

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| FORTUNALDO AND LILLIAN | : | |
| EVANGELISTA D/B/A LA HACIENDA | : | |
| RESTAURANT | : | 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 December 1, 1982 | : | |
| through November 30, 1985. | : | |

Petitioners, Fortunaldo and Lillian Evangelista d/b/a La Hacienda Restaurant, 3019 Pine Avenue, Niagara Falls, New York 14301, 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 December 1, 1982 through November 30, 1985 (File No. 804933).

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 January 31, 1989 at 2:45 P.M. Petitioners appeared by David G. Boniello, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly denied petitioners' claim for credit or refund of tax on sales made in exchange for Canadian currency based upon a determination that petitioners failed to maintain complete records of each sale such that petitioners' exact sales tax liability could be determined.

FINDINGS OF FACT

On March 19, 1986, petitioners, Fortunaldo and Lillian Evangelista, as general partners in a partnership known as La Hacienda Restaurant, filed an Application for Credit or Refund of State and Local Sales or Use Tax wherein petitioners claimed a refund or credit of \$5,115.81, plus interest, for the period December 1, 1982 through November 30, 1985.

Petitioners' claim had two components. First, petitioners claimed a refund or credit of \$4,563.20 in tax paid on sales made in exchange for Canadian currency. The basis for this claim shall be more fully explained below. Petitioners also claimed a \$552.61 refund or credit for tax claimed to have been collected on purportedly exempt sales. At hearing, petitioners withdrew their claim with respect to such sales.

By letter dated September 12, 1986, the Division of Taxation denied, in full, petitioners' claim.

As noted above, petitioners are partners in La Hacienda Restaurant, located at 3019 Pine Avenue, Niagara Falls, New York. Petitioners have owned La Hacienda since 1980. Petitioner Fortunaldo Evangelista ran the restaurant operation. Consequently, all references to petitioner herein shall refer to Fortunaldo Evangelista.

Located in Niagara Falls, New York, which borders Niagara Falls, Ontario, Canada and Southern Ontario, La Hacienda Restaurant caters to a large Canadian clientele. Approximately 50% of the restaurant's sales during the period at issue were to Canadian customers and were paid with Canadian currency. During this same period, the Canadian dollar was valued at a discount relative to U.S. currency.

Given the competitive nature of the restaurant business, petitioner offered his Canadian customers a "preferential" rate of exchange for their Canadian currency during the period encompassed by the refund claim. That is, petitioner offered his Canadian customers a better rate of exchange for their currency than the rate available at local banks.

During the period in question, petitioner's customers were asked prior to receiving their bill whether they would be paying in Canadian or U.S. funds. If the customer responded that Canadian currency would be used, the waiter or waitress then totaled the purchases on the front of the check at La Hacienda's menu prices (listed in U.S. dollars) and added the applicable sales tax for a "total amount due". On the reverse side of the check, the preferential exchange rate in effect was applied to this "total amount due" (U.S. dollars) to reach a total amount due in Canadian currency.

On his cash register, petitioner or his employees rang up the "total amount due" in U.S. funds as the amount of the sale for all guest checks. Thus, checks paid in Canadian funds were rung up as if they had been paid in U.S. funds. At the end of each day, the cash in the register was counted and balanced against the cash register summary tape. For purposes of this daily summary, the Canadian currency in the register was counted and then multiplied by the restaurant's preferential rate of exchange for that day, so that on the daily summary (as on the register tape) sales in Canadian currency were totaled as if paid in U.S. currency at menu prices.

The net effect of petitioner's treatment of his Canadian receipts was to overstate on his register tape and daily summaries the value received by the restaurant in exchange for Canadian currency.

Petitioner deposited his Canadian receipts into an account he maintained at the Canadian Imperial Bank of Commerce ("CIBC") in Niagara Falls, Ontario. From time to time, as was necessary to pay bills, petitioner converted the Canadian currency in his account at CIBC into U.S. currency. These funds were then withdrawn from the CIBC account and deposited in an account maintained by petitioner in the U.S.

Petitioner maintained his account at CIBC because, in petitioner's opinion, its exchange rates were more favorable than those offered by banks in the U.S. Petitioner thus sought to minimize his loss incurred through his use of a preferential rate of exchange.

During the period covered by the refund claim, petitioner's sales tax returns were prepared by his accountant using sales figures as set forth on the daily summaries and cash register tapes.

Also during the period covered by the refund claim petitioner's accountant prepared income tax returns for the partnership. On these returns petitioner claimed deductions for "Canadian Exchange" in the amounts of \$13,867.11 (1983), \$18,589.00 (1984) and \$34,529.00

(1985). These deductions were premised upon petitioner's cost of offering a preferential rate of exchange to customers paying with Canadian currency. That is, in theory, petitioner's cost of offering the preferential rate of exchange (and therefore the amount of the deduction) was equal to the difference between the total amount of Canadian sales for the year per the menu prices (U.S. dollars) and the value in U.S. dollars of the Canadian currency ultimately received by petitioner from his sales in Canadian currency at the preferential rate.

Petitioner's refund claim was premised upon the "Canadian Exchange" deductions claimed on the partnership's Federal income tax returns. The Canadian exchange deduction was apportioned to the various sales tax quarters based upon the percentage of annual Canadian sales (per the daily summaries) for that quarter. The portion of the Canadian exchange applied to each quarter was then multiplied by the prevailing sales tax rate of 7% to each the refund claimed per quarter.

The amount of the "Canadian Exchange" per the refund claim was as follows:

| | | |
|------------------|------------------|------------------|
| 12/1/82-11/30/83 | 12/1/83-11/30/84 | 12/1/84-11/30/85 |
| \$13,867.00 | \$18,589.00 | \$32,505.00 |

Petitioner either did not maintain or did not produce individual guest checks or cash register tapes for the period covered by the refund claim.

Petitioner maintained no record nor was any evidence introduced of the daily market rates of exchange during the period in question.

During the period in question, if a customer at the restaurant so requested, petitioner would exchange Canadian currency for U.S. funds and would deposit such Canadian funds into his cash register.

SUMMARY OF PETITIONER'S POSITION

The record is unclear as to how petitioner's accountant determined the specific amounts of the deductions claimed on La Hacienda's income tax returns for 1983 through 1985. Petitioner contended that these deductions were determined by an analysis of petitioner's deposits of Canadian currency into his CIBC account, Canadian currency in the CIBC account converted into U.S. dollars, the average exchange rate for any given year, and petitioner's sales settled in Canadian currency per his daily summary sheets. Petitioner explained this analysis by use of a summary which was introduced into evidence as Exhibit "2".¹ The following is an example of this analysis, as explained at hearing by petitioner. In 1985, petitioner bought \$248,000.00 in U.S. currency at CIBC at a cost of \$352,911.85 Canadian. The ratio of U.S. currency purchased to the cost of that currency in Canadian funds is .7027. This ratio was the average value to petitioner of the Canadian dollar (relative to the U.S. dollar) for 1985. Petitioner deposited \$320,692.84 in Canadian currency into his CIBC account during 1985. Multiplying this \$320,692.84 Canadian in deposits by the average value (in U.S. dollars) of the Canadian dollar in 1985 of .7027 results in an equivalent of \$225,350.85 (U.S.). Petitioner's

¹The figures set forth in this paragraph and in paragraphs "20"-"23" with respect to petitioner's sales, deposits, withdrawals, and exchange rates are taken from petitioner's Exhibit "2". Such figures are not accepted as fact herein, but are intended to show the various methodologies used by petitioner to establish his right to the refund claimed herein.

daily summary sheets for 1985 indicated sales settled in Canadian currency of \$258,401.57. The difference between the amount of sales settled in Canadian currency recorded on petitioner's daily summaries and the average U.S. dollar value of petitioner's deposits of Canadian currency in his CIBC account as determined above is \$33,050.72. According to petitioner, this \$33,050.72 constituted his loss incurred through the offering of the preferential rate of exchange and is approximately the same as the \$34,529.00 deduction for "Canadian Exchange" claimed on the partnership's 1985 income tax return.

Using the same method as discussed in paragraph "19" for the year 1984 reveals a difference between sales settled in Canadian currency (\$299,269.40) per the daily summary sheets and the average value in U.S. currency of petitioner's deposits in the CIBC account (\$237,220.47) of \$62,048.93.

Applying this same method to 1983 reveals a difference between sales settled in Canadian currency per daily sheets (\$280,673.50) and the average U.S. dollar value of petitioner's CIBC deposits (\$123,853.88) of \$156,819.62.

Petitioner contended that the restaurant's preferential rate of exchange was changed every week or two. Four different charts setting forth rates of exchange were introduced into evidence. All four were purportedly

used by petitioner at some point during the period at issue. None of the four were dated.

CONCLUSIONS OF LAW

A. Tax Law § 1139(a) authorizes refunds or credits for amounts of sales tax erroneously paid. "A determination of exact tax liability is a condition precedent to obtaining a refund" (Matter of Raemart Drugs, Inc., Tax Appeals Tribunal, July 8, 1988 [citing Saltzman v. State Tax Commn., 101 AD2d 910]).

B. The Division of Taxation's denial of petitioner's claim for credit or refund based upon the inadequacy of petitioner's records was proper. Pursuant to Tax Law § 1135, petitioner was required to maintain records of each sale such that a determination of the restaurant's exact tax liability was possible (Matter of Raemart Drugs, Inc., *supra*). Petitioner failed to meet this requirement as he failed to maintain individual guest checks. Moreover, petitioner's daily summary sheets listed only receipts, they did not list sales tax charged or collected. Also, petitioner maintained no record of either the market exchange rate for Canadian currency or his preferential exchange rate for any given day. Petitioner, therefore, had no way of determining his exact sales tax liability.

In the absence of guest checks and records of daily exchange rates, petitioner was forced to rely upon his daily summaries, his deposits of Canadian funds into his CIBC account, and his subsequent withdrawal and conversion of such funds into U.S. currency in an effort to approximate or estimate his sales tax liability. Petitioner's inexact measure of his own sales tax liability may be seen in the significant variations in "Canadian Exchange" figures as set forth on the refund application (Finding of Fact "15"), and the figures which may be obtained by using the method explained by petitioner at hearing (paragraphs "19"- "21"). As a corollary to the "exact tax liability" prerequisite to obtaining a refund, the Tax Appeals Tribunal in Matter of Raemart Drugs, Inc. (*supra*) specifically rejected estimates of tax liability as a basis for obtaining a refund. At best, petitioner's "Canadian Exchange" figures as set forth on the refund application constitute an estimate of his sales tax liability. These figures, therefore, must be rejected.

Accordingly, given petitioner's failure to maintain records of each sale such that an exact determination of petitioner's sales tax liability was possible, the Division properly denied petitioner's claim (Matter of Raemart Drugs, Inc., supra).²

C. The petition of Fortunaldo and Lillian Evangelista d/b/a La Hacienda Restaurant is in all respects denied and the Division of Taxation's denial of petitioner's claim for credit or refund is sustained.

DATED: Troy, New York
August 31, 1989

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE

²The issue in this matter as presented by the respective parties centered upon whether petitioner's records were sufficient to establish his exact tax liability. The determination herein considers this issue as presented and does not consider whether petitioner would be entitled to the refund claimed herein even if his records were sufficient. In view of the resolution of the records issue, this determination does not reach other substantive issues which might need to be addressed if the sufficiency of records issue were resolved differently.