB, although the three corporations each had separate Federal employer identification numbers, and three separate payroll lists were maintained. NFS, on its subsidiaries' behalf, issued W-2 forms to all employees of the three corporations. The name of the employer listed on the W-2 corresponded with the particular

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[1]It should be noted that the Audit Division made a detailed review of the TAB invoices in question for a portion of the audit period, and employed, with petitioner's consent, a computer-assisted sampling of the invoices for the balance of the audit period. It should be further noted that the computation of the deficiency herein is not at issue.

payroll on which an employee was listed.

10. NFS and its subsidiaries filed combined New York State franchise tax reports and consolidated Federal income tax returns during the period at issue. The three corporations requested permission to file franchise tax reports on a combined basis.

11. Petitioner and TAB each filed separately for sales tax purposes during the audit period. Petitioner, however, reported TAB's sales tax liability for work performed in noncompany franchise stores on petitioner's returns.

12. NFS made all decisions regarding capital improvements and investments in petitioner's facilities. All major operating decisions for both petitioner and TAB were made by NFS management.

13. NFS also exercised detailed control over day-to-day operations of both petitioner and TAB. Neither subsidiary could authorize an expenditure in excess of $1,000.00 without NFS approval. NFS leased vehicles used by TAB and Tops service personnel. Also, NFS provided each subsidiary with necessary insurance, including directors' and officers' liability policies and general liability policies.

14. During the audit period, petitioner's corporate secretary also held that same office with NFS and TAB. In addition, the president and treasurer of petitioner and TAB also held positions with NFS and were on NFS's payroll. The controller of NFS also acted as controller for the subsidiaries, although he formally held that title only with NFS and was paid by NFS.

15. Petitioner and TAB shared office space on Dingens Street in Buffalo. They also shared telephones, secretaries, two-way radios and receptionists, and used the TAB dispatcher service.

16. NFS also served a personnel function as individuals on the NFS payroll hired TAB employees. Promotions and advancements of personnel of the three corporations were intermingled among the three corporations depending upon qualifications of applicants and available job opportunities. For example, Tops store managers, who were Tops employees, could be promoted to district managers employed by NFS.

17. As stated previously, TAB provided maintenance and repair services to petitioner's stores. Generally, the procedure was that a store manager of petitioner called a dispatcher of TAB and described a list of tasks that the manager needed to have done at petitioner's store. Additionally, less urgent work, the "weekly log", was called in to the dispatcher by the manager.

18. In response to a service request, the serviceman reported to the store manager upon his arrival at the store and was "signed in". The manager then told the serviceman of his primary assignment. Upon completion of the assigned task, the serviceman reported back to the manager. The manager could then assign the serviceman to other tasks, if necessary. If there was no other work for the serviceman, the manager "signed him out" and the serviceman contacted the dispatcher for his next assignment.

19. Following completion of his assigned tasks, the TAB serviceman submitted an invoice to the Tops store manager detailing his labor and the cost of materials, if any. Appropriate accounting entries were then made on the books of each corporation with respect to the submitted invoices.

20. While in a Tops store, TAB servicemen were subject to all of the same rules and regulations as Tops' other employees, including rules relating to lunch and break times, permissible smoking areas, etc.

21. When calling the dispatcher for service, the Tops store manager could request a specific individual if he felt that the work required that individual. The dispatcher would attempt to meet the store manager's request. The store manager also had veto power over allowing a particular serviceman to work in his store. The store manager also had the power to send a serviceman home if he disregarded the store's rules or failed to satisfactorily perform his assigned task.

22. As indicated previously, servicemen were on the payroll of either petitioner or TAB. The relationship between the store manager and the servicemen was the same as that described above, whether the particular serviceman was on the Tops or TAB payroll. Often the store manager was unaware of which payroll a serviceman was on.

23. Store managers were, from time to time, consulted by NFS personnel to evaluate the performance of servicemen who had worked in their stores.

24. In addition to its service function, TAB also was involved in the construction of new stores for NFS and the remodeling of stores for NFS.

SUMMARY OF THE PARTIES' POSITIONS

25. Petitioner contends that the exclusion provided for in Tax Law § 1105(c)(5) precludes the imposition of tax on repair and maintenance services provided by TAB personnel to petitioner and advances two theories in support of its claim. First, petitioner contends that the TAB employees who performed the services in question were, while they were working in the stores, "special employees" of petitioner within the common law meaning of that term. Therefore, petitioner argues, the TAB employees, while working in Tops stores, were employees of petitioner within the meaning of Tax Law § 1105(c) and the services rendered were not subject to tax. Second, petitioner argues that NFS, TAB and petitioner formed a single unitary business so thoroughly dominated by NFS that the status of the subsidiaries as separate legal entities should be ignored, for the subsidiaries were merely the "alter egos" of the parent. It therefore follows that the services at issue herein were really services performed by NFS personnel for NFS and were therefore nontaxable.

26. The Audit Division maintains that no "special employment" relationship was created between TAB servicemen and Tops store managers. Further, the Audit Division maintains that petitioner's "alter ego" theory is inapposite, for petitioner and its parent chose their form of business operation and should not now be permitted to disregard that form.

27. Both petitioner and the Audit Division rely upon 107 Delaware Associates v. State Tax Commn. (99 AD2d 29, revd on dissenting opn below 64 NY2d 935) in support of their respective positions.

CONCLUSIONS OF LAW

A. Tax Law § 1105(c)(5) imposes a sales tax upon the receipts from the sale, except for

resale, of services of "[m]aintaining, servicing or repairing real property". The final paragraph of subdivision (c) provides the following:

> "Wages, salaries and other compensation paid by an employer to an employee for performing as an employee the services described in paragraphs (1) through (5) of this subdivision (c) are not receipts subject to the taxes imposed under such subdivision."

B. The Audit Division properly determined that the repair services provided to petitioner by TAB servicemen did not fall within the exclusion offered by Tax Law § 1105(c)(5) and were therefore subject to the tax assessed herein. Justice Casey's dissent in 107 Delaware Associates v. State Tax Commn. (99 AD2d 29, 33-34) is dispositive of this issue. NFS, petitioner and TAB elected to conduct their "unitary food service business" in the form of three separate corporate entities. As part of this business format, TAB provided repair and maintenance services to petitioner, along with the construction and remodeling of other of petitioner's stores. A separate payroll was maintained for TAB employees. TAB submitted invoices to petitioner and appropriate accounting entries were made on the books of each corporation. Additionally, the three corporations elected to file franchise tax reports on a combined basis. As with the taxpayers in 107 Delaware Associates, petitioner herein, along with NFS and TAB, elected to conduct its business under a certain format, and, it is concluded, enjoyed the benefits of that format (Conclusion of Law "C", infra). It is, therefore, proper to bind petitioner and the related entities herein to the form of business chosen by them (107 Delaware Associates v. State Tax Commn., 99 AD2d 29, 33-34, [Casey, J. dissenting], supra; see also, Greco Bros. v. Chu, 113 AD2d 622, 625).

C. Petitioner's reliance on the rationale of Justice Casey's opinion in support of its position is misplaced. Petitioner seeks to distinguish the instant matter from 107 Delaware Associates on the facts, contending that it (petitioner) did not "reap the benefits" of its selected format because it filed income tax returns on a consolidated basis and franchise tax reports on a combined basis. Yet petitioner and its related corporations did elect to file franchise tax reports on a combined basis. It is, of course, presumed that such an election was in the best interests of the three corporations (see___ 15 NY Jur 2d, Business Relationships, § 1001). It follows, therefore, that such an election, indeed, any decision affecting the three corporations, made in the best interests of the corporations, benefitted petitioner.[2]

D. Petitioner also seeks to distinguish the instant matter from 107 Delaware Associates by asserting that the facts in that case failed to establish the existence of a special employer-employee relationship, while the facts herein establish the existence of such a relationship. In my opinion, Justice Casey's dissent rejects the special employer-employee analysis of the majority in favor of a decision which follows well-established tax law principles pertaining to exclusions from taxation.

"In determining the applicability of an exclusion, it is the form of the transaction, not the substance, which controls (see___, Matter of Sunny Vending Co. v. State Tax Commn., 101

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[2]Notwithstanding the legal presumption that decisions made by directors and officers of a corporation are made in the corporation's best interests, it is noted that combined reporting for franchise tax purposes has been considered by experts to be "an extremely valuable device" (see___, Comeau, Helm, Murphy, New York Tax Service, § 33.20).

AD2d 666, 667; Matter of Ormsby Haulers v. Tully, 72 AD2d 845; Matter of Sverdlow v. Bates, 283 App Div 487, 491)." (Matter of Greco Bros. v. Chu, 113 AD2d 622, 625, supra.) In accordance with this principle, Justice Casey's analysis centers upon the form of the relationship between the two entities involved in the 107 Delaware Associates case. He concluded that "[t]here is nothing irrational about the Tax Commission's determination which has the effect of binding the taxpayers to the form of business chosen by them" (107 Delaware Associates v. State Tax Commn, supra, at 34). It follows, therefore, that the existence or nonexistence of the special employer-employee relationship between petitioner's store managers and TAB servicemen is not determinative of the applicability of the Tax Law § 1105(c)(5) exclusion to the facts herein. Similar to Justice Casey's opinion, the analysis herein (Conclusion of Law "B") centers upon the form of the business format chosen by petitioner and not its substance. Accordingly, that petitioner, TAB and NFS may have blurred the relationships among themselves does not result in finding in favor of petitioner, for the corporations could, at any time, have altered their formal relationships so as to more accurately reflect their substantive relationships.

E. Petitioner's contention that petitioner and TAB were "alter egos" of their common parent and that therefore the separate legal status of the subsidiaries should be ignored is also rejected. While it is true that, under certain circumstances, a corporate entity may be disregarded for tax purposes, it is also true that the corporate structure will ordinarily be respected where a taxpayer seeks to ignore the corporate entity for his own advantage (see___, 6 Fed Tax Coordinator 2d [RIA] ¶ D-1206). This follows from the principles discussed above (Conclusion of Law "D"). The corporate form may be disregarded to prevent injustice to a third party or the taxing authorities (see___ 13 NY Jur 2d, Business Relationships, §§ 25-31; Moline Properties v. Commr., 319 US 436). Where, as here, however, a taxpayer selects a business format, he may not disregard that format to avoid tax disadvantages which subsequently may arise.

F. Although the notice of determination issued to petitioner in this matter contained clerical errors pertaining to the periods ended 2/28/82 and 5/31/82, said notice was nonetheless sufficient pursuant to Tax Law § 1138(a)(1) to assess petitioner sales tax due for the period March 1, 1979 through May 31, 1982 (see___, Matter of William Brown d/b/a Brown's Liquor Store, State Tax Commission, December 14, 1979). As the record indicates, the notice issued to petitioner bore the correct period designators for the final two periods set forth in the notice; the tax assessed for those final two periods corresponded with the tax asserted for the final two periods in audit workpapers which were provided to petitioner. Additionally, it should be noted that the original petition which protested the notice indicated that the period in question was "5/31/79 to 5/31/82". The petition thus protested the entire audit period notwithstanding the clerical errors contained in the notice. Accordingly, petitioner's claim that said notice failed to assess tax for the final two periods at issue is rejected.

G. The petition of Tops, Inc. is in all respects denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated October 5, 1984, is sustained.

DATED: Albany, New York
December 1, 1988

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE