

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
WADING RIVER DELI, LTD. : DETERMINATION
for Revision of Determinations or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period March 1, 1984 :
through February 29, 1988. :

Petitioner, Wading River Deli, Ltd., 30 Fireside Lane, East Setauket, New York 11733, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1984 through February 29, 1988 (File No. 807035).

A hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on June 21, 1990 at 1:15 P.M., with all briefs to be submitted by October 4, 1990. Petitioner appeared by Peter R. Newman, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUES

I. Whether the one-day observation test, conducted by the Division of Taxation, of Wading River Deli, Ltd., was a sales tax field audit method reasonably calculated to reflect taxes due.

II. Whether petitioner's request in mid-February 1990 for an expedited scheduling of the administrative hearing, in lieu of a hearing during the week of June 18 or July 30 as offered by a letter dated January 30, 1990 of the Division of Tax Appeals, was improperly denied so as to deprive petitioner of its ability to present its case because of the subsequent death of petitioner's principal officer and witness prior to the hearing on June 21, 1990.

III. Whether the notices of determination mailed to petitioner were sent to an incorrect

address thereby requiring their cancellation.

IV. Whether the notices of determination were timely issued with regard to all sales tax quarters at issue herein.

FINDINGS OF FACT

Petitioner, Wading River Deli, Ltd. (hereinafter "Wading River Deli"), operated a delicatessen selling primarily prepared food in Wading River (Suffolk County), New York. By the time the sales tax audit at issue herein was commenced in mid-1987, this Long Island delicatessen had been operated by petitioner for approximately six years and had five employees. Open seven days per week, the delicatessen's usual business hours were 7:00 A.M. to 9:00 P.M.

The Division of Taxation issued three notices of determination and demands for payment of sales and use taxes due, all dated April 21, 1988, against Wading River Deli. The taxpayer's address shown on each of the notices was Rt. 25A & Wading River Road, Wading River, N.Y. 11792. Two of the three notices have United States Postal Service Forms 3811 stapled to them. These return receipts show the date of delivery to petitioner of April 25, 1988, and the "addressee's signature" appears to be N. Seccadanari.¹

One of the notices of determination dated April 21, 1988 asserted tax due of \$58,947.42, plus penalty and interest. This notice provided the following explanation:

"The tax assessed has been estimated in accordance with the provisions of Section 1138(a)(1) of the Tax Law. Since you have not submitted your records for audit as required by Section 1142 of the Tax Law, the following taxes are determined to be due in accordance with Section 1138 of the Tax Law, and are based upon available records and information."

At the bottom of the notice, taxes, penalty and interest due were itemized for 14 sales tax quarters as follows:

<u>Period Ending</u>	<u>Tax Due</u>	<u>Penalty Due</u>	<u>Interest Due</u>
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¹The affirmative statement in the answer of the Division of Taxation that petitioner refused delivery is not supported by the evidence in the record.

5/31/84 - 484	\$4,207.03	\$1,051.76	\$2,456.28
11/30/84 - 285	4,211.92	1,052.98	2,069.68
2/28/85 - 385	4,278.33	1,069.58	1,916.32
5/31/85 - 485	4,325.00	1,081.25	1,750.68
8/31/85 - 186	4,340.00	1,302.00	1,575.14
11/30/85 - 286	4,364.16	1,309.25	1,408.62
2/28/86 - 386	4,321.33	1,296.40	1,228.17
5/31/86 - 486	4,298.00	1,289.40	1,057.13
8/31/86 - 187	3,929.00	1,100.12	820.54
11/30/86 - 287	4,025.16	1,006.29	697.23
2/28/87 - 387	4,068.33	895.03	565.58
5/31/87 - 487	4,111.00	781.09	432.02
8/31/87 - 188	3,751.00	600.16	270.71
11/30/87 - 288	4,717.16	613.23	191.40

The Division of Taxation did not seek to assess the period ending August 31, 1984, the first sales tax quarter of 1985. A review of the auditor's workpapers shows no tax due for this quarter "because expired". Petitioner, by its corporate officer, John Seccadanari, executed a Consent Extending Period of Limitation for Assessment of Sales and Use Taxes dated March 2, 1988 which provided as follows:

"That the amount of sales and use taxes due from [petitioner]...for the taxable period March 1, 1984 through May 31, 1985...may be determined at any time on or before September 20, 1988."

The Division of Taxation introduced into evidence sales and use tax returns for six sales tax quarters only: the period ending May 31, 1984, the fourth quarter of 1984; the period ending August 31, 1984, the first quarter of 1985; the period ending November 30, 1984, the second quarter of 1985; the period ending February 28, 1985, the third quarter of 1985; the period ending May 31, 1985, the fourth quarter of 1985; and the period ending August 31, 1985, the first quarter of 1986. The return for the period ending August 31, 1984 (which was not assessed) was dated September 19, 1984. It does not show an indate stamp by the Division of Taxation. The return for the earlier period ending May 31, 1984 (which was assessed) shows an indate stamp of January 15, 1986.

The second notice of determination dated April 21, 1988 asserted tax due of \$4,717.16, plus penalty and interest, against petitioner for the period ending February 28, 1988, which was the third sales tax quarter of 1988. This notice included the same explanation that was included in the other notice described in Finding of Fact "3", supra.

The third notice of determination dated April 21, 1988 asserted penalty under Tax Law § 1145 in the total amount of \$4,664.24 for the following periods:

<u>Period Ending</u>	<u>Penalty Asserted Due</u>
8/31/85 - 186	\$ 434.00
11/30/85 - 286	436.42
2/28/86 - 386	432.13
5/31/86 - 486	429.80
8/31/86 - 187	392.80
11/30/86 - 287	402.52
2/28/87 - 387	406.83
5/31/87 - 487	411.10
8/31/87 - 188	375.10
11/30/87 - 288	471.72
2/29/88 - 388	<u>471.72</u>
Total	\$4,664.24

This third notice explained that "[t]his notice is in addition to [the two other notices]...."

On August 6, 1987, Henry Glassman, a sales tax auditor, visited petitioner's place of business at around 2:00 P.M. for the purpose of performing a so-called "spot check". The auditor took a reading of the cash register tape in the machine used by petitioner to record sales for the business day, which had begun at around 7:00 A.M. Mr. Glassman testified:

"The sales as of 2:00 [P.M.] for that day were \$976.77. Doing a quick calculation, I felt they were severely underreporting their sales based on their returns filed."

Consequently, the auditor determined that an audit of petitioner's books and records was necessary.

A review of the auditor's log as well as Mr. Glassman's testimony supports the finding that from August 1987 through February 1988, a seven-month period, Mr. Glassman made several attempts to obtain petitioner's books and records for audit. Petitioner's accountant, Gerald Rosenfeld (who also prepared each of the six sales tax returns in the record), was unresponsive and uncooperative. Appointments were arranged by the auditor which would subsequently be cancelled. Finally, on February 23, 1988, Mr. Rosenfeld telephoned Mr. Glassman to advise that he "did not have time to get things together or to do write-ups" and requested a further delay of the audit, which Mr. Glassman refused.

The Commissioner of Taxation and Finance issued a subpoena duces tecum dated February 26, 1988 commanding petitioner to produce, on March 16, 1988, the following documents:

"[A]ll books and records pertaining to your Sales Tax liability for the period under audit [designated on the subpoena as March 1, 1984 through November 30, 1987]. This would include journals, ledgers, sales invoices, purchase invoices, cash register tapes, exemption certificates & all Sales Tax records."

On March 16, 1988, the return date for the subpoena, the auditor's log noted that John Seccadanari appeared without producing any books or records.

As a result of the failure of petitioner to produce any books and records for audit, Mr. Glassman performed a one-day observation test of sales made at petitioner's premises on April 13, 1988.² The auditor's log noted the following:

"Observation performed. Appeared to be new owners. Speaking to them, one of whom is known as Frank Montanez, it was disclosed that they are planning to purchase the deli for \$140,000, pending that they get a beer license. The deli is currently being operated under a managerial agreement. Deli appears to have expanded its grocery inventory. Menu of prepared food the same."

The observation of sales at petitioner's premises resulted in the Division of Taxation calculating audited taxable sales totalling \$946,198.04 for the four-year audit period, March 1, 1984 through February 29, 1988 (except for the sales tax quarter ending August 31, 1984 which had expired as noted in Finding of Fact "3", supra). This calculation was based upon the average daily taxable sales figure of \$691.16, which was calculated as follows:

Taxable sales per observation	\$744.39
Sunday allowance $\frac{6\frac{1}{2}}$	92.85%
Average daily taxable sales	\$691.16

²The brief narrative portion of the audit file which was repeated in the answer of the Division of Taxation as an "affirmative statement" incorrectly noted that the observation test was performed on April 17, 1988, which was a Sunday. In fact, the auditor's log noted that the test was performed on April 13, 1988, which was a Wednesday. The variance is explained by the fact that the "3" in the "13" in the log is difficult to read and looks like a "7". However, the entry in the log for the observation test is preceded by one for 4/5 and followed by one for 4/14. Furthermore, it is clear that the observation test was performed on a weekday since the auditor would later make an adjustment for Sunday sales as noted, infra.

Mr. Glassman testified only briefly at this hearing. In fact, neither the representative for the Division of Taxation nor petitioner's

representative were inclined to have him testify. The following exchange occurred:

ALJ: "Now, Mr. Larry Newman, I believe you wish to call Mr. Glassman at this time?"

Mr. L. Newman: "You [Mr. P. Newman] want to call him?"

Mr. P. Newman: "No, you."

After a brief pause, the colloquy continued as follows:

ALJ: "It might be helpful to have some, at least, brief testimony."

Mr. L. Newman: "If the Judge feels it's helpful, all right. We will give you a general idea, okay."

ALJ: "Okay. Mr. Glassman, would you step up to the witness' chair...."

As a result, there is only a minimal explanation of the audit report. (For example, there is no specific explanation for the Sunday allowance noted in Finding of Fact "9", supra).

Furthermore, when petitioner's representative was given the opportunity to cross-examine Mr. Glassman, he asserted that he could not "really effectively cross-examine as to audit techniques and as to number of attempts made" because of the death prior to the hearing of John Seccadanari. Consequently, in lieu of cross-examination of Mr. Glassman, petitioner's representative requested and received permission to submit with his brief an analysis of the audit report and workpapers³ which would

³Mr. Peter Newman complained that it was not until the hearing that the audit report and workpapers were made available to him. (As a result, the auditor retained these documents, Exhibit "O", after the hearing in order to make a copy for Mr. Newman. The original was later resubmitted to the administrative law judge.) It is observed that petitioner defaulted at the conciliation conference scheduled for February 16, 1989; neither petitioner nor a representative appeared. The conciliation conference process (see 20 NYCRR part 4000) serves to air and disclose the parties' positions in a less formal setting, and petitioner's default might explain why it was not until the hearing that Mr. Peter Newman apparently saw the audit report and workpapers for the first time.

disclose any "inconsistencies within itself and for possible mathematical inaccuracies or possible irrational assumptions." However, no such analysis was provided nor, in fact, was a brief submitted by petitioner.

By a letter dated January 30, 1990, the Division of Tax Appeals notified petitioner's representative, petitioner and the Division of Taxation's representative that it anticipated scheduling the hearing in this matter during either the week of June 18, 1990 or the week of July 30, 1990.⁴ Mr. Peter Newman was advised to indicate on the bottom of the letter any preferred day or week and/or any inconvenient day or week. By a letter dated February 8, 1990, on behalf of Mr. Peter Newman, his legal assistant wrote to the calendar clerk of the Division of Tax Appeals as follows:

"Our client, Mr. John Seccadanari, is suffering from liver cancer, and his wife has requested that we schedule the hearing as soon as possible since he is a necessary witness, and his disease appears to be progressing rapidly. Mr. Ranalli advised me that the attorney for the Tax Department, Lawrence A. Newman, was scheduled to be in New York City for hearings during the week of March 19, 1990 and if there were any cancellations, we would be given the first opening."

Unfortunately, it was not possible to schedule this hearing during the week of March 19, 1990 because no adjournment occurred in time to give the

parties adequate advance notice to prepare for a hearing during such week.⁵

Neither Jane Seccadanari nor Nives Seccadanari, who were present at the hearing herein, testified on behalf of petitioner.

Petitioner offered no evidence to prove that it ever notified the sales tax auditor or the

⁴The perfected petition was dated June 7, 1989 and signed by Mr. Peter Newman. It was received by the Division of Tax Appeals on June 12, 1989. The answer was dated October 18, 1989.

⁵The letter of February 8, 1990 was not introduced into the record by petitioner, but in order to make the record complete and provide a basis to address Mr. Peter Newman's contention, pursuant to the State Administrative Procedure Act § 306 (4), official notice was taken of this letter as well as the letter dated January 30, 1990 described, supra.

Division of Taxation of a new address to which letters and notices from the Division of Taxation should be mailed. In fact, included in the audit papers (Exhibit "O") is a handwritten letter dated March 23, 1988 from John Seccadanari to an unidentified Division of Taxation employee, "Ms. Kotfica", concerning Mr. Seccadanari's partial payment on behalf of petitioner of "back sales tax". The address used by Mr. Seccadanari for petitioner in this last communication from petitioner in the audit file is the address to which the notices of determination, detailed in Finding of Fact "2", supra, were sent.

SUMMARY OF THE PARTIES' POSITIONS

The Division of Taxation contends that the one-day observation test was reasonably calculated to reflect sales and use taxes due from petitioner, and that penalties were properly imposed.

Petitioner argues that it is "hamstrung" in its defense by reason of the failure of the Division of Tax Appeals to schedule the hearing at an earlier date due to the illness of petitioner's principal, John Seccadanari. It also complains that the notices of determination mailed

to petitioner were not sent to petitioner's last known address. Other than the general statement in the petition dated June 7, 1989 that the Division of Taxation's determination was "arbitrary and capricious", petitioner did not address the substance of the sales tax audit by the introduction of evidence or any specific analysis, nor did it specifically challenge the imposition of penalties.

CONCLUSIONS OF LAW

A. Every person required to collect sales tax must maintain records sufficient to verify all transactions, in a manner suitable to determine the correct amount of tax due (Tax Law § 1135[a][1]; 20 NYCRR 533.2[a]). As noted in Findings of Fact "7" and "8", supra, petitioner failed to provide to the auditor any books and records concerning its sales. Consequently, the Division of Taxation had the right to resort to an estimate of petitioner's sales subject to sales

and use tax as long as it selected an audit method reasonably calculated to reflect the sales and use taxes due (Tax Law § 1138[a][1]; see Matter of Grant v. Joseph, 2 NY2d 196, 204, 159 NYS2d 150, 157, cert denied 355 US 869).

It is further noted that considerable latitude is given to an auditor in estimating sales. It is only necessary that sufficient evidence be produced by the Division of Taxation to demonstrate that a rational basis existed for the auditor's calculations (Matter of Grecian Square v. State Tax Commn., 119 AD2d 948, 501 NYS2d 219). The burden is then placed upon petitioner to show that "the result of the audit used is unreasonably inaccurate or that the amount of the tax assessed is erroneous" (Matter of Meskouris Bros. v. Chu, 139 AD2d 813, 526 NYS2d 679, 681).

B. It is concluded that the assessments described in detail in Findings of Fact "3" and "4", supra, had a rational basis (see, Matter of Fokos Lounge, Inc., Tax Appeals Tribunal, March 7, 199), and that the one-day observation test described in Finding of Fact "9", supra, was reasonably calculated to reflect petitioner's sales and use taxes due (see, Matter of Sarantopoulos, Tax Appeals Tribunal, February 28, 1991) [Tribunal upheld a one-day observation test which provided the basis for estimating the sales of a diner over a 58-month period]).

C. Since it is concluded that the assessments were rational, petitioner had the burden of proof to show, by clear and convincing evidence, that the result of the audit was unreasonably inaccurate or that the amount of tax assessed was erroneous (Matter of Sarantopoulos, supra). Petitioner, however, has not even attempted to sustain this burden. Rather, it chose to base its defense on two procedural arguments, as noted in paragraph "15", supra. Petitioner's contention that it was "hamstrung" in its defense by reason of the failure to obtain a hearing date prior to the death of John Seccadanari is without merit. The question must be asked why petitioner failed to appear at the conciliation conference and/or to cooperate in the course of the sales tax audit. These events occurred prior to Mr. Seccadanari's death, and petitioner has offered no evidence to counter the auditor's comments concerning petitioner's lack of cooperation and

dilatory tactics. Petitioner chose not to address the merits of the audit when Mr. Seccadanari was able to assist. If petitioner's strategy, for whatever reason, was to wait for the formal hearing before it addressed the merits of the audit, its strategy backfired. It also must be noted that the Division of Tax Appeals took reasonable steps to schedule this matter earlier as requested by petitioner. Furthermore, the hearing herein was held on June 21, 1990, just barely over a year after the petition dated June 7, 1989 was filed.

D. Petitioner's contention that the notices of determination mailed to petitioner were not sent to its last known address is also without merit. As noted in Finding of Fact "13", supra, in what appears to be the last communication in the course of the audit from petitioner to the Division of Taxation (the handwritten letter dated March 23, 1988 of John Seccadanari), the address provided by Mr. Seccadanari was the business premises, the same address to which the notices were mailed.

E. Finally, the assessments at issue herein were timely made. As noted in Finding of Fact "3", supra, petitioner executed a consent extending the period of limitations. The Division of Taxation properly determined that the period of limitation for an assessment for the sales tax quarter ending August 31, 1984 had expired, as noted in Finding of Fact "3", supra, and such period was not included in the assessment. It is reasonable to presume that by March 2, 1988, the date the consent extending the period of limitations was executed by petitioner, the period for assessment of the sales tax quarter ending August 31, 1984 had expired because a timely sales tax return had been filed by petitioner for such quarter, while the period for assessment of the sales tax quarter ending earlier, on May 31, 1984, could still be assessed because petitioner did not file a tax return for such period until January 15, 1986.

F. The petition of Wading River Deli, Ltd. is denied, and the three notices of determination and demands for payment of sales and use taxes due dated April 21, 1988 are sustained.

DATED: Troy, New York

3/28/91

ADMINISTRATIVE LAW JUDGE