STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of BAP APPLIANCE CORP. 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, 1984 through February 28, 1985.	:	DETERMINATION DTA NOS. 805681 AND 805683
In the Matter of the Petition of RUTH EPSTEIN, AS OFFICER OF BAP APPLIANCE CORP. 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, 1984 through February 28, 1985.	:	

Petitioner BAP Appliance Corp., c/o Morris D. Weintraub, 2 Park Avenue, 19th Floor, New York, New York 10010, 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, 1984 through February 28, 1985.

Petitioner Ruth Epstein, as officer of BAP Appliance Corp., 972 Southend, Woodmere, New York 11598, 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, 1984 through February 28, 1985.

A consolidated hearing was commenced before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on January 25, 1990 at 2:45 P.M.,continued at the same offices on September 10, 1990 at 1:15 P.M., and concluded on October 24, 1990 at 10:00 A.M., with all briefs to be filed by

February 11, 1991. Petitioners filed a brief at the hearing on January 25, 1990. The Division of Taxation did not file a brief. Petitioners appeared by Morris D. Weintraub, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUES

I. Whether the execution of a consent to the fixing of tax due pursuant to Tax Law § 1138(c) bars petitioners from challenging the accuracy of the sales tax audit.

II. Whether petitioners' application for amnesty bars petitioners' claim for a refund of tax and an abatement of penalty.

III. If not, whether the Division of Taxation properly determined petitioners' sales tax liability.

IV. Whether penalties and interest in excess of the minimum, which were imposed against petitioners, should be waived.

FINDINGS OF FACT

In late October 1987, the Division of Taxation ("Division") mailed a letter to petitioner BAP Appliance Corp. ("BAP") which scheduled a field examination of BAP's sales tax returns on November 20, 1987 at BAP's offices. The letter requested that BAP make available all books and records pertaining to its sales tax liability for the period under audit including journals, ledgers, sales invoices, purchase invoices, cash register tapes, exemption certificates and all sales tax records.

The audit period set forth in the appointment letter was December 1, 1984 through August 31, 1987. However, only the first quarterly period of the period under audit is at issue herein.

BAP was a retail store which sold furniture and appliances. Petitioner Ruth Epstein was BAP's president.

On October 23, 1987, an auditor visited BAP and met the store manager, Bert Epstein, Mrs. Epstein's husband. The auditor learned that a Mr. Wiznia was BAP's accountant.

Subsequently, the auditor spoke with Mr. Wiznia and asked him for BAP's journals,

general ledger, purchase and sales records and Federal income tax returns. In response, Mr. Wiznia presented a cash receipts journal, purchase records and Federal corporate income tax returns. At the outset of the audit, the auditor made a list of the sales tax returns which BAP had filed and verified that BAP paid tax on the amounts which had been reported. In examining the returns, the auditor found that when BAP's accountant prepared the returns, he did not report BAP's gross sales. BAP's returns only reported taxable sales and the tax due.

The auditor made a list of BAP's purchases for the period December 1, 1984 through November 30, 1987 and ascertained that BAP had purchases in the amount of $706,746.00.[1] During the same period of time, BAP's cash receipts records showed cash receipts of $948,137.00. The auditor found that the difference between the cash receipts and purchases corresponded to the amounts which BAP had reported as its taxable sales on its sales tax returns during the period in issue. However, the gross sales per BAP's cash receipts records corresponded with the gross sales reported on BAP's Federal income tax returns. The auditor then asked BAP's

accountant to explain the discrepancy between the cash receipts per BAP's records and gross sales reported on the Federal income tax returns and the taxable sales reported on BAP's sales tax returns. Mr. Wiznia responded that the difference was attributable to layaway sales. Thereafter, the Division asked Mr. Wiznia to substantiate the layaway sales through the production of sales contracts, sales invoices or a sales book. Since BAP was unable to furnish any of the requested documentation or other evidence of layaway sales, the Division regarded all of BAP's cash receipts as taxable sales.

On the basis of the foregoing audit, the Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner BAP Appliance Corp., dated March 20, 1988, which assessed sales and use taxes for the period December 1, 1984 through

---

[1]For the months of April 1987 through November 1987, the auditor utilized BAP's Federal income tax returns in the absence of other information.

February 28, 1985 in the amount of $5,317.87, plus penalty of $1,329.47 and interest of $1,914.43, for a total amount due of $8,561.77. The Division also issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated March 20, 1988, to petitioner Ruth Epstein, as an officer of BAP Appliance Corp., which assessed the same amount of tax, penalty and interest which had been assessed against the corporation.

On April 18, 1988, a conference was held which was attended by Bert Epstein, Morris Weintraub, Esq., who was BAP's representative, the sales tax section head, two sales tax team leaders and the auditor who had conducted a prior audit of BAP. At this meeting, petitioners submitted sales invoices and schedules which showed layaway sales. The sales invoices indicated that customers made a small downpayment and thereafter several additional payments were made. Petitioners explained that the merchandise was not delivered until the customers had completed payments. Petitioners also submitted documents which showed out-of-state sales and that some sales were made for resale.

The invoices produced at the conference were not in any kind of order and the dates thereon had gaps in time. They did not remotely account for the difference in total receipts and the reported taxable sales.

At the conference, the section head explained the Division's position that uncompleted layaway sales were not subject to tax. However, the section head felt that petitioners did not have any way of verifying which of the sales in issue were layaway sales. Nevertheless, the documents produced at the conference reinforced the section head's opinion that BAP had some uncompleted layaway sales. Therefore, in order to close the case, the Division and petitioners' representative agreed that 9½ percent of BAP's sales would be treated as nontaxable layaway sales and nontaxable out-of-state sales. This figure was not determinable from the records provided, but was used as a vehicle to resolve the case. As a result of this concession, the original assessment of tax for the audit period December 1, 1984 through August 31, 1987 was reduced from $53,050.36 to $42,280.14.

In contrast to the foregoing, it was Mr. Epstein's understanding that the Division was

holding all of the receipts taxable because it considered layaway sales taxable regardless of whether the sale was complete. Mr. Epstein was afraid of potential penalties and additional interest. Petitioners were also fearful that they had broken the law.

Mr. Epstein had an opportunity to discuss the Division's position with Mr. Wiznia. At this time, it was also Mr. Wiznia's understanding that the Division was holding uncompleted layaway sales taxable. During their conversations, Mr. Wiznia concluded that Mr. Epstein was suffering from mental anguish because BAP had been held up a few times. On one occasion, Mr. Epstein had been hit on the head and on another occasion a gun was pointed at him. As a result, Mr. Epstein just wanted to be rid of the business.

The Division's Field Audit Report contains a list of those present at the conference and then presents the following narrative of the events at the conference:

> "Prior audit as well as current audit was discussed. Vendor submitted sales invoices and schedules showing "Lay Away Sales" (sales where deposit was made but merchandise not shipped due to open balances).
>
> Sales Invoices indicated a small down payment was made and several additional payment [sic] were made. Taxpayer stated that delivery of merchandise was not shipped until final payment of invoice was made.
>
> Taxpayer submitted sales invoices showing open balances, out of state sales with delivery receipts, and resale sales with resale certificates.
>
> Based on review of these documents, L. Grimaldi, STA III allowed vendor 9½% credit for non-taxable and lay-away sales.
>
> The original assessment of $53,050.36 was revised to $42,280.14 which taxpayer agreed, signed consent and submitted $40,000 part payment of tax due.
>
> However taxpayer intends to made application for remission of penalties.
>
> Omnibus document was tendered to taxpayer, but refused.
>
> Subsequent to conference it is still recommended that penalty, interest and Omnibus [sic] penalty be added to assessment."

On May 12, 1988, the Brooklyn District Office of the Department of Taxation and Finance received a Statement of Proposed Audit Adjustment signed by Ruth Epstein. The first full paragraph of the statement provided as follows:

> "The statement of Proposed Audit Adjustment is based on the information indicated by the box checked above. If you agree that a sales and/or use tax as detailed below is due and payable to the State Tax Commission, please sign one copy of this statement and return it to this office within 30 days. Appropriate penalty and/or interest will continue to accrue until full payment is made."

In the center of the statement, the following handwritten notation was made:

> "12/1/84-11/30/87 42,280.14

Plus Penalty & Interest

Taxpayer intends to make Application for Remission of penalties."

The following paragraph appears directly above Ruth Epstein's signature on the statement, which was dated May 10, 1988:

> "The Tax Law provides that a taxpayer is entitled to have tax due finally and irrevocably fixed by filing a signed consent with the State Tax Commission. Such consent, subject to review and approval, waives the ninety (90) day period for fixing tax due but does not waive the taxpayer's right to apply for a credit or refund within the time limit set forth by law. The agreement to and signing of this statement constitutes such a consent. YOU MAY CONSIDER AN APPROVAL OF THIS MATTER FINAL IF YOU ARE NOT NOTIFIED TO THE CONTRARY WITHIN 60 DAYS FROM THE DATE THE SIGNED CONSENT IS RECEIVED BY THE DEPARTMENT."

BAP filed an application for amnesty and, in conjunction therewith, remitted $25,000.00.

On the basis of the adjustments made at the conference, the Division issued a revised Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated May 10, 1988, to BAP Appliance Corp., c/o Ruth Epstein. The notice assessed sales and use taxes for the period December 1, 1984 through February 28, 1985 in the amount of $2,410.98, plus penalty of $602.75 and interest of $1,102.93 for a total amount due of $4,116.66. The notice contained the following explanation:

> "Tax of $2,410.98 paid in full on May 10, 1988,
> Penalty Disagreed.
> Tax agreed pursuant to consent executed on May 10, 1988.
> Penalty disagreed.
>
> 'THE TAX ASSESSED HEREIN HAS BEEN ESTIMATED OR DETERMINED TO BE DUE IN ACCORDANCE WITH THE PROVISIONS OF SECTION 1138 OF THE TAX LAW AND MAY BE CHALLENGED THROUGH THE APPEAL PROCESS BY FILING A PETITION WITHIN 90 DAYS.'"

The Division also issued a revised Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated May 10, 1988, to petitioner Ruth Epstein, as an officer of BAP Appliance Corp., which assessed the same amount of revised tax, penalty and interest as had been assessed against BAP.

BAP was located in an economically-depressed area. It was BAP's practice to allow

customers to purchase merchandise by making a series of partial payments. When the item was fully paid for, it would be delivered.

During the period in issue, petitioners' accountant went to BAP's office once a month. On these visits, he made entries in BAP's records, reconciled bank statements and prepared payroll, sales tax and income tax returns. While performing these duties, BAP's accountant told petitioners that uncompleted layaway sales were not subject to sales tax. Mr. Epstein relied on this advice.

BAP kept a book of completed sales which had entries for the date of the sale, the name of the customer, the gross sales and the sales tax liability. The sales tax liability was reported on the basis of the entries in this book. BAP's records also included a cash receipts book, a cash disbursements book and a sales tax book.

It was BAP's practice to maintain a set of cards for recording layaway sales. When an individual went to the store to make a payment, the amount paid was entered on the card and a duplicate held by the customer. Mr. Epstein and the customer then initialed the card and its duplicate. Although there is some testimony to the contrary, the weight of the evidence is that these cards were never made available to the auditor during the audit or to the auditor's supervisors at the post-audit conference.

At the time of a layaway sale, BAP furnished the purchaser with a sales slip which contained a description of the article, the term "layaway" and a notation of the monies paid towards the balance due.

During the period in issue, Mr. Epstein kept BAP's records including sales slips, invoices, receipts and memorandums of sale. These are the same records that were kept during the period December 1981 through December 1984. BAP did not change its recordkeeping methodology from December 1, 1981 through the period in issue.

The Division never advised petitioners that BAP's records on completed sales were insufficient.

SUMMARY OF THE PARTIES' POSITIONS

It is petitioners' position that the receipts upon which tax has been assessed are layaway sales and that such sales are only taxable when the goods are fully paid for and delivered to the customer. Petitioners further argue that they are not required to maintain receipts or records of layaway transactions until the item is delivered. However, petitioners submit that they kept adequate records.

It is also petitioners' position that prior to signing the consent they were told that their layaway sales were subject to tax and they were not told of certain authority that stated that layaway sales were not taxable or that there were no regulations on layaway sales.

It is also petitioners' position that the Tax Appeals Tribunal's prior decision regarding the petitioners herein is "law of the case" and requires an acceptance of petitioners' arguments that no tax is due.

It is the Division's position that the Tax Appeals Tribunal's decision on a prior audit has no bearing on this matter. The Division also argues that petitioners have not sustained their burden of proving that the difference between their total receipts and those reported on their sales tax returns were nontaxable sales.

CONCLUSIONS OF LAW

A. In their presentation, petitioners have focused on the underlying audit. However, before the audit is addressed, the impact of the document signed by Mrs. Epstein must first be addressed. Tax Law § 1138(c) provides as follows:

> "A person liable for collection or payment of tax (whether or not a determination assessing a tax pursuant to subdivision (a) of this section has been issued) shall be entitled to have a tax due finally and irrevocably fixed prior to the ninety-day period referred to in subdivision (a) of this section, by filing with the tax commission a signed statement in writing, in such form as the tax commission shall prescribe, consenting thereto."

Neither party in this matter has disputed the fact that Mrs. Epstein signed the consent. Through this signature, Mrs. Epstein manifested an intention to take advantage of the provisions of Tax Law § 1138(c) and have the tax finally and irrevocably fixed. Thus, by the terms of the Tax Law, through the signature petitioners became bound pursuant to Tax Law § 1138(c) to the terms of the consent.

B. At the hearing, petitioners presented evidence which was apparently intended to establish that there had been overreaching on the part of the Division in obtaining the consent. This overreaching purportedly came from several sources. First, petitioners submit that they were led to believe that their uncompleted layaway sales were subject to tax. Secondly, the Division never gave petitioners a correct interpretation of the law on the taxability of their sales. Finally, petitioners were "browbeaten" at the conference by the prospect of being assessed additional penalties and interest.

C. Each of the foregoing arguments is without merit. With regard to the first argument, the record shows that throughout the audit at issue herein, the Division has consistently maintained that petitioners were liable for additional tax because they did not substantiate that the additional taxable receipts arose from layaway sales transactions. It is recognized that it is possible that petitioners' confusion over the Division's position may have arisen because of an inconsistent position taken by the Division during the prior audit of BAP wherein the Division initially stated that tax was due on all receipts (see, Matter of BAP Appliance Corp. and Ruth Epstein, as Officer, Tax Appeals Tribunal, June 22, 1989). However, the change in the Division's position during the prior audit cannot prejudice in the Division in a subsequent, separate and distinct audit.

D. Petitioners' argument that the Division misrepresented the law on the taxability of layaway sales is also fallacious. Assuming, without deciding, that, at a conference, the Division is under an obligation to give the taxpayers an accurate disposition of the law, it appears that the Division's position was accurate. That is, the Division did not contend that uncompleted layaway sales were subject to tax. Rather, it maintained that petitioners did not establish that the additional receipts arose from uncompleted layaway sales. As will be elaborated upon later, there is nothing in this legal position which is inconsistent with Matter of BAP Appliance Corp. and Ruth Epstein, as Officer (supra).

E. Lastly, petitioners' contention that they were "browbeaten" into signing the consent is belied by the facts. The record shows that petitioners were represented by counsel at the

conference and later had the opportunity to discuss the audit with their accountant. In view of petitioners' opportunity to discuss this matter with both a lawyer and an accountant before signing the consent, petitioners' claims of duress are unpersuasive. Thus, on the basis of the foregoing, it is concluded that petitioners are bound by the terms of their consent.

F. Under the terms of the consent, petitioners reserved the right to challenge the penalty which had been assessed. According to Mr. Epstein, petitioners filed an amnesty application and paid tax in conjunction with this application. There is no evidence in the record that the Division declined to accept the amnesty application. Thus, the question which emerges is whether petitioners may pursue their challenge to the penalty when they applied for and paid taxes under the Amnesty Program.

G. Effective April 17, 1985, the New York State Legislature enacted an Amnesty Program (L 1985, ch 66). Under this program, civil and criminal penalties were waived when an eligible taxpayer filed an application, paid the tax and interest due and filed any required returns (20 NYCRR 2500.1[c]). Once a taxpayer elected to take advantage of the Amnesty Program, the law barred the granting of a refund or credit of the taxes plus interest paid under the program unless the State Tax Commission, on its own motion, redetermined the amount of tax due (L 1985, ch 66, § 1[e]; 20 NYCRR 2500.1[b]; see, Matter of Mon Paris Operating Corp. v. Commissioner of Taxation and Finance, 151 AD 822, 542 NYS2d 61, 62).

H. The problem presented here is that it is not clear from the record whether the amnesty application and payment pertained to the quarterly period at issue herein. The inference drawn from the statement on the revised notices of determination is that petitioners' payment of the tax for the quarterly period at issue herein was pursuant to the consent (Finding of Fact "16") and not part of an application for amnesty. Furthermore, the Division never argued that petitioners' challenge is barred by the granting of an amnesty application. On the basis of the foregoing, it is concluded that petitioners' application for amnesty does not pertain to the quarterly period at issue herein and that their challenge to the penalties is proper.

I. Tax Law § 1135(a)(1) requires every person required to collect tax to keep records of

every sale and all amounts charged thereon. The records required to be maintained include a vendor's "sales slip, invoice, receipt, contract, statement or other memorandum of sale, ...cash register tape and any other original sales document" (20 NYCRR 533.2[b][1]). The maintenance of proper records is important because the Tax Law provides that, for proper administration of the sales tax law and to prevent evasion of sales tax, it is presumed that all receipts from every retail sale of tangible personal property are subject to sales tax (Tax Law § 1132[c]).

J. With these principles in mind, the fallacies in petitioners' arguments become evident. First, the contention that all of the additional sales were layaway sales must be rejected in the absence of any evidence to support this assertion. In view of the obligation on a taxpayer to keep proper records of every sale (Tax Law § 1135[a][1]) and the presumption that all receipts are subject to tax (Tax Law § 1132[c]), it is clear that the burden of establishing a nontaxable receipt is on petitioners. Furthermore, it was reasonable for the Division to ask petitioners for sales contracts and invoices to substantiate the exempt sales. Petitioners' argument that the statutes do not mention layaway sales must be rejected. The language of the statutes cited herein is very broad and clearly encompasses layaway sales. Furthermore, if petitioners' argument were accepted, it would be impossible to enforce the Tax Law because auditors would be forced to accept, without any documentation, a vendor's explanation that his receipts were not subject to tax because they arose from layaway sales.

K. Petitioners' alternative argument that they maintained adequate records must also be rejected. Petitioners did not present any original sales documentation at the time of the audit or at the hearing. Therefore, it is impossible to evaluate the adequacy of these records. The documents produced at the post-audit conference did not remotely account for the receipts at issue herein. Furthermore, the self-serving testimony presented at the hearing as to the accuracy of BAP's records cannot be accepted as verification that the receipts in issue are not subject to tax (see, Matter of Club Marakesh, Inc. v. Tax Commn. of the State of New York, 151 AD2d 908, 542 NYS2d 881, 883).

L. Contrary to petitioners' position, Matter of BAP Appliance Corp. and Ruth Epstein, as Officer (supra) does not compel a contrary result. The facts set forth in that prior decision show that an audit of BAP was conducted for the period December 1, 1981 through November 30, 1984. According to the decision, BAP's records were described as follows:

> "The corporation's business records were found to be in fair condition. Petitioners timely filed sales tax returns for the audit period and remitted sales tax with those returns. The audit report indicates that petitioners had no prior audit history and that all books and records requested were provided.
>
> * * *
>
> The entries in the corporation's books were made by Bert Epstein. He would make daily entries of monies received and at the end of each week would post entries of delivered merchandise into the sales tax book. Each entry consisted of an order number, a gross amount, a taxable amount and the tax.
>
> * * *
>
> An accountant from the accounting firm retained by the corporation would come to the store once a month. The accountant would go over all books and reconcile the checkbook with the bank statement. At the end of each quarter, the accountant would prepare a sales tax return based on the sales tax book kept by Mr. Epstein."

At the conclusion of the audit, the Division found that tax was due in the amount of $58,854.21, plus penalty and interest. Initially, the Division took the position that all layaway sales were taxable. Later, it conceded that uncompleted layaway sales were not taxable, but asserted that tax was due on all layaway sales which petitioners could not substantiate as unfulfilled. Eventually, petitioners and the Division stipulated that petitioners were liable for tax in the amount of $51,725.00. Consequently, the only issue remaining for the Tax Appeals Tribunal to decide was whether petitioners were liable for penalty and statutory interest.

In its opinion section, the Tax Appeals Tribunal first reviewed the statutory and regulatory provisions regarding sales tax recordkeeping requirements. It then noted that, based on the audit report, the deficiency at issue therein was due solely to layaway sales and observed that neither the Tax Law nor the Division's regulations contained a definition of a layaway sale or specific provisions dealing with layaway sales.

The Tax Appeals Tribunal next found that petitioners reasonably relied on the advice of

their accountant that layaway sales were not taxable. This conclusion was based on the observation that the advice was correct and that petitioners' reliance on this advice was reasonable given the Division's change of position concerning the taxable status of layaway sales during the audit.

The Tax Appeals Tribunal next focused on the Division's assertion that petitioners did not have adequate books and records. In considering this position, the Tribunal made the following comments:

> "The standard imposed by the Division in this case was to require the petitioner to prove that a sale did not occur thus rendering the money received in the layaway transactions not receipts and not subject to sales tax. The record before us does not indicate the criteria set forth by the Division with respect to such substantiation nor the deficiency in petitioners' records. Nor does the Division deal with this issue on exception. On the contrary, it is conceded by all parties that a substantial volume of the petitioners' business involved layaway sales.
>
> The Administrative Law Judge determined that Mr. Epstein made daily entries of monies received at the end of each week and would post entries of delivered merchandise into the sales tax book. Each entry consisted of an order number, a gross amount, a taxable amount and the tax. Further, it was found that the petitioners' records were in fair condition and that petitioners timely filed sales tax returns for the audit period and remitted sales tax with those returns. The audit report indicates that petitioner had no prior audit history and that all books and records requested were provided. Under these circumstances, we find no basis for the Division's assertion on exception that petitioners failed to keep adequate books and records" (emphasis added).

When the decision is viewed closely, it is clear that petitioners' arguments are incorrect. First, the Tax Appeals Tribunal did not find that BAP had adequate records. It only found that there was no basis for the Division's assertion that petitioners did not keep adequate records.[2] Unlike the prior case, the Division in the current matter explained on repeated occasions that it was BAP's failure to produce invoices and contracts establishing layaway sales which led to the conclusion that BAP's records were inadequate. Thus, the facts presented in this case are readily distinguishable from the facts reviewed by the Tax Appeals Tribunal in the decision relied upon by petitioners. Secondly, there is nothing in the language of the earlier decision

---

[2]Even if the Tax Appeals Tribunal found that BAP had adequate records, it would not mean that BAP would necessarily have adequate records during a later audit period.

which could be construed as meaning that taxpayers do not have to maintain any records until the transaction becomes subject to tax. Here, since petitioners did not make available records from which their tax liability could be determined, they have not shown that their failure to pay tax was due to reasonable cause and not due to willful neglect (Tax Law § 1145[a][1][iii]). Therefore, there is no basis to remit the penalty.

M. The petitions of BAP Appliance Corp. and Ruth Epstein, as officer, are denied.

DATED: Troy, New York

_____

ADMINISTRATIVE LAW JUDGE