

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
STODDARD COMMUNICATIONS, INC. :
D/B/A SATELLITE COMMUNICATIONS :
for Revision of a Determination or for Refund :
or Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period September 1, 1979 :
through February 29, 1984. :

DECISION

In the Matter of the Petition :
of :
DANIEL STODDARD OFFICER OF :
STODDARD COMMUNICATIONS, INC. :
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, 1979 :
through February 29, 1984. :

Petitioners Stoddard Communications, Inc. d/b/a Satellite Communications and Daniel Stoddard, Officer of Stoddard Communications, Inc., 45 Church Street, Freeport, New York 11520, filed an exception to the determination of the Administrative Law Judge issued on December 14, 1989 with respect to their 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, 1979 through February 29, 1984 (File Nos. 801778 and 801777). Petitioners appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Michael Glannon, Esq., of counsel).

Petitioners filed a brief on exception. The Division filed an Exception Response Brief. Oral argument was requested but not granted.

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

ISSUE

Whether the sale of telephone equipment by the corporate petitioner was exempt from the imposition of sales and use taxes under Tax Law § 1115(a)(12).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and such facts are stated below.

Petitioner Stoddard Communications, Inc. ("the corporation"), which did business as Satellite Communications, sold, installed and serviced private telephone systems during the period at issue. Petitioner Daniel Stoddard, president of the corporation, at the hearing of this matter, conceded that he would be personally liable for any sales and use taxes determined to be due from the corporation. Mr. Stoddard had previously worked for New York Telephone as an installer and an installation foreman. When other than regulated companies were allowed to sell and service telephone systems, he went to work for a company called Telecom Plus. Subsequently, he started his own company, Stoddard Communications, Inc., to sell, install, maintain and repair telephone equipment and was president of the corporation throughout the period at issue.

During the approximately four and one-half year period at issue, the corporation reported taxable sales of \$4,791,109.00.

On November 14, 1984, the Division of Taxation issued four notices of determination and demands for payment of sales and use taxes due, two against Stoddard Communications, Inc. d/b/a Satellite Communications for the periods September 1, 1979 through February 28, 1983 and March 1, 1983 through February 29, 1984 showing tax due of \$153,271.22 and \$62,135.05, plus penalty and interest, respectively, and two against Daniel Stoddard, as officer of the corporation, for corresponding periods and amounts.

Of the total tax deficiency asserted against petitioners of \$215,406.27 (\$153,271.22 for the period September 1, 1979 through February 28, 1983 plus \$62,135.05 for the period March 1, 1983 through February 29, 1984), petitioners conceded that some tax was due and paid the following: \$3,162.63 on disallowed nontaxable sales, \$3,494.54 on the purchase of materials used in capital improvements, \$11,555.51 from the corporation's sales tax accrual account, and \$2,146.80 on recurring purchases for the corporation's own use. The amount that remains in dispute, \$195,046.79, represents additional sales tax asserted to be due on the sale of telephone systems. The telephone systems were described by the auditor as the equipment, the wiring, the switchboards and other property required to establish telephone service. The corporation hooked the customer into the telephone company's lines so that petitioners provided the system only, while the telephone company provided the telephone service.

The audit workpapers detailed the calculation of the additional tax asserted due on the sale of telephone systems by petitioners as follows:

<u>Period Ending</u>	<u>Total Taxable Sales</u>	<u>Adjustment for Correct Tax Rate</u>	<u>Tax Due</u>
11/30/80	\$ 261,763	2%	\$ 5,235.26
2/28/81	47,527	2%	950.54
5/31/81	352,816	4%	14,112.64
8/31/81	293,713	4%	11,748.52
11/30/81	687,585	4 ¹ / ₄ %	29,222.36
2/28/82	200,947	4 ¹ / ₄ %	8,540.25
5/31/82	305,956	4 ¹ / ₄ %	13,003.13
8/31/82	350,432	4 ¹ / ₄ %	14,893.36
11/30/82	527,031	4 ¹ / ₄ %	22,398.82
2/28/83	331,027	4 ¹ / ₄ %	14,068.65
5/31/83	559,929	4 ¹ / ₄ %	23,796.98
8/31/83	256,698	4 ¹ / ₄ %	10,909.67
11/30/83	305,017	4 ¹ / ₄ %	12,963.22
2/29/84	<u>310,668</u>	4 ¹ / ₄ %	<u>13,203.39</u>
Total	<u>\$4,791,109</u>		<u>\$195,046.79</u>

The amounts shown under the column "Total Taxable Sales" were taken from the corporation's sales tax returns. Petitioners had treated all of the sales reported from September 1, 1980 through February 29, 1984 as subject to the so-called manufacturer's exemption under Tax Law § 1115(a)(12), and accordingly charged a lower tax rate.

In or about July 1980, the Taxpayer Services Division issued a "Notice", a copy of which was sent to the corporation, noting, in part, as follows:

"Effective September 1, 1980, the statewide sales and use tax rate on certain parts, tools, supplies used or consumed in production and services to tangible personal property used or consumed in production is reduced to 2%.

The reduced rate of sales and use tax applies to:

* * *

B. ...

2. Installing, repairing, maintaining or servicing telephone and telegraph central office equipment and station apparatus used directly and predominantly in receiving at destination or initiating and switching telephone or telegraph communication . . ."

Daniel Stoddard reviewed this notice with his accountant, Maurice Mauner, who then advised him that the lesser sales tax rate could be charged on the corporation's sales of telephone systems. The corporation had been charging the full sales tax rate on its sale of telephone systems prior to its receipt of this notice.

The Audit Report Log shows that on August 30, 1982, the auditor advised petitioners' accountant that the Division of Taxation did not agree to any of the reduced rates charged by the corporation on its sale of telephone systems and that he thought they should be charging the full sales tax rates. The accountant replied that he felt they were correct and that he could substantiate petitioners' position. Apparently, the auditor's position was not conveyed by Mr. Mauner to Daniel Stoddard who testified that "Mauner never, to my knowledge, never told Forman¹ or myself that we were charging tax incorrectly . . . "

Although Daniel Stoddard created a business that had multi-million dollar sales during the period at issue, he was not a sophisticated businessman. As noted in Finding of Fact "1", supra, his background was in the technical aspects of the telephone industry. His credible testimony was that he "collected what I believed to be the proper amount. I did not receive any guidance that it was wrong."

¹Donald Forman was the vice president of the corporation.

OPINION

In the determination below the Administrative Law Judge held petitioners' sales of telephone systems did not qualify for the Tax Law § 1115(a)(12) sales tax exemption.² However, the Administrative Law Judge abated penalties and interest in excess of the minimum after finding that the petitioners' "failure to collect the proper amount of sales tax on the sale of telephone equipment was not willful."

On exception, petitioners Stoddard Communications, Inc. d/b/a Satellite Communications and Daniel Stoddard, Officer of Stoddard Communications, Inc. allege that the New York State Department of Taxation and Finance must share in the blame due to: (1) its failure to review twenty (20) sales tax returns filed over a five (5) year period; (2) its failure to act in a timely fashion to correct a poorly-worded Notice; (3) the refusal on the part of the New York State Department of Taxation and Finance employees to inform Stoddard Communications' officers of tax deficiencies; and (4) the long, drawn-out audit process. Petitioners allege all of the above materially contributed to the underpayment of tax.

In response, the Division argues: (1) it should not be estopped from enforcing the Tax Law; (2) it is not required by the Tax Law to advise taxpayers upon the filing of sales tax returns whether those returns are correct; and (3) the Administrative Law Judge's determination should be sustained in all respects.

We affirm the determination of the Administrative Law Judge.

Section 1138(a) of the Tax Law provides that if a sales tax return "is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the commissioner of taxation and finance from such information as may be available." The burden then rests upon the taxpayer to demonstrate that the method of audit or the amount of the tax assessed was erroneous (Surface Line Operators Fraternal Org. v. Tully, 85 AD2d 858, 446 NYS2d 451).

Section 1132(c) of the Tax Law provides that:

²This same conclusion was recently reached on similar facts in Eastern Kodak Co. v. Department of Taxation (Sup Ct, Monroe County, Nov. 22, 1989 Siracuse, J.).

"[f]or the purpose of the proper administration of this article and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property or services of any type mentioned in subdivisions (a) of section eleven hundred five . . . , are subject to tax until the contrary is established, and the burden of proving that any receipt . . . is not taxable hereunder shall be upon the person required to collect tax . . ." (emphasis added).

20 NYCRR 3000.10(d)(4) states: "[T]he burden of proof shall be upon the petitioner, except as otherwise provided by law."

The record before us is clear. Petitioners have failed in their burden of proof and now attempt to shift this burden to the Division. We find no merit in and are unpersuaded by petitioners' argument that mere acceptance by the Department of filed returns can be construed as estopping the Division from collecting taxes properly due and owing the State. The Tax Law should be enforced fully and "the general rule that estoppel cannot be employed against the State or governmental subdivision is particularly applicable with respect to the Tax Commission" (Matter of Turner Constr. Co. v. State Tax Commn., 57 AD2d 201, 394 NYS2d 78, 80). Further, estoppel is only applicable when it is necessary to prevent manifest injustice (see, Matter of Sachs New York v. Tully, 79 AD2d 1056, 435 NYS2d 172). Such is not the case here as there are no facts to support a finding of such manifest injustice, rather any injustice may be deemed to have been self-imposed.

While petitioners refer to a poorly-worded notice and a long drawn out audit, petitioners' representative (accountant) was made aware on August 30, 1982 by the Division's auditor that he thought they should be charging the full sales tax rates. Further, neither petitioners nor their representative requested an advisory opinion under Tax Law § 171(Twenty-fourth) as to the correct tax due on the sale of telephone systems.

We find no basis in the record before us for modifying the Administrative Law Judge's determination in any respect and therefore affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Stoddard Communications, Inc. d/b/a Satellite Communications and Daniel Stoddard, Officer of Stoddard Communications, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of Stoddard Communications, Inc. d/b/a Satellite Communications and Daniel Stoddard, Officer of Stoddard Communications, Inc. are granted to the extent indicated in conclusions of law "G" and "H" of the determination of the Administrative Law Judge but are otherwise denied; and
4. The Division of Taxation is directed to modify the notices of determination dated November 14, 1984 in accordance with paragraph "3" above but such notices are otherwise sustained.

DATED: Troy, New York
August 30, 1990

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner