

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**GIUSEPPA AND BENEDETTO** :  
**ROMANO (PARTNERS)** : DECISION  
**D/B/A BENNY'S PIZZA** :  
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, 1976 :  
through November 30, 1984. :

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Petitioners, Giuseppa and Benedetto Romano (Partners) d/b/a Benny's Pizza, 141-75 11th Avenue, Malba, New York 11357, filed an exception to the determination of the Administrative Law Judge issued on April 27, 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 June 1, 1976 through November 30, 1984 (File Nos. 802464 and 802465). Petitioners appeared by Murray Appleman, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Michael Gitter, Esq., of counsel).

Petitioners did not file a brief on exception. The Division submitted a letter in lieu of a brief.

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

***ISSUE***

Whether the sales tax assessment issued against petitioner, Giuseppa Romano, should be cancelled.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge and such facts are set forth below. We also find a fact in addition to those found by the Administrative Law Judge as indicated below.

On June 3, 1985, the Division of Taxation issued a series of notices of determination and demands for payment of sales and use taxes due to petitioners, Giuseppa Romano d/b/a Benny's Pizza and Benedetto Romano, Partner of Benny's Pizza. These notices span in the aggregate the period June 1, 1976 through November 30, 1984, and reflect the assessment of sales tax against each of the petitioners in the aggregate amount of \$171,441.51, plus penalty (Tax Law § 1145 former [a][1]), plus interest. These notices are based on the results of a Division of Taxation field audit of the operation of a pizzeria located at 44-13 Queens Boulevard, Sunnyside, New York, as described hereinafter.

In or about mid-July of 1984, the Division of Taxation determined to conduct an audit of the operation of a pizzeria located at 44-13 Queens Boulevard, Sunnyside, New York. On July 16, 1984, a Division of Taxation auditor issued an audit appointment letter to Benny's Pizza at the 44-13 Queens Boulevard address indicating that an audit was scheduled for Friday, August 3, 1984 at 9:30 A.M. at the business premises. This letter requested that petitioner have available all books and records pertaining to sales tax liability for the period under audit. These records were to include all journals, ledgers, sales invoices, purchase invoices, cash register tapes, exemption certificates and all other sales tax records. The letter further specified that the period under audit covered March 1, 1982 through May 31, 1984.

On July 19, 1984, the auditor visited the business premises. The auditor noted that the business was located on a busy thoroughfare, and that the premises included a counter for ordering, four tables (each with four chairs) and also a window to the outside from which take-out orders could be placed. The auditor observed that the business sold pizza (whole and by the

slice), soda, ices and some other foods including veal parmigiana, eggplant parmigiana and sausage rolls.

On or about July 30, 1984, the auditor was contacted by one Laurie Russo, a certified public accountant, who advised that she was petitioners' representative and requested cancellation of the scheduled August 3, 1984 audit appointment. The auditor agreed to the cancellation and rescheduled the matter for audit examination on August 24, 1984. This rescheduled date was confirmed by a second audit appointment letter dated August 1, 1984. This letter again requested that petitioners have available all books and records pertaining to their sales tax liability and also specified that the period under audit spanned March 1, 1982 through May 31, 1984.

In response to the second audit appointment letter, the auditor was again contacted by Ms. Russo, by telephone on August 21, 1984, requesting a postponement until September 10, 1984. Again, postponement was granted with the audit rescheduled for September 10, 1984. This third scheduled audit appointment was thereafter cancelled by Ms. Russo on September 7, 1984. At this time, the auditor was also advised that there were no records available relative to the operation of Benny's Pizza, and was given no indication as to when any records would be available. By letter issued to Ms. Russo and to Benny's Pizza dated September 13, 1984, the auditor advised that failure to furnish the required records for audit within a two-week period would result in the use of external indices in an effort to verify the accuracy of petitioners' sales tax liability as reported. No records were submitted within such two-week period, nor have any records been submitted at any time through the present.

On January 15, 1985, the auditor issued a letter to petitioners at the 44-13 Queens Boulevard address indicating that the auditor had been attempting for several months to contact the owners of Benny's Pizza to conduct an audit. The letter noted the auditor had not been given any records for the business and explained that failure to immediately provide such records would result in the issuance of an assessment based upon external indices. This letter

specifically noted that the sales tax audit period spanned March 1, 1982 through November 30, 1984 (an extension to the audit period from the original ending date of May 31, 1984).

Faced with the unavailability of any records, the auditor determined to utilize external indices in conjunction with a test period as a means of verifying the accuracy of petitioners' sales tax liability as reported. The auditor obtained third-party information from one of petitioners' suppliers, specifically verification of the amount of flour and cheese purchased by petitioner for the quarterly period ended May 31, 1982. On September 20, 1984, the auditor conducted an observation of sales at the premises during the hours 11:00 A.M. through 4:00 P.M. Finally, the auditor obtained from petitioners' landlord a copy of the lease to the premises.

The auditor based his computation of sales upon the amount of flour purchased, the amount of flour used in the production of one pizza (one pound), and upon projections as to the number of whole pizzas, slices of pizza and other items sold, based on the September 20, 1984 observation. Using this method, the auditor determined taxable sales for the test quarter ended May 31, 1982 to be \$31,803.50. Comparing this amount to the sales reported for such quarter (per sales tax returns filed by petitioner) revealed that petitioner underreported sales by some 837.59 percent. The auditor projected this underreporting percentage against reported sales for the period spanning March 1, 1982 through November 30, 1984 (\$86,008.00) to arrive at additional taxable sales for such period in the amount of \$720,396.00.

The auditor was uncertain as to when petitioners had commenced doing business. Accordingly, the auditor reviewed the lease to the premises. Said lease, in the name of 44-13 Queens Boulevard Corporation ("the corporation"), commenced June 1, 1976 and was to continue through May 31, 1986. Under the terms of the lease, the corporation was to operate a pizzeria at the premises. The auditor thus assumed that petitioners began doing business on June 1, 1976, notwithstanding the fact that there was no record of petitioners registering as vendors prior to March 1, 1982. The auditor estimated sales for the period spanning June 1, 1976 through March 1, 1982 by taking the total rent paid under the lease for the period March 1, 1982 through November 30, 1984 and dividing such amount by the amount of total sales (both audited

and reported) for the same period to arrive at a rental ratio of 2.52 percent. The auditor then divided the rent paid per lease for the period June 1, 1976 through February 28, 1982 by said rental ratio to arrive at additional taxable sales for the period June 1, 1976 through February 28, 1982 in the amount of \$1,395,832.00. The auditor combined this latter amount with the amount of additional sales found for the period spanning March 1, 1982 through November 30, 1984 to arrive at total sales for the entire period in the amount of \$2,116,228.00. In turn, sales tax due on this amount was computed to be \$171,441.51, and was assessed against petitioners. In addition to the sales tax assessment, the auditor recommended the inclusion of a penalty in view of the fact that the petitioners "did not cooperate" in the conduct of the audit, failed to submit any records, had substantially underreported taxable sales and tax liability, and had apparently failed to register for sales tax purposes immediately upon the commencement of business.

Petitioners offered no specific challenge to the audit methodology employed herein. Further, neither of the individual petitioners (the Romanos) appeared or gave testimony at the hearing. The only evidence submitted by petitioners at hearing was a certificate of incorporation for the corporation indicating that the corporation was incorporated on June 9, 1976 and that, as noted, among its purposes was the operation of a restaurant and pizzeria business.

The lease to the premises was initially entered into between one Felice Schwartz d/b/a Plymouth Apartments and 44-13 Queens Boulevard Corporation. However, also introduced in evidence was a cover sheet indicating an assignment of the lease from the corporation to Giuseppa Romano. This cover sheet indicates that the assignment was consented to by Felice Schwartz on behalf of Plymouth Apartments in "June-July 1978". The specifics of the assignment were not included, with the only other documentation attached thereto being a page for acknowledgment of signatures before a notary public. Such acknowledgments indicate the persons signing to be Giuseppa Romano and Nicola Romano, respectively. Each indicates the assignment date as June 30, 1978, and bears the signature of a notary public. However, the actual signature page on the assignment was not included in evidence and the signatures of Giuseppa Romano and Nicola Romano are not shown on those documents in evidence. On the

acknowledgment, Nicola Romano is listed as president of the corporation. No further evidence as to Nicola Romano or his relationship, if any, to petitioners herein was furnished.

No sales and use tax returns were filed for Benny's Pizza prior to the quarterly period beginning March 1, 1982. Returns filed for the quarterly periods ended May 31, 1982, August 31, 1982, February 28, 1983 and May 31, 1983 were filed in the name of "Giuseppa Romano; Benny's Pizza" or "Benny's Pizza". Each of such returns bears the signature of Benedetto Romano and reflects the title "owner" or "pres.". The auditor observed a sign at the premises indicating the name "Boulevard Pizza". However, neither Boulevard Pizza nor 44-13 Queens Boulevard Corporation were registered as vendors for sales tax purposes, and the auditor found no evidence of sales tax returns having been filed for either of such entities.

In addition to the facts found by the Administrative Law Judge we find that a certificate of registration (form ST-105.1A) was filed with the Sales Tax Bureau for Benny's Pizza which is dated March 1, 1982 and contains the printed name of Giuseppa Romano as an owner and/or principal officer of Benny's Pizza.

#### ***OPINION***

In the determination below the Administrative Law Judge decided that all of the assessments at issue were timely issued. Further, it was concluded that petitioners did not maintain a complete, adequate and accurate set of records of sales so that the Division was justified in resorting to external indices to estimate petitioners' sales tax liability after having made a request for such records. The Division's estimation procedures were upheld as they were not objected to by petitioners. Additionally, the argument that other parties rather than petitioners may have operated the business was rejected in light of certain evidence to the contrary. Lastly, a portion of the period under assessment was cancelled as it was concluded that the Division failed to properly make a request for records for such period.

On exception petitioners argue only that nothing in the record substantiates petitioner Giuseppa Romano's ownership in the business at issue. Specifically, petitioners note that the only signature on the returns indicating corporate liability are those of Benedetto Romano.

In response the Division argues that Giuseppa Romano was an individual responsible for the collection of taxes. As support for this contention, the Division relies on the following facts: (1) the sales tax registration form for Benny's Pizza was in her name, (2) her name appeared on the cover page for an assignment of lease, (3) her name appeared on a notarized acknowledgement dated the same day as the assignment of lease cover page, and (4) the caption on the May 31, 1988 sales tax return read "Giuseppa Romano, Benny's Pizza".

We affirm the determination of the Administrative Law Judge.

When protesting a sales tax assessment, the petitioner bears the burden of proving that the assessment is erroneous (Surface Line Operators Fraternal Organization v. Tully, 85 AD2d 858, 446 NYS2d 451; Allied New York Services, Inc. v. Tully, 83 AD2d 727, 442 NYS2d 624; Matter of Cousins Service Station, Inc., Tax Appeals Tribunal, August 11, 1988; 20 NYCRR 3000.10[d][4]). In particular, "once an assessment has been made, the burden of proof is on the taxpayer to show it was not properly applied to him" (Petrolane Northeast Gas Service, Inc. v. State Tax Commn., 79 AD2d 1043, 435 NYS2d 187, 189).

In the present case the exception is limited to the contention that nothing in the record supports petitioner Giuseppa Romano's ownership in Benny's Pizza. Absent from the exception is any claim with regard to the determination of the Administrative Law Judge as far as it concerned petitioner Benedetto Romano. Accordingly, our decision concerns only whether petitioner Giuseppa Romano (hereinafter petitioner) has met her burden of proof to overcome the assessment issued against her. We conclude that she has not met her burden of overcoming the assessment as issued.

A review of the record indicates that petitioner's attempt to overcome the assessment merely consisted of the claim that the Division failed to prove that she was the owner of Benny's Pizza. Apart from this claim, petitioner failed to present any proof in the form of testimony, affidavits or otherwise which support a claim that she was not properly issued the assessment before us. Such a lack of evidence fails to satisfy the burden which petitioner carries to overcome the assessment issued against her (see, Surface Line Operators Fraternal Organization,

Inc. v. Tully, supra; Allied New York Services, Inc. v. Tully, supra; Matter of Cousins Service Station, Inc., supra; 20 NYCRR 3000.10[d][4]). Petitioner has not even affirmatively stated to this Tribunal, through her attorney or otherwise, that she was not the owner or an individual responsible for the collection of sales tax for Benny's Pizza. Absent any evidence to the contrary, the information relied upon by the Division, namely, a notarized acknowledgment with petitioner Giuseppa Romano's name printed on it bearing the same date as the cover page for an assignment of lease to petitioner Giuseppa Romano, a sales tax return for Benny's Pizzeria with petitioner Giuseppa Romano's name printed on it and a sales tax certificate of registration (form ST-105.1A) with petitioner Giuseppa Romano's name printed as an owner and/or principal officer of Benny's Pizza, supports the Division's conclusion that petitioner Giuseppa Romano was an individual responsible for the collection of sales tax for Benny's Pizza. In light of this evidence and as a result of petitioner's failure to present any proof with regard to the incorrectness of the assessment, we conclude that petitioner Giuseppa Romano has failed to meet her burden of overcoming the assessment as issued (see, Envirogas, Inc. v. Chu, 114 AD2d 38, 497 NYS2d 503, 506).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioners Giuseppa and Benedetto Romano is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Giuseppa and Benedetto Romano, d/b/a Benny's Pizza,

is granted to the extent indicated in the Administrative Law Judge's conclusions of law "E" and "F" but is otherwise denied; and

4. The Division of Taxation and Finance shall modify the notices of determination and demand for payment of sales and use taxes due issued on June 3, 1985 as directed in paragraph "3" above but such notices are in all other respects sustained.

DATED: Troy, New York  
December 14, 1989

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

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

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