STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
HARRY'S EXXON SERVICE STATION	:	DECISION DTA NO. 801193
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, 1979 through August 31, 1982.	:	

Petitioner, Harry's Exxon Service Station, 18 Bradford Street, West Seneca, New York 14224, filed an exception to the determination of the Administrative Law Judge issued on January 22, 1988 with respect to its 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, 1979 through August 31, 1982 (File No. 801193). Petitioner appeared *pro se*. The Division appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

Neither party filed a brief on exception. Oral argument at the request of petitioner was heard on June 7, 1988.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether certain consents which extended the period of limitation for assessment of sales tax were illegally obtained from petitioner by the Division and, if so, the effect thereof on the assessment issued to petitioner.

II. Whether the Division of Taxation properly determined additional sales tax due from petitioner for the period at issue.

III. Whether a letter advising petitioner that no additional sales tax was due for the audit period, issued subsequent to an assessment for said period, serves to estop the Division from further administratively proceeding with the assessment, thereby canceling the same.

FINDINGS OF FACT

We find the facts as stated in the Administrative Law Judge's determination and such facts are incorporated herein by this reference except that we modify findings of fact "3", "4", "7" and "8" as stated below.

On March 20, 1984, the Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due in the amount of $10,503.00, plus penalty and interest, for a total amount due of $17,480.49 for the period June 1, 1979 through August 31, 1982.

Consents extending the period of limitation for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law were executed by Harry J. Eckert, owner of Harry's Exxon Service Station (hereinafter "petitioner"), as follows:

Date Executed	Taxable Period	Extension Date
9/14/82	6/l/79-8/31/79	12/20/82
12/14/82	6/l/79-11/30/79	6/20/83
3/19/83	6/l/79-2/28/80	9/20/83
6/15/83	6/l/79-5/31/80	9/20/83
8/27/83	6/l/79-8/31/80	12/20/83
12/13/83	6/l/79-11/30/80	3/20/84

The consent which indicated that it had been signed by Harry J. Eckert on March 19, 1983 was actually signed on Monday, March 21, 1983. The consent was stamped received by the

Division on March 18, 1983.

The Tribunal modifies finding of fact "3" as follows:

A field audit of petitioner commenced in February 1982. Records for a test period, the sales tax quarter ending November 30, 1980, were requested from petitioner. The test period was pursuant to office policy and not as a result of consent by the petitioner. According to the audit report, the records provided consisted of sales tax returns and related worksheets, Federal and State income tax returns and worksheets, depreciation schedules, cash receipts and purchase journals, purchase invoices for tires, batteries and accessories, and cancelled checks. The audit report indicates the records were in fair condition, however, records pertaining to gasoline purchases were not provided by petitioner. For this quarter, petitioner had reported gasoline sales of 41,303 gallons. Purchase records for the quarter, which had previously been obtained by the Division from petitioner's supplier, Exxon Company, U.S.A. ("Exxon"), indicated that petitioner had purchased 59,250 gallons for the quarter. The difference between the amount reported sold and the amount purchased (17,947 gallons) exceeded petitioner's storage capacity. The auditors returned to the service station and "discussed" this discrepancy with petitioner and "suggested" additional records would be required if he was not in agreement with the projected sales from the test period. A fire which occurred on February 28, 1982 had caused severe damage to the station.[1] Books and records which the petitioner had brought from his home to the station were destroyed in the fire. In September 1982, the Division requested petitioner's record of purchases from Exxon for the entire audit period. Such records were provided to the Division in June 1983.

The Tribunal modifies finding of fact "4" as follows:

On October 13, 1983, a Statement of Proposed Audit Adjustment was issued to petitioner in the amount of $12,089.98 for the period at issue. Petitioner's gasoline purchases as obtained from Exxon were marked up using the statewide average retail selling price contained in a Sales Tax District Office Audit Bureau memorandum dated December 7, 1982. For the period at issue, petitioner's gasoline purchases were determined to be 619,700 gallons. Subsequent to the issuance of the aforesaid Statement of Proposed Audit Adjustment, the Division allowed petitioner a 10 percent pump loss for the period December 1, 1980 through November 30, 1981 which reduced gallons available for sale by 15,360. This pump loss allowance was based upon a letter from Rockelman & Henn, a pump repair company, which stated that such loss had

[1]The basic field incident report of the fire filed by the Winchester Fire Department indicates the cause of the fire was a faulty furnace.

> occurred but had been corrected in the latter part of 1981. This allowance resulted in a reduction of tax due in the amount of $1,586.93. Sales of tires, batteries, accessories and labor were obtained from petitioner's books for the quarter ending November 30, 1980 ($2,973.00) and were projected throughout the entire audit period. Total taxable sales were, therefore, determined to be $727,940.00.[2] After giving petitioner credit for sales tax paid, additional tax in the amount of $10,503.00 was determined to be due by the Division of Taxation. This amount would be reduced by the modifications made herein.

Petitioner had two gasoline islands with three pumps on each island. One island was for self-service pumping, the other for full service. The pumps were of the older variety and were not equipped to handle sales when the price of gasoline rose to $1.00 or more per gallon. To remedy this situation, petitioner's pumps were set at one-half of the actual price per gallon and signs were posted to alert customers that the amount due on gasoline purchases was actually twice the amount indicated on the pumps. Approximately $15.00 per week was lost by petitioner due to self-service customers paying only the amount shown on the pumps.

Due to the fact that petitioner was prohibited by State law from having 'hold-open' devices on its self-service pumps, i.e., devices which permit the customer to pump until full without holding onto the pump handle, approximately 25 gallons per month were spilled by customers who refused to pay for this spillage.

The Tribunal modifies finding of fact "7" as follows.

> Petitioner's pumps were of the older variety. The computers in the pumps were driven by an electric motor through a belt system which, because of the age thereof, caused calibration problems. For the entire period of the audit, the pumps were giving away 1.25 gallons for every gallon sold. This problem was not corrected until sometime after the audit period. The problem existed for the entire

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[2]Since the station was closed for repairs for the quarter ending May 31, 1982, the total amount for repairs for the period has been reduced by $2,973.00. In addition, the auditor overstated taxable gasoline sales for the period ended February 28, 1982 by $22,136.00. 31,700 gallons at $1.18 per gallon was computed to equal $59,818.00. The correct amount was $37,682.00

> period. The loss average was 1.25 gallons for each 10 gallons pumped. For the entire period petitioner's pump loss totalled 77,462 gallons (619,700 x 12.5%).

The Tribunal modifies finding of fact "8" as follows:

> Petitioner filed a petition contesting the assessment in May 1984. On July 13, 1984, the Chief, Sales Tax Audit Section of the Buffalo District Office issued a letter to petitioner. The letter was addressed specifically to petitioner and all of the information contained in the letter was correct on its face, including the petitioner's taxpayer identification number and the audit period. The body of the letter stated:
>
> > "We have completed a New York State Sales Tax audit of your records for the period June 1979 through August 1982, and we have concluded that no additional sales or use taxes are due.
> >
> > "We would like to thank you for your cooperation during the course of this audit."

In addition to the facts found by the Administrative Law Judge, we find the following additional facts.

According to the audit report, petitioner had no prior audit history.

A letter dated March 20, 1984 which bore the signature of the Chief of the Sales Tax Audit Section of the Buffalo District Office was sent to petitioner explaining the methodology used in the audit of his business.

The July 13, 1984 letter also bore the signature of the Chief of the Sales Tax Audit Section of the Buffalo District Office. The Division asserted that the letter was issued, in error, by a stenographer in the Sales Tax Section of the Buffalo District Office approximately four months after issuance to petitioner of the notice of determination and demand. The Division did not explain the office procedures concerning the issuance of such letters nor the instructions apparently misinterpreted by the stenographer which led to the issuance of the letter. The Division did not demonstrate when the error was discovered or, that when discovered, that any

effort was made to notify petitioner of the error.

There was no contact between the Division and petitioner until petitioner received a notice of pre-hearing conference dated July 15, 1985, approximately one year later. In the interim, petitioner's accountant was given a copy of the letter by petitioner and, upon relocating to a smaller office in May 1985, destroyed certain personal tax records of the petitioner. The accountant testified that the records would have been helpful to petitioner at hearing. The accountant testified he destroyed such records because he believed the audit was closed and no-tax was due. The accountant's testimony on the destruction of the records was uncontroverted. Petitioner's accountant dealt only with petitioner's income and business tax returns and did not prepare petitioner's sales tax returns. However, in November 1983, the accountant, at the request of petitioner and based on records in his possession and using the same purchase records from Exxon, as used by the Division in its estimate of petitioner's liability, prepared an analysis of petitioner's sales tax liability from available records which concluded no sales tax was due. The analysis was submitted to the Division in February 1984. The analysis was rejected by the Division because it was based on a greater amount of gallons lost through pump malfunction, theft and evaporation than the the Division was prepared to allow. Petitioner's attorney filed a power of attorney on August 17, 1985.

OPINION

We deal first with the validity of certain consents which extended the period of limitation for assessment of sales tax. We f ind no evidence to substantiate petitioner's assertion that the audit was started prior to February 1982 and that several consents in addition to those submitted in this proceeding were obtained from petitioner after the statute of limitations had expired and

were backdated by the Division. With regard to the consents introduced in this proceeding, one consent was actually signed on March 21, 1983, dated March 19, 1983 and back stamped as received by the Division on March 18, 1983. The Administrative Law Judge determined that this consent was valid since it was executed before the expiration of the statute of limitations, i.e., March 21, 1983.[3] We agree. However, the practice of back dating consents, is one which, even if agreed to by a taxpayer, is fraught with problems as evidenced by the petitioner's assertions herein.

We deal next with whether the Division properly determined additional sales tax due from petitioner for the period at issue.

The decision in Chartair, Inc. v. State Tax Commn, (65 AD2d 44) makes it clear that resort to external indices as a method of computing sales tax liability must be founded on a determination of the insufficiency of the taxpayer's record keeping which makes it virtually impossible to verify sales receipts and conduct an audit. There must be an actual request for the taxpayer's books and records (Matter of Christ Cella, Inc. v. State Tax Commn., 102 AD2d 352) for the entire period of the assessment (Matter of Adamides v. Chu, 134 AD2d 776, lv to appeal denied 71 NY2d 806) and the Division must make a thorough examination of such records (Matter of King Crab Restaurant, Inc. v. Chu, 134 AD2d 51 [3d Dept. 1987]) before proceeding to external indices to determine the taxpayer's sales tax liability.

If persons required to collect taxes neglect to keep the requisite records, the method devised to ascertain taxes due is sufficient if it is "reasonably calculated" to reflect the taxes due

[3]March 20, 1983 was the last day for execution of the consent. However, since the 20th was a Sunday, the period was extended by one day to the 21st pursuant to Tax Law § 1147(3).

(Matter of Grant Co. v. Joseph, 2 NY2d 196, 206; see also, Matter of Meskouris Brothers, Inc., 139 AD2d 813). Here, petitioner's books and records for the quarter ending November 30, 1982 were examined and determined to be inadequate. The Division requested additional books and records from petitioner. It is acknowledged that the petitioner's books and records for the remainder of the audit period were destroyed in the February 28, 1982 fire. Accordingly, the Division was proper in resorting to external indices to estimate petitioner's liability.

We deal next with whether the issuance of the letter advising petitioner that no additional sales tax was due for the audit period estops the Division from seeking to collect these taxes. The elements of the estoppel issue in this proceeding are whether petitioner was entitled to rely on the letter, did he in fact rely on the letter to his detriment and does such reliance under the facts and circumstances of this case estop the Division from asserting sales tax liability. The petitioner asserts that he relied to his detriment on the July 13, 1984 letter. The Division asserts petitioner was not entitled to rely on the letter, and that in any event he did not rely on it to his detriment. The Administrative Law Judge determined that petitioner did not substantiate his assertion that he relied on the letter to his detriment. We reverse the determination of the Administrative Law Judge.

As a general proposition, the doctrine of estoppel is not applicable to governmental acts absent a showing of exceptional facts which require its application to avoid a manifest injustice (Matter of Sheppard-Po11ack, Inc. v. Tully, 64 AD2d 296, 298; Matter of Turner Construction Co. v. State Tax Commn., AD2d 201, 203). The doctrine as it applies to tax matters was concisely stated in Schuster v. Commissioner (312 F2d 311 [9th Cir 1962]). There the Court, after recognizing that estoppel should be applied against the Government with utmost caution

and restraint, stated:

> "It is conceivable that a person might sustain such a profound and unconscionable injury in reliance on the Commissioner's action as to require, in accordance with any sense of justice and fair play, that the Commissioner not be allowed to inflict the injury. It is to be emphasized that such situations must necessarily be rare, for the policy in favor of an efficient collection of the public revenue outweighs the policy of the estoppel doctrine in its usual and customary context." (Schuster v, Commissioner, supra, at 317.)

Exceptions to the doctrine have indeed been rare and limited to unusual fact situations (see, Belton v. Commissioner, 562 F Supp 30 [1982]; Haber v. United States, 831 F2d 1051 [1987]; Parrish v. Loeb, 558 F Supp 921 [1982]; Eden v. Bd. of Trustees, 49 AD2d 277; Bender v. New York City Health and Hospitals Corp)., 38 NY2d 662).

Applying these principles to the facts in this case, we conclude that petitioner was entitled to rely on the letter at least until informed it was issued in error, that he did so rely on it to his detriment and, as a result, the Division is estopped from asserting sales tax liability.

We deal first with whether petitioner could reasonably rely on the letter.

The letter in question is one routinely sent by the Division of Taxation to inform taxpayers who have been involved in an audit that the Division's audit activity is concluded and no tax is due. In this case, petitioner had no prior audit history. The audit of petitioner's gasoline station consumed 26 months during which time petitioner consistently dealt with the Division of Taxation through the Buffalo District Office, signing several extensions allowing the audit to proceed, providing books and records to the Division and receiving correspondence from the Division which bore the signature of the Chief of the Sales Tax Audit Section of the Buffalo District Office. Petitioner steadfastly maintained throughout this period that the proper tax had been paid to the State and that any difference in gallons purchased from gallons sold was due primarily to

pump malfunction -- a factor recognized by the Division which allowed a 10% pump loss for the period December 1, 1980 through November 30, 1981, the Administrative Law Judge who allowed such loss from December 1, 1981 through the end of the audit period, August 31, 1982 and this Tribunal which found the facts justified such loss for the entire period of the audit. The July 13, 1984 letter indicated the audit was completed and no additional sales or use taxes were due.

While the Division now asserts the letter was issued as a result of stenographic error, that fact is not evident from the face of the letter or from any other facts reasonably available to the petitioner (cf. , Matter of Moog, Inc. v. Tully, 105 AD2d 982; Matter of Adirondack Steel Casting Company Inc. v. State Tax Commn., 121 AD2d 834).

The letter was properly addressed to the petitioner. It was not computer generated but typed and it bore the signature of the Chief of the Sales Tax Audit Section of the Buffalo District Office as did the March 20, 1984 letter previously received by petitioner.

The Division did not explain the office procedures concerning the issuance of such letters nor the instructions apparently misinterpreted by the stenographer which led to the issuance of the letter. Moreover, the Division did not explain when the error was discovered or that when discovered that any effort was made to notify petitioner of the error. In fact, petitioner was not so informed until after one year had elapsed and then only in response to an inquiry by the petitioner when he received a notice of pre-hearing conference, not by action initiated by the Division.

It seems obvious and reasonable that the Division use such letters as a convenient means to conclude audit activity. It also seems obvious that the Division must reasonably expect that

taxpayers involved in audit activity will accept letters concluding such activity at face value and conduct their personal and business affairs accordingly, at least until informed otherwise. To expect that petitioner, under the circumstances in this case, would act otherwise and not rely on the content of the letter strains fundamental notions of common sense and fairness.

We next address the issue of whether petitioner relied on the letter to his detriment. We conclude he did.

In the one year period between the issuance of the letter and the notice of pre-hearing conference from the Division, the petitioner had provided his accountant with a copy of the letter. When the accountant moved to a smaller office in May of 1985 he disposed of certain of petitioner's tax records in reliance on the letter and with the understanding the case was closed. The accountant testified that the records would have been helpful to petitioner in challenging the sales tax liability asserted by the Division. While no evidence other than the accountant's testimony was offered substantiating destruction of the records, it is difficult to conceive of what other type of evidence could be available to document this fact.

It must be remembered that petitioner bore the burden of proving that the Division's assertion of liability was erroneous (Matter of Surface Line 0perators Fraternal Orzanization, Inc. v. Tully, 85 AD2d 858, 859).

We need not speculate here as to the probative value of these records. We realize that these records were not the original source documents of petitioner's business and thus could at best offer indirect proof of the business activity. However, since petitioner's business records were destroyed, through no fault of petitioner, it was necessary for petitioner to resort to such indirect evidence. The important fact is that the records were not available to petitioner because of

actions taken by his accountant in reliance on the letter. Under these circumstances, we conclude petitioner relied on the letter to his detriment and that his ability to meet the burden of proof imposed upon him was severely impaired by the Division's actions. On these facts, we conclude it would be manifestly unjust to allow the Division to assert liability against the petitioner. In so concluding, we wish to make it clear that we are persuaded by the exceptional facts and circumstances of this case. In no way should our decision be read as diminishing the vitality of the general rule that the doctrine of estoppel is not applicable to the Division of Taxation acting in its governmental capacity.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner, Harry's Exxon Service Station, is granted;

2. The determination of the Administrative Law Judge is reversed; and

3. The petition of Harry's Exxon Service Station is granted and the Notice of Determination issued on March 20, 1984 is cancelled.

Dated: Albany, New York
DEC 06 1988

_____
John P. Dugan
President

_____
Francis R. Koenig
Commissioner