

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JOSE CRUZ D/B/A CRUZ EL BODEGON : DETERMINATION
for Revision of a Determination or for Refund of Sales : DTA NO. 825550
and Use Taxes under Articles 28 and 29 of the Tax :
Law for the Period December 1, 2006 through :
August 31, 2009.

Petitioner, Jose Cruz d/b/a/ Cruz El Bodegon, 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, 2006 through August 31, 2009.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, in Albany, New York, on August 13, 2014 at 2:00 P.M., with all briefs submitted by April 15, 2015, which date began the six-month period for issuance of this determination. Pursuant to 20 NYCRR 3000.15(e)(1) the period for issuance was extended. Petitioner appeared by Buxbaum Sales Tax Consulting LLC (Michael Buxbaum, CPA). The Division of Taxation appeared by Amanda Hiller, Esq. (Michael Hall).

ISSUES

I. Whether the Closing Agreement by and between Jose Cruz and the Division of Taxation may be vacated because of fraud, malfeasance or misrepresentation of a material fact.

II. Whether the power of attorney appointing Mark Stone and Joseph Calamia as Jose Cruz's representatives is invalid thus making consents extending the period of limitations for

assessment signed by those individuals, and thusly the Closing Agreement, invalid.

FINDINGS OF FACT

1. During the period in issue, petitioner, Jose Cruz d/b/a Cruz El Bodegon,¹ operated as a sole proprietorship a “bodega” type of grocery store located in a small strip mall on Washington Avenue, Brentwood, New York. The store was open seven days a week from 5:00 A.M. until between 11:45 P.M. and midnight on Monday through Saturday, and from 6:30 A.M. until 11:30 P.M. on Sunday. It sold a variety of grocery items in addition to prepared foods, hot and cold beverages, beer, cigarettes and sundries.

2. The Division of Taxation (Division) performed an audit of Mr. Cruz’s books and records for the period December 1, 2006 through August 31, 2009. Tax was not assessed on expense purchases or capital assets on audit.

3. The audit began in September 2009 with a written request for books and records for the audit period, which was sent to Mr. Cruz. Shortly thereafter, Mr. Cruz’s accountant, Antonio Cuevas, telephoned the auditor and advised her that he would represent Jose Cruz on audit. During that telephone conversation, the auditor, Alice Gavin, asked Mr. Cuevas to provide her with a power of attorney form.

4. Mr. Cuevas, who was dealing with some personal health issues and apparent facsimile machine problems, had some difficulty providing a properly completed power of attorney, but he was eventually able to provide one to the auditor. A copy of a properly completed power of attorney form (Form POA-1) was later forwarded back to Mr. Cuevas for his records.

5. During the initial audit appointment, the auditor received from Mr. Cuevas some

¹ Documents in the record indicate that petitioner operated his sole proprietorship as “Jose Cruz d/b/a Cruz Bodegon” during the audit period.

original books and records that were to be returned to him at a later date. In addition, the auditor received three questionnaires and a copy of the initial audit appointment letter, all written in the English language and all signed by Mr. Cruz. The Responsible Person Questionnaire (AU-431) indicates that it was prepared by Mr. Cruz and that, among other things, he had the authority to sign consents extending periods of limitation, to sign a power of attorney for the business, and to sign consents fixing tax.

6. The auditor reviewed the books and records provided by petitioner and determined that they were inadequate to perform a detailed audit of sales. Among the records that were not made available for review were cash register tapes. After discussing the lack of adequate books and records with petitioner's then representative, Mr. Cuevas, it was decided that an observation test would be performed.

7. On Thursday, June 3, 2010, an observation took place at petitioner's place of business, and the results of such observation, which showed a taxable ratio of 87.84% against gross sales,² were extrapolated over the audit period. Based upon the observation results, the auditor determined that Mr. Cruz had underreported gross sales for the audit period.

8. After the auditor discussed the observation results with her team leader and her section head, Allan Korenstein, a recommendation was made to refer this matter to the Audit Division's income tax unit for audit review. The referral was based on additional gross sales after the observation in the amount of approximately \$1,000,000.00 per year. On July 26, 2010, the auditor called Mr. Cuevas and advised him that he would be contacted by the Audit Division's income tax unit because of the large discrepancy in sales observed during the observation.

² Mr. Cruz reported quarterly taxable ratios that fluctuated between 52.36% and 60.75% throughout the audit period.

9. On September 10, 2010, the auditor received a power of attorney (Form POA-1 [9/09]) appointing Mark Stone, CPA, MST, and Joseph Calamia, tax specialist, of Sales Tax Defense LLC, as Mr. Cruz's representatives with respect to a sales and use tax audit for the period December 1, 2006 through August 31, 2009, Audit Case number X864057925. Mr. Cruz's employer identification number was listed in section 1 of this power of attorney. The box in section 4 of this power of attorney form was checked, indicating that Mr. Cruz did not want an existing power of attorney revoked, and a copy of the power of attorney appointing Mr. Cuevas, tax preparer, as Mr. Cruz's representative was attached.

10. During the course of the audit, the period to assess sales and use tax due was extended by a series of consents or waivers. The first consent was signed by Jose Cruz on December 18, 2009 and extended the time to assess for the period December 1, 2006 through February 29, 2008, until March 20, 2011. A second consent was signed by Mark Stone on January 20, 2011 and extended the time to assess for the period December 1, 2006 through May 31, 2008, until June 20, 2011. A third consent was signed by Joseph Calamia on April 11, 2011 and extended the time to assess for the period December 1, 2006 through August 31, 2008, until September 20, 2011.

11. As a result of the audit, gross receipts were increased from \$852,202.00 to \$3,580,041.00 for the period December 1, 2006 through August 31, 2009. After making allowances for days closed, inflation, and reported taxable sales, the auditor determined additional taxable sales in the amount of \$2,680,978.68 and additional tax due in the amount of \$231,234.41 for the period December 1, 2006 through August 31, 2009. Based upon Mr. Cruz's record of timely filing his sales tax returns and his willingness to comply with the tax laws, penalties were abated, and interest was computed at the minimum rate pursuant to Tax Law §

1145(a)(1)(iii).

12. For tax years 2007 through 2009, Mr. Cruz and his wife, Lucia Cruz, filed joint personal income tax returns. At the beginning of the income tax audit, correspondence was sent by the Audit Division's income tax unit to Mr. and Mrs. Cruz notifying them that they were under audit for the years 2007 through 2009. On December 15, 2010, Mr. and Mrs. Cruz executed a Power of Attorney appointing Mark Stone, CPA, Jennifer Koo, Esq., and Joseph Calamia, of Sales Tax Defense LLC, as their representatives with respect to the income tax audit for the years 2007 through 2009.

13. Using the sales tax audit findings of additional taxable sales for the audit period, the income tax auditor, Kim Striffler, determined that Jose Cruz and his wife failed to pay the appropriate New York State income tax for the years 2007 through 2009 and owed additional tax totaling \$85,594.00 for those years. It was determined that the best method for finalizing both the sales tax and income tax audits was by the use of closing agreements.

14. During the course of the sales tax and income tax audits, Mr. Cruz communicated with the auditors, indicated that he understood what was discussed with him by the auditors, did not indicate that he did not understand the English language, and never requested that any conversations or documents be translated into any other language.

15. At the conclusion of the sales tax audit, Ms. Gavin discussed the closing agreement with petitioner's representative, Mr. Stone, who told her that he was going to discuss the sales tax and income tax audits and closing agreements with Mr. Cruz. Subsequently, on April 15, 2011, Mr. Stone telephoned Ms. Gavin to set up a time to execute the closing agreements at the Division's Suffolk County District Office (Suffolk District Office), which appointment was scheduled for May 11, 2011 at 3:00 P.M. During that telephone conversation, it was determined

that a partial payment of \$150,000.00 to be made by Mr. Cruz on May 11, 2011 would be distributed between sales tax (\$115,500.00) and income tax (\$34,500.00).

16. During the course of the sales tax audit, on several occasions, Ms. Gavin discussed the audit with Mr. Cruz's then sales tax representatives, Mr. Cuevas, Mr. Stone and Mr. Calamia. Mr. Cruz's representatives never indicated that he had any issues understanding the English language, the nature of the sales tax audit or the terms of the closing agreement. On several occasions during the income tax audit, Ms. Striffler spoke with Mr. and Mrs. Cruz's representatives and they never indicated that Mr. Cruz had any issues understanding the English language, the nature of the audit or the terms of the closing agreement. All audit issues, and terms of the closing agreements were discussed with Mr. Cruz's representatives as is the normal practice when a taxpayer has indicated that he wishes to have representation while under audit.

17. On May 11, 2011 at 3:00 P.M., the sales tax and income tax auditors, Ms. Gavin and Ms. Striffler, respectively, along with their respective team leaders, met with Jose Cruz and Mr. Stone at the Division's Suffolk County District Office. During that meeting, the waiving of Mr. Cruz's protest rights and appeal procedures were explained to him before he signed the closing agreements. Mr. Cruz executed three original closing agreements for sales tax. At that meeting, Mr. Cruz also executed three original closing agreements for income tax, and Mr. Stone executed the three original closing agreements for income tax as power of attorney for Mrs. Cruz. Mr. Cruz never asked for any documents to be translated into another language, nor did he ever request that any verbal communications be translated into another language at the meeting when he executed the closing agreements. In addition, at the May 11, 2011 meeting, Mr. Cruz tendered a check in the amount of \$150,000.00 to be applied to tax only that was to be split

between sales tax (\$115,500.00) and income tax (\$34,500.00).³ The Closing Agreement for income tax was countersigned by Nonie Manion, the Division's Director of Tax Audits, on May 31, 2011.

18. The closing agreement for sales tax bears Mr. Cruz's signature, his handwritten name and title, "owner," and the handwritten date of "5-11-11," as well the signature of Nonie Manion, the Division's Director of Tax Audits, and the handwritten date of "5/31/11" on the last page. The parties entered into this three-page closing agreement, captioned: "In the Matter of Jose Cruz . . . Audit Case # X - 864057925 For a Sales and Compensating Use Tax Audit under Article 28 & 29 of the New York State Tax Law for the Audit Period December 1, 2006 through August 31, 2009," pursuant to Tax Law § 171(18).

19. The closing agreement for sales tax contained eight paragraphs, which provided, in pertinent part, as follows:

"FOURTH, this Agreement sets forth the entire understanding between the Taxpayer and the Commissioner with respect to the subject matter or Taxable Period hereof and supersedes any prior negotiations, agreements, understandings or arrangements between them with respect to the subject matter or Taxable Period hereof. Except as otherwise stated within this Agreement, this Agreement shall be final, conclusive and irrevocable for the subject taxes and Audit Period, and except upon a showing of fraud, malfeasance or misrepresentation of a material fact: (a) the case shall not be reopened as to the matters agreed upon or the Agreement modified, by any officer, employee, or agent of this state, and (b) in any suit action, or proceeding, this Agreement, or any determination, assessment, collection, payment, cancellation, abatement, refund or credit made in accordance herewith, shall not be annulled, modified, set aside or disregarded.

* * *

EIGHTH, This Agreement shall be binding upon New York State, the Taxpayer and the Taxpayer's respective successors and assignees."

³ The check, dated May 11, 2011, payable to "New York Tax Department" in the amount of \$150,000.00 and drawn on the Capital One Bank checking account of "Jose E. Cruz D/B/A Cruz Bodegon," bears Mr. Cruz's signature.

The last two lines of text contained in the sixth paragraph are set forth on the last page of the closing agreement, along with the seventh paragraph, consisting of five lines of text, and the eighth paragraph, consisting of the two lines of text, set forth above.

20. The Division issued to Jose Cruz, Cruz Bodegon, a Notice and Demand for Payment of Tax Due (Notice and Demand) (Assessment ID# L-036270278-5) dated June 16, 2011 that asserted sales tax due for the period December 1, 2006 through August 31, 2009 in the amount of \$231,234.41 plus interest in the amount of \$61,496.15, less assessment payments/credits in the amount of \$115,500.00, for a current amount due of \$177,230.56. Petitioner was given credit for the \$115,500.00 payment made on the date he executed the closing agreement. Petitioner designated that the payment be applied to tax and the Division applied the payment to tax asserted for the six earliest quarters beginning with the quarter ending February 28, 2007 through the quarter ending May 31, 2008. The Computation Section of this Notice and Demand stated that:

“[t]his Notice and Demand is for tax, interest, and any applicable penalties that both you and the Division of Taxation of the Department of Taxation and Finance, agreed that you owe, under paragraph Eighteenth of section 171 of the Tax Law. You have voluntarily agreed in that closing agreement to waive your rights to file a protest under the Tax Law.”

21. On June 23, 2011, the auditor sent a validated original closing agreement for sales tax to Mr. Cruz, at his business address. A copy of that closing agreement was sent to Mr. Cruz's representative, Mr. Stone.

22. On June 14, 2011, Mr. Cruz made a \$5,000.00 payment towards the outstanding sales tax liability. He directed that the payment be applied to tax before it was applied to interest. This payment was applied to assessment L-0362702785.

23. On July 7, 2011, Mr. Cruz hand delivered to Ms. Gavin, at the Suffolk District Office,

a check in the amount of \$100,000.00, as payment towards the outstanding sales tax liability. He directed that the payment be applied to tax before it was applied to interest. This payment was applied to assessment L-0362702785.

24. Mr. Cruz made the following additional payments towards the outstanding sales tax liability: a \$5,000.00 payment on August 16, 2011; a \$5,000.00 payment on September 15, 2011; and a \$5,000.00 payment on October 14, 2011. Mr. Cruz directed that each of these payments be applied to tax before it was applied to interest. Each of these payments was applied to assessment L-0362702785. At some point, the sales tax liability was paid in full. However, the exact date is not part of the record.

25. On November 27, 2012, petitioner's current representative, Michael Buxbaum, CPA, filed on petitioner's behalf an Application for Credit or Refund of Sales or Use Tax (Form AU-11) (refund claim) in the amount of \$231,234.41 for the period December 1, 2006 through August 31, 2009, #X-864057925. The explanation of this claim stated that:

“The Power of Attorney appointing Antonia [sic] M. Cuevas was invalid as signed by Jose Cruz as Jose Cruz was an individual taxpayer. At the time the POA was signed the law required a POA-1 Individual, the POA for individuals. The POA for Individuals signed on 9/2/2010 by Mark Stone and Joseph Calamies [sic] was also invalid as it retained and [sic] invalid POA, Antonia [sic] M. Cuevas, as co-power of attorney.

All information and forms received by the Tax Department are accordingly invalid since the taxpayer relied upon advice and representation of individuals who did not have the legal authority to represent him.

The correct Power of Attorney should have had the Social Security number to correspond to the business number.”

No supporting documentation was included with the refund claim.

26. Subsequently, the Division returned the refund claim to petitioner's current representative, Michael Buxbaum, CPA, as “unprocessible.” In her letter returning the refund

claim, Alice Gavin, a Tax Auditor 1 in the Division's Transaction Field Audit Bureau, wrote as follows:

“We are returning the refund claim received by our office on November 27, 2012 as unprocessable. The refund claim arises directly from an audit that was concluded with a closing agreement signed by the taxpayer on May 11, 2011. Your position is that the Power of Attorney form used by the taxpayer and the former representative was an incorrect form, which invalidated any actions taken by the former representative, including signing the waivers in the audit. We have reviewed this issue, and have concluded that the appropriate Power of Attorney form was used. Finally, the closing agreement signed by your client precluded the filing of any refund claims for the period December 1, 2006 through August 31, 2009. As a result, we cannot process this refund and are returning it to you.”

27. In protest of the return of the refund claim as unprocessable, petitioner timely filed a petition with the Division of Tax Appeals. In his petition, petitioner asserts that the refund claim was erroneously denied by the Audit Division as it was in processible form. Petitioner further asserts that “[t]he Powers of Attorney in this matter were invalid and all information received and signed by these POAs invalidated the Closing Agreements.” Petitioner also contends that “[t]he Refund Claim submitted is in proper form and has not received the jurisdictional document of denial, and therefore, the taxpayer should be allowed his appellate rights.”

28. The hearing in this matter was held on August 13, 2014 in Albany at which Allan Korenstien, a Tax Auditor III in the Division's Long Island Regional Office, appeared in response to a subpoena served by petitioner. Petitioner's representative, Michael Buxbaum, appeared. However, petitioner failed to appear. Mr. Buxbaum examined Mr. Korenstein regarding his involvement, as section head, in the sales tax audit of Jose Cruz for the period December 1, 2006 through August 31, 2010. Because his second witness, petitioner Jose Cruz, was unable to appear at the hearing due to alleged flooding at his location, Mr. Buxbaum requested that the record remain open for the submission of an affidavit from Mr. Cruz, and

possibly a second affidavit from either Mr. Cuevas or Mrs. Cruz. At the conclusion of the hearing, the record was left open to allow Mr. Cruz to present affidavits in support of his claims. The Division was provided an opportunity to respond with rebuttal affidavits at which time the record was to close with the proviso that petitioner be allowed a reasonable period of time to make a motion to reopen the record. Both representatives requested and received additional time to submit post-hearing documentation, and the schedule for submission of post-hearing documents and briefs was adjusted accordingly.

29. In accordance with the revised post-hearing document submission schedule, petitioner's representative timely submitted the affidavit, dated October 21, 2014, of petitioner, Jose Cruz, which was received into evidence as petitioner's exhibit 2.

30. In accordance with the revised post-hearing document submission schedule, the Division's representative submitted rebuttal affidavits of the following Division employees that were received into evidence:

a. the affidavit, dated December 1, 2014, of Kim Striffler, a Tax Auditor I in the Division's Long Island Regional Office Income Franchise Tax Unit, and attached exhibits including a copy of the October 21, 2010 internal Division email from Ms. Striffler to Maria Salvaggio and Ms. Gavin; the executed power of attorney appointing Mr. Stone, Ms. Koo and Mr. Calamia as Mr. and Mrs. Cruz's representatives with respect to the income tax audit; a copy of the District Office Audit Bureau Visitor Log for May 2011 (portions of which have been redacted); and a copy of the validated closing agreement for income tax for Mr. and Mrs. Cruz (Division's exhibit G);

b. the affidavit, dated December 1, 2014, of Alice Gavin, a Tax Auditor I in the Division's Long Island Regional Office Sales Tax Unit (Division's exhibit H); and

c. the affidavit, dated November 24, 2014, of Karen Landeck, an Investigator for the Division's Long Island Regional Office's Audit Division, and an attached exhibit consisting of the field visit report of the June 3, 2010 observation of the business (Division's exhibit I).

31. The facts set forth above in Findings of Fact 12 through 17 were established in whole or in part through the affidavits of Alice Gavin, Karen Landeck and Kim Striffler. Alice Gavin began working for the Division in 2009 as a Tax Auditor Trainee and has held her current position of Tax Auditor I since 2011. In her position as a tax auditor, her responsibilities have included conducting audits of taxpayers regarding sales and use taxes. Ms. Gavin conducted the sales tax audit of Mr. Cruz for the period December 1, 2006 through August 31, 2009. Karen Landeck has been in her current position of Investigator since 2007. In her position as an Investigator, Ms. Landeck's responsibilities have included: the conduct of field observations and surveys, surveillance, canvassing businesses to determine registration and compliance with reporting requirements, and interviewing cooperative and noncooperative taxpayers during investigations. Ms. Landeck has participated in hundreds of field observations during her employment, and she has spoken to many owners and employees during these field visits. At the time she participated in the June 3, 2010 field observation of the business, Ms. Landeck worked out of the Division's Suffolk District Office. Kim Striffler began working for the Division in 2009 as a Tax Auditor Trainee and has held her current position of Tax Auditor I since 2011. In her position as a tax auditor, Ms. Striffler's responsibilities have included conducting audits of personal income tax returns. After the referral was made to Audit Division's income tax unit, Malinda Sederquist was the initial auditor assigned to the audit of Mr. and Mrs. Cruz for the years 2007 through 2009, but in September 2010 the audit was reassigned to Ms. Striffler and she completed the income tax audit of Mr. and Mrs. Cruz for the years 2007 through 2009.

32. The record in this matter closed on December 3, 2014, the date on which the Division's rebuttal affidavits were submitted and accepted into evidence. As a result of the extensions granted to submit documents, the parties' briefing schedules were also extended. By letter dated January 6, 2015, petitioner's representative requested a one-month extension of time to file petitioner's brief. In that letter, Mr. Buxbaum also stated that "petitioner may be submitting a motion to reopen the record in order to refute the affidavits, recently, presented by the Office of Counsel." By letter dated January 7, 2015, the undersigned granted Mr. Buxbaum's request for an extension of time to file his brief, and revised the briefing schedule for the submission of briefs in this matter. The January 7, 2015 letter did not address a possible filing of a motion to reopen the record by petitioner.

33. On February 10, 2015, along with his initial letter brief, petitioner filed a "Notice of Motion to Reopen the Record," a second affidavit of petitioner, Jose Cruz, dated February 10, 2015 with attached exhibits including a blank DTF-29 [10/12] *Access to Services in Your Language: Complaint Form*, a copy of a "Closing Agreement Checklist," and a copy of an internal Division email dated April 15, 2011 from Ms. Gavin to David Lindhurst.

34. On March 13, 2015, the Division of Taxation submitted an affidavit of Michael Hall in opposition to petitioner's Motion to Reopen the Record. In his affidavit, Mr. Hall asserts that the additional submission was not made within a reasonable period of time, and that the second affidavit of Mr. Cruz is merely a rehash of his first affidavit submitted on October 21, 2014.

35. Shortly thereafter, the Division filed its letter brief by the due date set in the undersigned's January 7, 2015 letter to Mr. Buxbaum. Petitioner filed his reply letter brief by the revised due date. By letter, the parties were notified that a decision on petitioner's motion to reopen the record would be addressed in the determination.

SUMMARY OF THE PETITIONER'S POSITION

36. In his first affidavit, Mr. Cruz asserted that the following circumstances surrounding his signing of the closing agreement for sales tax should make it null and void:

a. English is not his first language so he depended upon a translator to explain in Spanish what his rights were regarding the sales tax audit;

b. the Division did not offer him Spanish translation services, which he has discovered is common practice by calling the Tax Compliance telephone line;

c. although the terms of the financial settlement were explained to him by his representatives, authorized by powers of attorney, his representative was not given a copy of the closing agreement in advance of the May 11, 2011 meeting and failed to explain to him that he would be forfeiting his rights of appeal and refund;

d. he did not see the closing agreement until the date he signed it;

e. his power of attorney, Antonio Cuevas, tax preparer, was not present with him at the time that the closing agreement was signed;

f. he did not understand that he would be giving up his appeal and refund rights by signing the closing agreement, as nothing was explained to him in detail in Spanish by either his representative or the Division on the date of signing;

g. on the date of the signing, his representative just instructed him to sign the closing agreement, without explaining to him his compromised rights;

h. the Division did not meet its obligation to him and misrepresented the closing agreement at the May 11, 2011 meeting because it did not explain to him in Spanish that he would be forfeiting his rights in order to pay more than \$200,000.00; and

i. he signed the closing agreement without reading it and without understanding what he

signed because his English is limited and English is his second language.

37. Mr. Cruz also averred, in his first affidavit, that it was unconscionable that he signed a legal document for more than \$200,000.00 without being given ample time to review the actual document with a Spanish speaking attorney. He maintained that when he purchased his home, his attorney explained to him in Spanish the terms of the contract several weeks in advance. Mr. Cruz further maintained that at the time he signed the closing agreement, it was not properly communicated to him by either the Division or his representative, who was not an attorney. Mr. Cruz asserted that he was neither properly prepared to sign the closing agreement nor fully capable of signing this contract with all its terms, and as a result, he did not know that he was entering into a legal contract with the Division that would be absolutely binding for years to come. He further asserted that if he had known that he was giving up his appeal rights and refund rights, he would never have signed the closing agreement.

38. In his second affidavit, Mr. Cruz alleged that: Mr. Stone never discussed any closing agreement with him; he never saw the closing agreement in either English or Spanish before he signed that document on May 11, 2011; the Division never offered him translation services at any time during the audit or anytime subsequent to the audit; his conversations with Ms. Gavin were limited to “hello” and other greetings; he did not conduct a detailed conversation in English with Ms. Landeck regarding his business on June 3, 2010 at the commencement of the observation; he did not conduct a detailed telephone conversation in English with Ms. Striffler; and Ms. Landeck and Ms. Striffler did not explain the closing agreement to him and did not arrange for him to have a translator upon his request. Mr. Cruz averred that he signed the closing agreement for sales tax “not knowing or reading or understanding what [he] signed and what the document and contract meant.”

CONCLUSIONS OF LAW

A. The first matter to be addressed is petitioner's motion to reopen the record for the admission of a second affidavit of petitioner, Jose Cruz. At the conclusion of the hearing, the record was left open to allow petitioner to present affidavits in support of his claims. The Division was provided an opportunity to respond with rebuttal affidavits at which time the record was to close with the proviso that petitioner be allowed a reasonable period of time to make a motion to reopen the record. Both representatives requested and received additional time to submit post-hearing documentation. The affidavit of petitioner, Jose Cruz, was submitted and accepted into evidence on October 21, 2014. The Division's rebuttal affidavits of three of its employees, Ms. Striffler, Ms. Gavin and Ms. Landeck, were submitted and accepted into evidence on December 3, 2014 at which time the record closed. As a result of the extensions granted to submit documents, the parties' briefing schedules were also extended. Along with requesting a one-month extension of time to file his initial brief, petitioner's representative, in his January 6, 2015 letter, also stated that petitioner may submit a motion to reopen the record in order to refute the Division's three rebuttal affidavits. By letter dated January 7, 2015, petitioner's extension request was granted and the briefing scheduled was revised; however, a possible filing of a motion to reopen the record by petitioner was not addressed. Along with his initial letter brief, petitioner filed a motion to reopen the record pursuant to the "hearing transcript and the Tax Appeals Tribunal's Rules of Practice and Procedure."

The Division opposes petitioner's motion to reopen the record on the grounds that the additional submission was not made in a reasonable period of time after the record closed on December 3, 2014 and is merely a rehash of the first affidavit of Mr. Cruz submitted and accepted into evidence on October 21, 2014.

B. The granting of a motion to reopen the record and admit additional evidence is dependent upon the sound exercise of discretion (*Matter of Byram*, Tax Appeals Tribunal, August 11, 1994). When a motion has been made following a hearing, the exercise of this discretion has been limited (*id.*; *Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991). To reopen the closing agreement, petitioner must prove that the written agreement was induced by fraud, malfeasance or misrepresentation by the Division (Tax Law § 171[18]). Petitioner is entitled to a fair hearing in which the elements of due process are satisfied (Tax Law § 2000). At a hearing, “the parties may call and examine witnesses, introduce exhibits, cross-examine opposing witnesses on any matter relevant to the issues even though the matter was not covered in direct examination, impeach any witness regardless of which party first called the witness to testify, and rebut the evidence against them” (20 NYCRR 3000.15[d][1]). “Affidavits as to relevant facts may be received, for whatever value they may have, in lieu of oral testimony of the persons making such affidavits” (*id.*). The hearing ended on August 13, 2014, but the record remained open for post-hearing submissions by both parties with my proviso that petitioner could make a motion to reopen the record after reviewing the rebuttal documents submitted by the Division. The record in this matter closed on December 3, 2014. Given the statement in petitioner’s representative’s January 6, 2015 letter that a motion to reopen the record in order to refute the Division’s rebuttal affidavits may be made and the motion was in fact made one month later, I do not find that there was an unreasonable delay in the submission of the second affidavit of Mr. Cruz. Accordingly, petitioner’s motion to reopen the record is granted; the second affidavit of petitioner, Jose Cruz, is accepted into evidence as petitioner’s exhibit 3; and the record is now closed. I will determine the weight to be given this affidavit in making the determination in this matter.

C. Tax Law § 171(18) provides that the Commissioner of Taxation and Finance shall:

“Have authority to enter into a written agreement with any person, relating to the liability of such person (or of the person for whom he acts) in respect of any tax or fee imposed by the tax law or by a law enacted pursuant to the authority of the tax law or article two-E of the general city law, which agreement shall be final and conclusive, and except upon a showing of fraud, malfeasance, or misrepresentation of a material fact: (a) the case shall not be reopened as to the matters agreed upon or the agreement modified, by an officer, employee, or agent of this state. . . .”

Accordingly, to meet the burden of proof, petitioner must prove the requirements for reopening the Closing Agreement, specifically that the written agreement was induced by fraud, malfeasance, or misrepresentation by the Division (*see Matter of Brahms*, Tax Appeals Tribunal, July 3, 1997, *confirmed* 256 AD2d 822 [1998]; *see also Matter of Rally Oil*, Tax Appeals Tribunal, January 17, 1991; *cf Matter of D & C Glass Corp.*, Tax Appeals Tribunal, June 11, 1992).

D. Petitioner alleges in his letter briefs that the Division committed malfeasance and misrepresented a material fact as a basis to reopen the closing agreement. Specifically, petitioner asserts that the Audit Division incorrectly stated that it explained the appeal rights to the vendor, when it never was done; the Audit Division failed to offer and provide him with a copy of the closing agreement for review with a Spanish speaking attorney in advance of its signing; and the Audit Division failed to offer him the closing agreement in his native language, Spanish, and upon his request. I have carefully reviewed the record in this matter and I do not find that the Division committed malfeasance or misrepresented a material fact either during the audit or at the May 11, 2011 meeting at which Mr. Cruz executed the closing agreement. During the sales tax audit, Mr. Cruz was represented by co-powers of attorney, i.e., Mr. Cuevas, tax preparer; and Mr. Stone, CPA, and Mr. Calamia, tax specialist, of Sales Tax Defense LLC. It is noted that Mr.

and Mrs. Cruz were represented by Mr. Stone, Jennifer Koo, Esq., and Mr. Calamia, of Sales Tax Defense LLC with respect to the income tax audit for the years 2007 through 2009 that was conducted simultaneously with the sales tax audit for the period December 1, 2006 through August 31, 2009. All audit issues, and terms of the closing agreements were discussed with Mr. Cruz's representatives as is the normal practice when a taxpayer has indicated that he wishes to have representation while under audit (*see* Finding of Fact 16). As noted, petitioner submitted two affidavits but did not appear at a hearing to offer testimony. In those affidavits, petitioner made numerous assertions, all of which sprang from his alleged need for translation services on audit because his understanding of the English language is limited and English is his second language. There is no question that competent evidence can be submitted by affidavit, as authorized by the Tribunal's regulations (20 NYCRR 3000.15[d][1]), and findings of fact may be made on the basis of affidavits (*see Matter of Orvis Co. v. Tax Appeals Tribunal*, 86 NY2d 165 [1995], *cert denied* 516 US 989 [1995]). However, statements made by affidavit are not subject to cross examination, thus precluding the opportunity for the trier of fact to observe the demeanor of the witness and assess the credibility of the statements made. Given the lack of opportunity for cross examination and observation of petitioner's demeanor on an issue that petitioner deemed crucial to the matter at hand, I afford no weight to petitioner's two affidavits (*id.*).

The record clearly shows that during the course of the sales tax and income tax audits, Mr. Cruz communicated with the auditors, indicated that he understood what was discussed with him by the auditors, did not indicate that he did not understand the English language, and never requested that any conversations or documents be translated into any other language. It also shows that on several occasions during the course of the sales tax audit, Ms. Gavin discussed the audit with Mr. Cruz's then representatives and they never indicated that Mr. Cruz had any issues

understanding the English language, the nature of the audit or the terms of the closing agreement. As the Division correctly pointed out, Mr. Cruz did have an attorney, Ms. Koo, a colleague of Mr. Stone's, representing him and Mrs. Cruz in the associated income tax matter, and she was available at any time for consultation regarding the closing agreement, the waiver of his protest rights and appeal procedures. Petitioner's then representative, Mr. Stone, set the appointment date for the execution of the closing agreements. He accompanied Mr. Cruz to the May 11, 2011 meeting at the Division's Suffolk District Office, at which the waiving of Mr. Cruz's protest rights and appeal procedures were explained to him before he signed the closing agreements. During that meeting, Mr. Cruz could have stopped the proceeding at any point in the process and asked for clarification if he did not understand, but he did not do so (*Matter of Roberts*, Tax Appeals Tribunal, July 14, 2011). Petitioner has failed to prove that the Division committed fraud, malfeasance, or misrepresentation of a material fact and, as a result, there is no reason to reopen the closing agreement for sales tax executed by Mr. Cruz (*Matter of Brahms*).

E. Petitioner also argues that the appointment of his representatives, Mark Stone and Joseph Calamia, was invalid thus making consents to extend the statutory assessment periods signed by those individuals, and thusly the closing agreement, invalid. He claims that the Power of Attorney appointing Mr. Stone and Mr. Calamia as his representatives with respect to the sales tax audit for the period at issue did not reference his proper taxpayer identification number. Petitioner's argument is without merit. The Division's regulations at 20 NYCRR 2390.1(d)(1) provide that a power of attorney should contain the following information: (i) the name and mailing address of the taxpayer; (ii) "the identification number of the taxpayer (*i.e.*, social security number or employer identification number)"; (iii) the name and mailing address of the representative(s); (iv) a description of the matter for which the representative is authorized to act

which, if applicable, should identify the type of taxes and the specific years or periods involved; and (v) if applicable, a clear expression of the taxpayer's intent to limit the authority conveyed.

In this matter, the executed power of attorney, appointing Mark Stone and Joseph Calamia as Mr. Cruz's representatives with respect to the sales and use tax matter for the period December 1, 2006 through August 31, 2009, listed Mr. Cruz's employer identification number and an Audit case number of X864057925. Since Mr. Cruz conducted business as a sole proprietorship, the correct taxpayer identification number was the sole proprietorship's employer identification number. As such, the power of attorney appointing Mr. Stone and Mr. Calamia as Mr. Cruz's representative was properly completed. Petitioner signed the first consent on December 18, 2009, which extended the period to assess sales and use taxes due for the period December 1, 2006 through February 28, 2009 until March 20, 2011. The second consent signed by petitioner's representative, Mr. Stone, extended the period in which to assess sales and use taxes due for the period December 1, 2006 through May 31, 2008 to June 20, 2011. The third consent executed by petitioner's representative, Mr. Calamia, extended the period in which to assess sales and use taxes due for the period December 1, 2006 through August 31, 2008 to September 20, 2011. The second and third consents were signed by Mr. Cruz's duly appointed representatives before the period of limitations for assessment expired and, therefore, are valid. The closing agreement for sales tax for the period December 1, 2006 through August 31, 2009, listing Mr. Cruz's employer identification number and the Audit Case number of X864057925, was signed by Mr. Cruz on May 11, 2011, well before the period of limitations expired.

F. Since petitioner failed to prove that the Division committed fraud, malfeasance, or misrepresentation of a material fact, there is no reason to reopen the closing agreement for sales tax for the period December 1, 2006 through August 31, 2009 executed by Mr. Cruz on May 11,

2011. As such, the Division of Tax Appeals lacks jurisdiction to hear the merits of this case (*see Matter of Roberts*).

G. The petition of Jose Cruz d/b/a Cruz El Bodegon is hereby dismissed; and the rejection of petitioner's refund claim is hereby sustained.

DATED: Albany, New York
October 15, 2015

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE