

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CHRISTIAN BLEISTEIN	:	DETERMINATION
OFFICER OF SECOND STREET DELI, INC.	:	DTA NO. 808747
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 September 1,	:	
1985 through August 31, 1988.	:	

Petitioner, Christian Bleistein, officer of Second Street Deli Inc., 356 Indian Head Road, Commack, New York 11725, 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 September 1, 1985 through August 31, 1988.

A hearing was commenced before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York on November 5, 1991, continued at the same offices on October 15, 1992 at 10:45 A.M. and concluded at the same offices on December 10, 1992 with all documents to be filed by April 7, 1993 which began the six-month period to issue this determination. Petitioner filed his brief on March 5, 1993. The Division of Taxation filed a brief and a letter on January 27, 1993 and April 1, 1993, respectively. Petitioner appeared by Louis F. Brush, Esq. The Division of Taxation appeared by William F. Collins (Gary Palmer, Esq., of counsel).

ISSUES

- I. Whether the execution of a consent to the fixing of tax due pursuant to Tax Law § 1138(c) bars petitioner from challenging the accuracy of the sales tax audit.
- II. Whether certain periods were barred by the statute of limitations because the consents to extend the statute of limitations were executed pursuant to an invalid power of attorney.
- III. Whether the Division of Taxation properly determined petitioner's sales and use tax

liability.

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

FINDINGS OF FACT

Second Street Deli, Inc. ("Deli") was a delicatessen which was located in a busy business district. It had 12 tables, two cash registers and a long counter. There were four or five people who worked behind the counter. Petitioner, Christian Bleistein, was Deli's president.

On September 7, 1988 an auditor called petitioner and told him that the delicatessen was going to be audited for a three-year period. Petitioner replied that his accountant, Mr. Forman, should be contacted.

On September 8, 1988 the auditor called Mr. Forman and explained that the Deli was being audited for sales tax. The auditor gave Mr. Forman an overview of the books and records that would be required for the audit.

In a letter dated September 8, 1988, the Division advised Mr. Forman that the audit of the Deli's sales and use tax returns was scheduled on October 11, 1988. The cover letter requested all of the Deli's books and records pertaining to its sales tax liability for the period under audit including journals, ledgers, sales invoices, purchase invoices, cash register tapes, Federal income tax returns and exemption certificates. The second page of the letter set forth an extensive list of records requested for the audit. Among other items, the Division asked for guest checks and cash register tapes for the period "[t]o be determined".

On October 11, 1988, the auditor and Mr. Forman met at the Nassau District Office. During their meeting, the auditor and the accountant reviewed the Deli's general ledger, Federal tax returns, purchase invoices and deposit slips. In addition, the accountant left the auditor with purchase invoices that covered a two-month period. However, the accountant did not produce any cash register tapes or a day book which listed the Deli's sales and sales invoices. The Division concluded that petitioner's records were inadequate to conduct a detailed audit since

there was no substantiation of the sales figures.

In the course of its examination, the Division compared the Deli's sales shown on its Federal income tax return with the sales recorded on its books. For the period ending in December 1987, the sales reported on petitioner's books exceeded the sales reported on the Federal income tax returns by \$6,811.76. The Division also found that during the entire audit period, the sales reported on the books exceeded the sales reported on the returns by \$2,122.28.

On October 13, 1988 the Division received a power of attorney form which appointed Mr. Forman to appear on behalf of the Deli. The box designated for the signature of a corporate officer bears petitioner's signature, his corporate title and the date of October 3, 1988.

Mr. Forman placed his name in a box for the signature of a witness and entered the date of October 4, 1988. The other box for the signature of a witness was left blank. He also signed the form as a notary public and entered the same date. Mr. Forman signed the bottom of the form as the appointed representative and checked the box stating he is a public accountant enrolled with the New York State Education Department.

Initially, the Division considered performing a markup test. In accordance with this plan, the Division examined purchase invoices for April 1987 and October 1988. The examination revealed that the purchase records for April 1987 were adequate. However, the October 1988 purchase invoices were \$20,000.00 less than that recorded in the general ledger. The inadequacy of the purchase invoices caused the Division to decide to perform an observation test.¹

Prior to conducting the audit, the Division went to the Deli and obtained the prices of every taxable item that was sold. The prices were either posted on a board or were obtained from Mr. Bleistein. During this meeting, petitioner told the auditor that the Deli did not close any days during the year.

¹It is noted that the field audit report contains a checkmark in a box which states that the purchase records were adequate. This box was checked because the person who wrote the report was not familiar with the case.

Before the observation test was performed, petitioner was told that if he disagreed with the results of the observation because the day selected was not representative, the Division would perform a second unannounced observation test on a different day of the week. The results of the first observation test would then be averaged with the results of the second observation test.

The observation test was performed on Monday, April 3, 1989. At the hearing the auditor explained that the Division does not usually conduct observation tests on a Monday because, in its experience, sales are commonly lower in the beginning of the week than the end of the week.

April 3, 1989 started out as a rainy day. Later the sky was overcast. The temperature was in the 50's.

The observation test was conducted by two auditors who were at the store at the same time for most of the day including the busy periods. However, one auditor started and finished earlier than the other auditor. By recording sales as they occurred, the auditors found total taxable sales of \$1,373.39² and gross sales of \$2,096.59.

At the conclusion of the observation, the auditor discussed the findings, including the tax, with petitioner. Petitioner responded that it was a representative day and that he agreed with the audit findings. At another juncture he said it was a slow day because of the rain. In addition, petitioner and Mr. Forman were offered an opportunity for a second observation test. Petitioner responded that he was not interested in a second observation test.

The Division divided the total taxable sales by the gross sales which were found during the observation test, in order to calculate a taxable ratio of 65.53 percent. The taxable ratio was used to examine what petitioner was reporting. It was not used to calculate the tax due.

In order to calculate the amount of taxable sales, the Division initially multiplied the

²The workpapers erroneously use the figure of \$1,373.99.

taxable sales found during the observation test by

seven to determine the amount of taxable sales during a week. The Division proceeded on the premise that the Deli was open seven days a week because petitioner stated that it was open for this period. Later, petitioner's accountant requested that the tax be recalculated as if the business was open six days a week since the Deli does not have as much business on a weekend as it does during the week. The Division agreed to this request and recalculated the amount of tax due. It then advised Mr. Forman of the result.

In response to the Division's proposal, Mr. Forman mailed a letter dated April 15, 1989 to the auditor which requested adjustments pertaining to delivery equipment and a leasehold expense. Mr. Forman also stated:

"I discussed the matter of days open to business with the taxpayer. This business is located in a business district. There is no reason to be open past the afternoon on Saturdays. I feel you should use a 5½ day week, not a 6 day week.

"Will you kindly recompute the tax giving the taxpayer credit for the above, and mail the corrected bill to me."

In order to recompute the amount of tax due, the Division projected the amount of taxable sales over a five and one-half day period and then multiplied that figure by 13 to calculate the amount of taxable sales in a quarterly period. The amount of taxable sales in a quarterly period was multiplied by four to calculate the amount of taxable sales in a year. The annual taxable sales were then multiplied in two successive steps by 95 percent in order to allow for a five percent inflation rate for the prior two years.³ On the basis of this procedure, the Division calculated total taxable sales, without catering, of \$1,120,922.39.

The Division asked for the Deli's books and records on catering. Petitioner provided the auditor with a catering menu. However, no catering records were available.

The Division concluded that, since the business had menus for catering, approximately

³The auditor's notes indicate that the United States Department of Labor reported an inflation rate of 3.3% in 1986, 5.1% in 1987 and 4.1% in 1988.

10 percent of the Deli's taxable sales arose from catering. The 10 percent estimate was based on office experience and on the auditor's experience in examining delicatessens.

Total audited taxable sales were obtained by adding the audited taxable sales from the Deli and the catering sales. The total audited taxable sales were then reduced by the reported taxable sales to determine the additional taxable sales. The Division divided the additional taxable sales by the reported taxable sales to calculate an error ratio of 262.22 percent. Thereafter, the Division, in succession, multiplied the reported taxable sales by the error rate and the tax rate to determine that tax was due in the amount of \$71,560.55.

The Division also determined that tax was due on the purchase of fixed assets on which no taxes were paid resulting in tax due of \$351.99. The amount of tax due was based on a detailed examination of petitioner's records which showed that no tax was paid for a computer which cost \$3,299.30 and that an invoice for \$1,100.00 was missing.

The Division concluded that omnibus penalty was due because the amount of tax found due on audit was 25 percent greater than the amount of tax reported.

The Division determined that petitioner was responsible for the taxes due from the Deli. The Division reached this conclusion because petitioner was the sole officer of the Deli, held himself out as president and signed the Federal tax returns. The Division also considered the fact that petitioner operated the business and was at the business premises on a daily basis. Further, petitioner signed checks and, as president, he signed the power of attorney form.

On June 15, 1989, the Nassau District Office received a signed Statement of Proposed Audit Adjustment. At the top of the page the statement was addressed to "Second St. Deli., Inc. c/o Mr. Joseph Forman, 77-05 220th St., Bayside, N.Y. 11364. The statement was dated May 1, 1989. Below the address, the statement contained the following explanation:

"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.

"If you DISAGREE with this statement, please return one copy of this statement along with a precise explanation of your disagreement, to this office

within 30 days.

"Failure to either agree or disagree to this Statement of Proposed Audit Adjustment within 30 days of the statement date will result in the issuance of a Notice of Determination and Demand for Payment of Sales and Use Taxes Due."

The document next listed a series of quarterly periods which ended November 30, 1985 through August 31, 1988, inclusive, and set forth the amount of tax due for each respective period. At the bottom of the column, the total tax of \$71,912.54 was listed. A line bracketed each of the quarterly tax amounts and contained the statement "Penalty & Interest To Be Computed". Beneath the column setting forth the asserted amount of tax, the statement contained the following paragraph:

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. (Emphasis in original.)

At the bottom of the page, there are boxes for signature, title and date. The box for signature bears an "X" and petitioner's signature. The title is listed as "Pres." and the document is dated May 10, 1989. On June 15, 1989, the Division received a second Statement of Proposed Audit Adjustment, which was signed by petitioner as president. This statement was identical to the first one except that only penalty was listed across from the corresponding periods. In addition, the box for dating the signature was left blank.

The records of the Division show that, on June 15, 1989, the Division received a check dated June 12, 1989 which was drawn on the account of Second Street Deli, Inc. The check was signed by petitioner and made payable to the order of the "N.Y.S. Sales Tax Bureau" in the amount of \$35,000.00.

On the basis of the foregoing audit, the Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated June 26, 1989, to petitioner, as president of Second Street Deli., Inc., for the period September 1, 1985 through August 31,

1988. The notice assessed tax of \$71,912.54 plus penalty of \$19,757.69 and interest of \$20,684.65 for a total amount due of \$112,354.84.

In the course of its audit, the Division received a series of consents to extend the period of limitation for assessment of sales and use taxes. The first consent was signed by petitioner on November 25, 1988. It permitted the assessment of sales and use taxes for the period September 1, 1985 through December 31, 1985 until on or before March 20, 1989. The second consent was signed by Mr. Forman on February 10, 1989 and permitted the assessment of sales and use taxes for the period September 1, 1985 through February 29, 1986 until on or before June 20, 1989. On June 10, 1989 Mr. Forman signed a consent which permitted the assessment of sales and use taxes for the period September 1, 1985 through February 29, 1987 at any time on or before September 20, 1989.

During the audit period, the Deli reported the following taxable sales:

Quarter <u>Ending</u>	Taxable <u>Sales</u>
November 1985	\$23,116.00
February 1986	25,640.00
May 1986	26,830.00
August 1986	25,940.00
November 1986	28,830.00
February 1987	27,314.00
May 1987	28,550.00
August 1987	27,918.00
November 1987	28,690.00
February 1988	29,418.00
May 1988	31,040.00
August 1988	37,120.00

It is the Division's experience that reported taxable sales increase after the Division contacts a taxpayer about an audit.

At the time of the hearing, petitioner had known Mr. Forman for about eight years. On the basis of a recommendation, petitioner met Mr. Forman just before petitioner became associated with the Deli. Mr. Forman told petitioner that he had a lot of experience with delicatessens. Petitioner has been satisfied with Mr. Forman's services and it was petitioner's wish that Mr. Forman represent him during the audit.

Mr. Forman told petitioner to keep a day book, receipts from bills and receipts from what the Deli pays its drivers. However, Mr. Forman never told petitioner to keep the backup to the day book. It was petitioner's practice to write a figure from the cash register tape into the day book and then destroy the tape.

At the hearing, petitioner testified that on the day that the observation test was conducted, the store's volume was 60% higher than usual. Petitioner explained that the 60% increase was attributable to two factors - Mondays are a busier day because the courts in the area are in session and, petitioner's main competitor, which was a sandwich shop located around the corner, was closed. Petitioner estimated that of the 60% increase in volume, 20% was due to the fact that it was a Monday and 40% was due to the competition being closed.

Petitioner further testified that beginning in January 1988 and ending during the second week of May 1988 the Deli was completely remodeled. The renovations included a new ceiling, new counters, new tables and a new floor. The renovated store also had a large salad counter and a steam table. In addition, the seating capacity increased from 24 to 48 patrons.

The Deli had to be closed for a certain number of days because of the renovations. However, upon completion, the remodeling resulted in increased volume.

Petitioner also explained that at or about the time of the renovation, new office buildings were built around the corner and a new three-story super structure was built across the street in the other direction. Petitioner contends that the new buildings, the remodeling and the increased seating capacity affected his taxable ratio because more people were coming in for lunch.

Petitioner also testified that the Deli provides catering only to small office parties and that on some weeks the Deli did not do any catering business. On other weeks it might cater two or three events. Petitioner estimated that during the audit period, the Deli averaged \$100.00 a week in catering business.

Lastly, petitioner maintained that by the end of 1989, the recession caused business to fluctuate. Further, petitioner submitted that if there had not been a recession, business would

have been better.

SUMMARY OF THE PARTIES' POSITIONS

In his brief, petitioner raises three arguments. First, petitioner argues that the audit methodology was not reasonably calculated to determine the amount of sales and use taxes due. Specifically, petitioner argues that the Division failed to consider that the Deli's main competition was closed, that the observation test took place on a Monday; that there was an increase in customers due to the occupancy of additional office space since the end of the audit period; that catering sales were approximately \$100.00 a week and that the Deli was closed four weeks a year. On the basis of the foregoing, petitioner recalculated the tax liability to determine an 8% error rate. It is then submitted that this figure is too small to make a change in the tax liability.

In regard to the penalties, petitioner submits that since the tax due, if any, is de minimis, no penalties should be assessed. In the alternative, petitioner argues that any error was due to the accountant and not petitioner and therefore it would be inequitable to charge the Deli or petitioner with a penalty. Lastly, petitioner argues that the statute of limitations expired for the quarters ending November 1985, February 1986 and May 1986. This argument continues that Mr. Forman signed a consent to extend the statute of limitations pursuant to a power of attorney in which Mr. Forman notarized petitioner's signature. It is contended that the power of attorney was void because Mr. Forman was not authorized to notarize the document since he was the recipient of the power and a party in interest. Therefore, it is concluded that the consent to extend the statute of limitations was void.

At the hearing, petitioner argued that it would have been more fair to compare the findings of the observation test with the sales reported during the last taxable period in order to calculate an error rate because of the increase in reported taxable sales over the audit period. Petitioner conceded that he was a responsible officer of the Deli.

In response to the foregoing, the Division submits that the audit was reasonably calculated to determine the taxes due; that Mr. Forman was authorized to represent petitioner

despite the defect in the power of attorney form, and therefore the consent to extend the statute of limitations was valid; and that the consent to extend the period of limitations for the corporate assessment also extends the period of limitations for issuing an assessment against an officer. The Division also argues that the annual inflation adjustment takes into account annual increases in taxable sales. At the beginning of the hearing, the Division also raised the issue of whether the consents to fix tax were binding on petitioner.

CONCLUSIONS OF LAW

A. In their briefs, petitioners have focused on the underlying audit. However, before the audit is addressed, the impact of the consent signed by petitioner must be discussed. 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 has disputed the fact that petitioner signed the consent. Through his signature petitioner manifested an intention to take advantage of the provisions of Tax Law § 1138(c) and have the tax finally and irrevocably fixed. Further, as a concededly responsible officer, petitioner is liable, pursuant to Tax Law §§ 1131(1) and 1133(a) for the tax due from the Deli. Thus, by the terms of the Tax Law, through his signature petitioner became bound pursuant to Tax Law § 1138(c) to the terms of the consent (see, Matter of BAP Appliance Corp., Tax Appeals Tribunal, May 28, 1992).

B. In view of the foregoing, petitioner's arguments concerning the validity of the consents to extend the statute of limitations, the accuracy of the audit and whether penalties and interest should be imposed are rendered academic.

C. The petition of Christian Bleistein, Officer of Second Street Deli, Inc., is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated June 26, 1989, is sustained together with such interest as may be lawfully due.

DATED: Troy, New York

October 7, 1993

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE