

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petitions :
of :
ANTONIO DIMICELI :
D/B/A TONY'S PIZZA AND RESTAURANT : DETERMINATION
for Revision of Determinations or for Refunds :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period May 1, 1969 :
through November 30, 1982. :
:

Petitioner, Antonio Dimiceli d/b/a Tony's Pizza and Restaurant, 261 Avenue X, Brooklyn, New York 11223, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period May 1, 1969 through November 30, 1982 (File No. 57705).

A hearing was held before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 1, 1987 at 9:15 A.M., with all briefs to be submitted by June 15, 1987. Petitioner appeared by Alfonso A. Ilaria. The Audit Division appeared by John P. Dugan, Esq. (Kevin A. Cahill, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined additional sales tax due from petitioner based upon the use of external indices.

II. Whether, based upon such determination, the Audit Division properly imposed a fraud penalty.

III. Whether the State Tax Commission should be estopped from the assessment and collection of sales taxes from petitioner for the period prior to September 1971 by reason of the fact that it allegedly accepted a sales tax payment from petitioner in September 1971 without informing petitioner that his liability for sales tax remittances was not current as of the date of this

alleged payment.

FINDINGS OF FACT

1. On October 4, 1984, the Audit Division issued to Antonio Dimiceli d/b/a Tony's Pizza and Restaurant (hereinafter "petitioner") four notices of determination and demands for payment of sales and use taxes due as follows:

<u>Period</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total Amount Due</u>	
5/1/69-8/31/72	\$ 8,815.07		\$ 4,407.53	\$16,477.76	\$ 29,700.36
9/1/72-2/29/76	12,556.04		6,278.01	17,529.15	36,363.20
3/1/76-8/31/79	16,124.80		8,062.40	14,904.33	39,091.53
9/1/79-11/30/82	<u>17,007.80</u>		<u>8,503.90</u>	<u>7,637.00</u>	<u>33,148.70</u>
	\$54,503.71		\$27,251.84	\$56,548.24	\$138,303.79
Total					

Each of the notices advised petitioner that fraud penalties in the amount of 50 percent of the amount of the tax due plus statutory interest had been added pursuant to section 1145(a)(2) of the Tax Law.

2. Pursuant to information received that petitioner was an unregistered vendor, the Audit Division commenced a field audit in November 1982. The Department of Health informed the Audit Division that petitioner initially obtained his permit to sell food on May 1, 1969. For the entire audit period, the Audit Division has no record of ever having received a sales tax return or a payment of sales tax liability from petitioner.

3. The auditor requested that petitioner provide books and records including general ledgers, cash receipts and disbursement journals, cash register tapes and guest checks. Petitioner provided no books and records, but did furnish the auditor with a Federal Schedule C, Profit or (Loss) From Business or Profession, for each of 1980 and 1981. At a pre-hearing conference, petitioner's representative stated that these schedules had been prepared solely for the purpose of the audit. From these schedules, the auditor determined that petitioner had fixed asset acquisitions totaling \$12,000.00 and, because petitioner had no proof that sales tax had been paid upon the purchase of such fixed assets, he assessed tax in the amount of \$960.00 for the quarter ending November 30, 1982.

4. The auditor obtained the names of petitioner's suppliers of flour and soda syrup and

contacted these suppliers through third-party verification letters. From the responses to these letters, the auditor determined that, for the years 1978 through 1982, petitioner had purchased 51,200 pounds of flour. By using a formula of one pound of flour per pizza and by using a selling price of \$4.50 per pizza (the lowest price of a pizza according to the wall menu), total pizza sales of \$230,400.00 for the years 1978 through 1982 were determined. The auditor also determined from such third-party verification that petitioner had syrup purchases of \$9,533.00 for the years 1978 through 1982. A markup percentage of 400 percent was applied which resulted in soda fountain sales for the period of \$47,665.00.

5. The auditor performed an observation test at petitioner's restaurant on February 1, 1983 for the purpose of determining canned soda sales and sales of sandwiches and hot plate items. By means of the observation test, it was determined that fountain sales were 96.9072 percent of total soda sales. Canned soda sales were, therefore, determined to be \$1,521.00 for the years 1978 through 1982. Pizza sales were found to be 90.085 percent of total food sales. Sandwich and hot plate sales were, therefore, determined to be \$25,358.00 for the years 1978 through 1982. By adding pizza sales (\$230,400.00), sandwich and hot plate sales (\$25,358.00), soda fountain sales (\$47,665.00) and canned soda sales (\$1,521.00), audited taxable sales for the years 1978 through 1982 were found to be \$304,944.00.

6. Using the year 1979 as the base year, the auditor allowed 5 percent each year for inflation. Audited taxable sales for the period May 1, 1969 through November 30, 1982 were determined to be \$705,313.00. By applying the sales tax rate in effect for each sales tax quarter at issue, additional tax due was determined to be \$53,543.71, plus \$960.00 for the tax due on the fixed asset acquisitions, or \$54,503.71 in total.

7. The auditor obtained from petitioner a copy of a printed menu which was used prior to the wall menu in use at the time of the observation test of February 1, 1983. The prices on the wall menu were approximately 25 percent higher than those on the printed menu. Petitioner stated that the printed menu was used during the late 1970s. At the bottom of the printed menu

was the statement, "All Items Subject to N.Y.C. Tax".

8. Petitioner maintained no business checking account during the period at issue. All business liabilities were paid in cash. From 1969 through 1972, petitioner's accountant was Sol Levine. Petitioner contends that Mr. Levine had all of his records, including sales tax returns, but that Mr. Levine's house burned, destroying all of the records. Mr. Levine is deceased. Although he asserts that returns were filed and taxes paid during this period, no credible evidence was produced to substantiate these assertions.

9. From 1973 through 1982, petitioner's accountant was Roger Gould. Petitioner gave to Mr. Levine, and later to Mr. Gould, the amount, in cash, which he was told by the accountant was due for each sales tax quarter. For the quarter ending August 31, 1971, the accountant did not come to petitioner's premises to collect the tax, so petitioner sent him a check in the amount of \$266.35, drawn on a First National City Bank account in the name of his wife, Mrs. Louise J. Dimiceli, which was made payable to New York State Sales Tax. Petitioner presented bank records which indicate that this check was, in fact, paid. He must, therefore, be credited with a payment in the amount of \$266.35 for the sales tax quarter ending August 31, 1971. In 1976, petitioner was informed by his accountant that the Department of Taxation and Finance had stopped sending Mr. Gould sales tax forms for petitioner and he was advised by the accountant not to worry because he would "take care of it when the time comes".

10. The contentions of petitioner are as follows:

- (a) no allowances were made for waste;
- (b) petitioner discontinued operations between 1973 and 1976;
- (c) sales tax returns were filed and tax was paid prior to 1976;
- (d) all prices included State and local sales taxes; and
- (e) each pizza consists of 1.3 to 1.4 pounds of flour and not 1 pound, the weight assigned by the auditor.

CONCLUSIONS OF LAW

A. That section 1135 of the Tax Law, in effect during the period at issue, requires every person required to collect sales tax to keep records of every sale and of the tax payable thereon. "Such records shall include a true copy of each sales slip, invoice, receipt, statement or memorandum" (Tax Law § 1135). Section 1138(a) provides that if a sales tax return "is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices...." "When records are not provided or are incomplete and insufficient, it is [the Tax Commission's] duty to select a method reasonably calculated to reflect the taxes due.... The burden then rests upon the taxpayer to demonstrate...that the method of audit or the amount of the tax assessed was erroneous" (Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858 [citations omitted]). Petitioner has failed to sustain this burden.

B. That section 1145(a)(2) of the Tax Law was added by section 2 of chapter 287 of the laws of 1975. During the period at issue, this paragraph provided:

"If the failure to file a return or to pay over any tax to the tax commission within the time required by this article is due to fraud, there shall be added to the tax a penalty of fifty percent of the amount of the tax due (in lieu of the penalty provided for in subparagraph (i) of paragraph one), plus interest...."

Section 1145(a)(2) of the Tax Law was enacted by the Legislature with the intention of having a penalty provision in the Sales and Use Tax Law which was similar to that which already existed in the Tax Law with respect to deficiencies of, inter alia, personal income tax (N.Y. Legis. Ann., 1975, p. 350). Thus, the burden placed upon the Audit Division to establish fraud at a hearing involving a deficiency of sales and use tax is the same as the burden placed upon the Audit Division in a hearing involving a deficiency of personal income tax. A finding of fraud at such a hearing "requires 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" (Matter of Walter Shutt and Gertrude Shutt, State Tax Commission, June 4, 1982).

C. That the Audit Division has not sustained its burden of proving that the imposition of fraud penalty is warranted. The evidence presented did not clearly establish all elements of fraud as set forth above. Accordingly, the fraud penalty is cancelled.

D. That petitioner's argument that the State Tax Commission should be estopped from the collection and assessment of sales tax from petitioner for the period prior to its acceptance of a payment for a particular sales tax quarter is without merit. Petitioner was an unregistered vendor. Upon receipt of such information, the Audit Division proceeded to conduct a field audit and to issue an assessment. Other than a single payment of sales tax for the period ending August 31, 1971, petitioner has no proof of ever having filed a sales tax return or paying over sales tax for any of the quarters prior to 1976. From 1976 on, petitioner admits that he never filed returns or paid over tax due. Moreover, petitioner argues that the Audit Division, by requiring him to maintain books and records back to May 1, 1969, has created an undue burden on petitioner and, as such, should be estopped from assessment and collection of sales tax for the periods which were, at the time of the audit, approximately thirteen years prior thereto. It should be noted, however, that petitioner was unable to produce books and records, as required by section 1135 of the Tax Law, for those portions of the period at issue which were immediately prior to the commencement of the audit. But, in any case, the State Tax Commission may not be estopped "from collecting taxes lawfully imposed and remaining unpaid in the absence of statutory authority" (McMahan v. State Tax Commn., 45 AD2d 625, 627).

E. That, as indicated in Finding of Fact "9", supra, petitioner must receive credit for payment of the sum of \$266.35 for the period ending August 31, 1971.

F. That the petitions of Antonio Dimiceli d/b/a Tony's Pizza and Restaurant are granted only to the extent indicated in Conclusions of Law "C" and "E"; that the Audit Division is directed to modify the notices of determination and demands for payment of sales and use taxes

due issued October 4, 1984 accordingly; and that, except as so granted, the petitions are in all other respects denied.

DATED: Albany, New York
November 16, 1987

ADMINISTRATIVE LAW JUDGE