STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ELOISE TOOMER	:	DETERMINATION DTA NO. 819279
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 June 1, 1996 through May 31, 1999.	:	

Petitioner, Eloise Toomer, 220-30 Merrick Boulevard, Springfield Gardens, New York 11413, 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 June 1, 1996 through May 31, 1999.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York on October 30, 2003 at 10:30 A.M., with all briefs to be submitted by January 23, 2004, which date began the six-month period for the issuance of this determination. Petitioner appeared by Leonard L. Fein, CPA. The Division of Taxation appeared by Mark F. Volk, Esq. (Michael P. McKinley, Esq., of counsel).

ISSUE

Whether the Division of Taxation's determination of additional sales and use tax due from petitioner was proper.

FINDINGS OF FACT

1. The Division of Taxation ("Division") began an audit of the retail liquor business operated by petitioner, Eloise Toomer, on or about August 2, 1999, when the auditor visited the store location and informed petitioner of the audit and the records she would be required to produce. Petitioner took over operation of the business from her estranged husband in 1998.

2. By letter dated August 3, 1999, the Division requested all books and records pertaining to the sales and use tax liability of petitioner's business for the period June 1, 1996 through May 31, 1999. Records requested by the Division included financial statements, journals, ledgers, sales invoices, purchase invoices, cash register tapes, sales and use tax returns, Federal income tax returns and exemption certificates. Included with the letter was Publication 130-F, "The New York State Tax Audit – Your Rights and Responsibilities," which stated that if, after audit, there were changes in the amount of tax due, the auditor would meet with the taxpayer and explain the findings, accept further information from the taxpayer and then issue a statement of proposed audit changes.

3. Subsequently, the auditor determined that the records available were not sufficient to perform a complete audit. He resorted to using petitioner's records to identify third-party suppliers. His log reflected that he requested purchase records from third-party suppliers on August 19, September 1, and 8, 1999, from which it was determined that petitioner made purchases of $625,431.00 during the audit period. Based on this information, the auditor prepared a statement of proposed audit change for sales and use tax for the period June 1, 1996 through May 31, 1999, dated January 6, 2000, which set forth additional tax due of $45,831.96 and interest of $8,214.77 for a total amount due of $54,046.73.

4. Prior to sending the statement of proposed audit change, the auditor spoke with petitioner by telephone and informed her of the results of his audit, which were consistent with the tax and interest figures in the January 6, 2000 statement of proposed audit change. This telephone communication was not reflected in the auditor's log, form "DO-220.5," but petitioner's use of the information prior to January 6, 2000 in her attempt to obtain financing to pay the tax confirmed that she had received the information.

5. After an unsuccessful attempt to obtain financing from Fleet Bank, petitioner responded to an advertisement from American Business Credit, Inc. for funds to pay the additional taxes determined to be due by the Division, purchase inventory and make some repairs at the retail location. The loan was more costly for petitioner who incurred a 16 percent interest rate.

6. On Friday, January 14, 2000, a real estate closing took place between American Business Credit, Inc. ("ABC") and petitioner at her store. A check in the amount of $54,046.73 was cut from the proceeds of the mortgage and forwarded by Mortgage Escrow Services, Inc., ABC's closing company, on January 19, 2000, to the Division's Queens District Office to the attention of the auditor, Mr. Alvin Licorish.

7. The cover letter ("payoff letter") sent with the check by Mortgage Escrow Services, dated January 19, 2000, indicated that the mode of delivery to the Division was Federal Express, and bore an in-date stamp of the Queens District Office of January 20, 2000. The letter referenced petitioner, her case number, Mr. Licorish, and a description of the check enclosed with the letter. Also included was the following statement:

> In accordance with our telephone conversation, we enclose check as follows:
> Date 1-19-00 Check No. 3162 Amount $54,046.73
> Payable to: NYC Dept of Tax + Finance
> In full satisfaction of __ Mortgage _x_ Judgment __ Lis Pendens
> Please forward to the attention of the undersigned, the Satisfaction of
> Judgement and or stipulation canceling Lis Pendens (if applicable).
>
> . . .

Please acknowledge receipt of this letter and check(s) on the enclosed copy of same. The letter was signed by a representative of the title company.

8. Mr. Licorish did not remember how the letter, check and statement of proposed audit change was delivered to his office and stated that he "probably discarded [the envelope] if [he] got it. Because I get Federal Express, I get UPS, I just can't hold on to boxes and letters, you know."[1] In addition, Mr. Licorish had no recollection of speaking with the title company prior to receiving the documents as recited in the letter, but conceded that they may have called to confirm the payoff. He did not acknowledge receipt of the letter or respond to the company in any manner, although requested to do so.

9. The certified check, dated January 18, 2000, in the sum of $54,046.73 was endorsed by the "Commissioner of Taxation and Finance" on January 20, 2000. On the face of the check were petitioner's "ID" number and case number from the statement of proposed audit change.

10. Mortgage Escrow Services also forwarded to the Division with the cover letter and check a copy of the statement of proposed audit change. The copy submitted in evidence by petitioner, which she received from the mortgage company, and which the company maintained was an exact copy of the document sent to the Queens District office on January 19, 2000,[2] bore her signature and the date of January 14, 2000. The Division submitted an unsigned copy of the same document, bearing a Division in-date stamp of January 20, 2000. Further, petitioner

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[1]The Division's Exhibit "I", a Statement of Receivable Deposit Record, TX-120, indicated that payment was received on account of Charles F. and Eloise A. Toomer, in the sum of $54,046.73, on January 21, 2000. A note on the top of the form stated that "the envelope, if any, in which payment was made **must** be attached to this form." No such envelope was attached.

[2]Realty Reports, Inc. sent petitioner a letter signed by R. Thomas Masters, dated June 19, 2003, in which it stated that it forwarded a signed copy of the statement and payoff check to the Division "on or about" January 14, 2000.

submitted a third copy of the same document with her petition which bore her signature and the date January 6, 2000.

11. The Statement of Proposed Audit Change, dated January 6, 2000, was received from Mr. Licorish by petitioner at some unknown time prior to the real property closing on January 14, 2000. The statement asserted that it was based on an audit of petitioner's records and that petitioner's failure to either agree or disagree with it by February 3, 2000 would result in the issuance of a notice of determination.

12. The statement asserted that petitioner could agree by merely signing the form and returning it to the Queens District Office by February 3, 2000. In the alternative, the form provided that petitioner could disagree with the tax set forth on the statement by providing "contact information" and a precise explanation for the disagreement by February 3, 2000.

13. On or about April 18, 2000, some 89 days after receiving payment, payoff letter and statement of proposed audit change, the auditor met with his superior to close the file in this matter. At that time, it was discovered that the audit was not complete and that purchases from an additional vendor, Premier, had not been considered in determining the additional tax due. The auditor had written and called Premier several times prior to issuing the January 6, 2000 statement but received no responses.

14. Once the auditor discovered his omission, he identified purchases made by petitioner from Premier in the cash disbursements journal between January and July of 1999 and calculated a monthly purchase figure of $6,135.00. After applying this purchase figure to each month of the audit period, the auditor determined purchases for the audit period of $846,305.00. After a ten percent adjustment for inventory and pilferage, total purchases were determined to be $761,675.00. These purchases were then marked up by 25 percent, a markup percentage utilized

on prior audits and on the 1993 Federal partnership return, to arrive at taxable sales of $952,093.00. After subtracting reported sales of $181,000.00, additional sales of $771,093.00 yielded additional tax due of $63,615.00, or $17,783.04 more than the tax previously determined and set forth on the statement of proposed audit adjustment.

15. At the time the auditor decided to close the case in April of 2000, he was aware that petitioner had agreed to the original assessment in full. The Division issued a Notice of Determination, dated May 30, 2000, to petitioner in the amount of $63,615.27, plus interest of $13,310.76, less the payment of $54,046.73, for a total due of $22,879.30.

SUMMARY OF THE PARTIES' POSITONS

16. The Division of Taxation contends that the audit was properly conducted given petitioner's inadequate records and that the additional tax determined to be due was a reasonable estimate arrived at using available records and information. Further, because petitioner failed to return a signed copy of the statement of proposed audit change, the Division believes it was not precluded from continuing its audit and increasing the amount of tax due.

17. Petitioner argues that she signed a copy of the statement of proposed audit change on January 14, 2000 at her real property closing with American Business Credit, Inc. and that she was told it would be forwarded to the Division with the proper payment and, in fact, received confirmation that this occurred. In the alternative, petitioner believes that all of the documents received by the Division at its Queens District Office on January 21, 2000 constituted an agreement to the tax and interest asserted on the statement of proposed audit change.

18. Petitioner contends that the audit was flawed because the Division utilized purchases made outside the audit period from Premier in preparing its markup test. In addition, petitioner objects to the Division's use of a markup percentage from a prior audit, asserting that there is no

basis for accepting it as correct when the auditor could have established the actual markup percentage by checking current prices of the retail inventory.

CONCLUSIONS OF LAW

A. Before reaching the question of whether petitioner filed a signed statement of proposed audit change with the Division, in which she expressed her acceptance of the audit findings, the propriety of the audit methodology must be examined because a finding that petitioner did not accept the audit results in January 2000 would require an examination of the audit methodology she now challenges.

B. The Division made a proper request for books and records of Toomer Liquors in its letter of August 3, 1999, and there is no dispute that petitioner did not produce adequate records in response thereto, thus making it impossible for the Division to verify taxable sales receipts and conduct a complete audit (***Matter of King Crab Rest. v. State Tax Commn.***, 134 AD2d 51, 522 NYS2d 978).

When a taxpayer's records are inadequate, the Division may select 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, 206, 159 NYS2d 150, 157, ***cert denied*** 355 US 869). Because the Division had the disbursements journal, it was able to discern petitioner's suppliers, and this provided a rational basis for choosing to perform a markup on purchases to project sales and calculate taxes due. It is only necessary that sufficient evidence be produced 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, by clear and convincing evidence, that the audit method employed or the tax assessed was

unreasonable (***Matter of Meskouris Bros. v. Chu,*** 139 AD2d 813, 526 NYS2d 679; ***Matter of Surface Line Operators Fraternal Org. v. Tully,*** 85 AD2d 858, 446 NYS2d 451).

Petitioner's dispute with the audit methodology focused on the product purchases from Premier, specifically challenging the assumption that Toomer Liquors made purchases from this vendor throughout the audit period based on purchases listed in the disbursements journal for the months of January to July of 1999 and the markup applied thereto. However, even though the Division used purchases from outside the audit period, it did so properly because petitioner failed to provide purchase figures for the entire audit period. (***See, Matter of The Humphrey House, Inc.,*** Tax Appeals Tribunal, July 31, 1997.) The Division of Taxation made projections from petitioner's own records to reasonably estimate the amount of purchases from Premier.

The same also applies to the markup percentage chosen. When no evidence of a markup was proffered to the Division on audit, it was taken from the prior audit of Toomer Liquors and confirmed by the 1993 Federal Form 1120 or 1120S, information that was readily available to the auditor.

Where, as here, the Division seeks to determine a taxpayer's sales tax liability on the basis of an indirect audit method, the methodology selected must be reasonably calculated to reflect the taxes due (***Matter of Ristorante Puglia, Ltd. v. Chu,*** 102 AD2d 348, 478 NYS2d 91; ***Matter of W.T. Grant Co. v. Joseph, supra***). However, exactness in the outcome of the audit method is not required (***Matter of Markowitz v. State Tax Commn.,*** 54 AD2d 1023, 388 NYS2d 176, 177, ***affd*** 44 NY2d 684, 405 NYS2d 454; ***Matter of Lefkowitz,*** Tax Appeals Tribunal, May 3, 1990). The burden rests with the taxpayer to show by clear and convincing evidence that the methodology was unreasonable or that the amount assessed was erroneous (***Matter of Meskouris***

Bros. v. Chu, 139 AD2d 813, 526 NYS2d 679; ***Matter of Surface Line Operators Fraternal Org. v. Tully, supra)***.

C. Petitioner offered no evidence to contradict the Division's chosen methodology and did not demonstrate that the results were erroneous. The mere allegation that the result was incorrect or that a different methodology would have been more accurate does not meet petitioner's burden of proof.

D. Having established the validity of the audit performed by the Division and the reasonableness of the results obtained, the issue of whether petitioner properly filed a statement of proposed audit change must be decided.

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 assessed 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.

The document referred to in Tax Law § 1138(c) has been construed to be a consent to the assessment contained on the statement of proposed audit change, which renders the tax liability set forth fixed and final and extinguishes the hearing right provided for in Tax Law § 1138(a)(1). (***See, Matter of Brewsky's Goodtimes Corporation,*** Tax Appeals Tribunal, February 22, 2001.) Further, and of particular significance herein, the Tribunal has decided that the *signature* of the petitioner on the consent to tax renders the tax fixed and final. (***See, Matter of Sica Elec. & Maintenance Corp.***, Tax Appeals Tribunal, February 26, 1998.)

Thus, if it is established that petitioner in fact signed and filed the consent, then the Division's recomputation more than 60 days after it issued the statement of proposed audit

change would be invalid and the additional taxes emanating from the Premier account would be eliminated.

Unfortunately, petitioner has not met her burden of proving that a signed consent was filed with the Division. Although petitioner credibly testified that she executed a consent at her closing on January 14, 2000, and entrusted the title company with *her* duty to file said consent and payment with the Division, the evidence in the record does not support a conclusion that the proper documents were forwarded to the Division.

The Division's production of a copy of the canceled check, which was dated January 18, 2000, certified on January 19, 2000 and endorsed by the Commissioner on January 20, 2000, must be considered more credible evidence than the unsworn letter of R. Thomas Masters of the realty company, who stated in his letter to petitioner that they had paid off the "NYS taxes" on her behalf on or about January 14, 2000 and that they forwarded a signed copy of the consent with the check. Quite simply, the facts demonstrate that the check, payoff letter and consent were not forwarded to the Queens District Office until January 19, 2000 by Federal Express.

In addition, both the unsigned statement of proposed audit change and payoff letter forwarded by the title company were imprinted with the identical stamp of the Queens District Office, indicating receipt of the items on January 20, 2000. Mr. Licorish credibly testified that these were the documents he received from the mail room staff on January 20, 2000 and that he never received a signed consent.

Since it is concluded that the consent filed with the Division was not signed, the Division was not constrained by the 60-day limit on changes to the assessment set forth on the consent. (***Compare, Adirondack Steel Casting Company v. New York State Tax Commission***, 121 AD2d 834, 504 NYS2d 265 [where the consent contained an open-ended review period for the

Commissioner's approval and the Court held that such a provision, when used to promptly find and correct a clerical error, "advance[d] a strong public policy in favor of the full and uninhibited enforcement of the Tax Law and constitute[d] a reasonable implementation of Tax Law § 1138[c]."

Petitioner's position is not enhanced by the third statement of proposed audit change attached to the petition. It raised the inference that numerous statements were executed by petitioner at various times and weakens petitioner's contention that the one she signed at the closing was the one filed ultimately with the Division.

E. Finally, this case presents an issue of equity which demands some analysis. First and foremost, it is noted that the actions of the Division in conducting the audit were suspect. The auditor's log, DO-220.5, demonstrated that the auditor did not follow the guidelines set forth in Publication 130F, which he provided to petitioner on August 3, 1999 with the appointment letter. Specifically, after some preliminary meetings in August 1999, the auditor completed his third-party verifications, sent petitioner a consent to extend the period of limitations and calculated the additional tax due. Publication 130F apprises taxpayers that the auditor would meet with them to explain the audit findings, but this does not appear in Mr. Licorish's log. Further, there was no entry in the log for issuance of the Statement of Proposed Audit Change on January 6, 2000, although there was an entry for calculation of the tax on January 7, 2000, the day after.

Ms. Toomer credibly testified that she had taken over operation of the business after a divorce and that she wanted to start anew. She stated that she wanted to pay her taxes, purchase some inventory and make some repairs to the store. After being turned down by Fleet Bank, she applied to ABC Inc. for a loan with an interest rate of 16%. She called Mr. Licorish and requested the amount of additional taxes he had determined and was provided the amounts set

forth on the statement. However, Mr. Licorish did not record any of these conversations in his log.

Mr. Licorish testified that he knew Ms. Toomer had paid the tax and interest set forth on the consent and understood that she had agreed to the audit and resulting tax and interest due as set forth on said form. However, he did not attempt to contact her when he received an unsigned statement of proposed audit change, which by its own terms, required that a notice of determination be issued by February 3, 2000, if petitioner failed to sign the form.

These actions were inconsistent with his issuance of the statement, which was the culmination of his audit findings. However, his provision of a fixed tax due prior to January 6, 2000 was consistent with his understanding that she had agreed to the additional tax found due, and his failure to take any action on receipt of the unsigned statement induced petitioner and the finance company to rely to their detriment on his acceptance of the payment and statement as final and binding. Petitioner incurred the expense of a 16-percent loan which was not sufficient to pay the additional assessment, and the finance company's lien was subordinated to further taxes found due for the period in issue.

Finally, it is disconcerting that the auditor did not appreciate the importance of the documents he received from the finance company. First, he was unaware that the materials were delivered to his office by Federal Express, even though this was stated on the payoff letter. Second, he did not confirm receipt of the letter as requested therein. Finally, as he cavalierly testified regarding the envelope in which the materials were delivered to his office, "I probably discarded it if I got it. Because I get Federal Express, I get UPS, I just can't hold on to boxes and letters, you know." This practice is in direct conflict with the statement on top of the TX-120, Payments Receivable Deposit Record (Division's Exhibit "I"), which says: "The envelope, if

any, in which payment was made must be attached to this form." No envelope was submitted in evidence. Although not demonstrated, his practice of discarding envelopes could have disposed of a document contained therein.

Equitable estoppel, usually referred to simply as estoppel, is not, as a general proposition, available as a defense to governmental acts absent a showing of exceptional facts which require its application to avoid a manifest injustice (***see, Matter of Sheppard-Pollack, Inc. v. Tully***, 64 AD2d 296, 409 NYS2d 847). This rule applies particularly to a taxing authority because sound public policy favors full enforcement of the Tax Law (***Matter of Turner Constr. Co. v. State Tax Commn.***, 57 AD2d 201, 394 NYS2d 78). Exceptions to the doctrine have been rare and limited to unusual fact situations. As Mr. Justice Holmes said, "Men must turn square corners when they deal with the Government." (***Rock Island, Arkansas and Louisiana Railroad Company, Appellant v. The United States*****,** 254 US 141,143.)

The Tax Appeals Tribunal has adopted a three-part test to determine the applicability of equitable estoppel to specific cases. Briefly, the test asks whether petitioner had the right to rely on the Division's representation; if, in fact, there was such reliance and whether the reliance was to the detriment of petitioner (***Matter of AGL Welding Supply Co.***, Tax Appeals Tribunal, May 11, 1995, ***confirmed Matter of AGL Welding Supply Co. v. Commissioner of Taxation & Fin.***, 238 AD2d 734, 656 NYS2d 502, ***lv denied*** 90 NY2d 808, 664 NYS2d 270; ***Matter of Harry's Exxon Serv. Sta.***, Tax Appeals Tribunal, December 6, 1988).

Although the Division's behavior was deplorable and its competency questionable in certain instances on this audit, the facts do not rise to the level of "exceptional" which would justify the implementation of the doctrine of equitable estoppel. While petitioner justifiably relied on the representations made to her by the Division, the detriment she suffered was due to

her failure to follow the letter of the law embodied in Tax Law § 1138(c), by filing with the Division a "signed" statement consenting to the tax. Her failure to assure that the title company delivered a signed copy of the consent she signed on January 14, 2000 was not the responsibility of the Division, and not a responsibility she could delegate to another and avoid the consequences.

F. The petition of Eloise A. Toomer and Toomer Liquors is denied and the Notice of Determination, dated May 30, 2000, is sustained.

DATED: Troy, New York
March 25, 2004

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE