STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
RALPH SCOTTO, OFFICER OF WATERSET ENTERPRISES, INC. T/A HARBOR CLUB RESTAURANT	:	DECISION DTA No. 803698
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, 1982 through August 31, 1985.	:	

Petitioner Ralph Scotto, Officer of Waterset Enterprises, Inc. t/a Harbor Club Restaurant, 57 Coleridge Street, Brooklyn, New York 11235 filed an exception to the determination of the Administrative Law Judge issued on April 25, 1991 with respect to his 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, 1982 through August 31, 1985. Petitioner appeared by Jerome Schwartz, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Carroll R. Jenkins, Esq., of counsel).

The Division of Taxation filed a motion to dismiss petitioner's exception. Petitioner did not respond to this motion, nor did petitioner file a brief in support of his exception.

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

ISSUES

I. Whether petitioner's exception should be dismissed for failure to state a claim for relief.

II. Whether the Division of Taxation properly determined that additional sales and use taxes are due.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Waterset Enterprises, Inc. t/a Harbor Club Restaurant ("Harbor Club") was a restaurant located in a busy downtown area. A small reservation desk was located at the right of the entrance to the restaurant. On the left side of the restaurant there was a bar area with tables and stools. Adining room with approximately 40 tables for seating patrons was located behind the bar. The main dining room, which contained approximately 100 tables for seating patrons, was on the right side of the restaurant. A balcony, located across from the main dining room, contained an additional 18 to 20 tables.

On May 30, 1985, the Division of Taxation (hereinafter the "Division") mailed a letter to the Harbor Club which stated that its New York State sales tax returns for the period December 1, 1982 through February 28, 1985 had been selected for an audit. The letter scheduled the audit at 10:00 A.M. on June 12, 1985 and requested that the corporation have available for the audit the following documents: copies of the 1982 and 1983 Federal tax returns, copies of the last nine sales tax returns and cancelled checks as proof of payment, documentation to support claimed exempt sales, worksheets for preparing the sales tax returns for the period December 1, 1982 through February 28, 1985, bank statements for the last six quarters of the audit period, and sales and purchase journals for the period December 1, 1982 through February 28, 1985. On May 31, 1985 Harbor Club's representative requested a postponement. In response, the initial appointment was rescheduled to June 24, 1985. On June 19, 1985 Harbor Club's accountant again requested that the appointment be rescheduled. Consequently, a new appointment was scheduled for July 8, 1985 at 9:30 A.M. On July 3, 1985 the corporation's accountant called and said that he did not have the corporation's books and records for the scheduled audit. He then acquiesced in the issuance of an assessment.

Since no books and records were provided, the auditor relied on information that the Division had obtained from the Internal Revenue Service. This information was that for the fiscal year ended June 1983 the corporation's Federal corporate income tax return reported that it had sales of $1,302,425.00. During the same period of time the Harbor Club's New York State sales and use tax returns reported sales in the amount of $939,336.00. The Division divided the difference in sales of $363,089.00 by the sales reported to New York State of $939,336.00 and obtained an error rate of 38.65 percent. Thereafter, the Division multiplied the amount of sales reported on the corporation's sales and use tax returns by the error rate in order to determine that the Harbor Club had additional taxable sales in the amount of $899,091.00. The amount of tax due was determined by multiplying the amount of additional taxable sales by the tax rate.

On the basis of the foregoing audit, the Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner, Ralph Scotto. The notice, which was dated April 28, 1986, assessed sales and use taxes for the period December 1, 1982 through February 28, 1985 in the amount of $74,175.01 plus penalty of $17,587.38 and interest of $23,916.92 for a total amount due of $115,679.31.

In the course of the audit, the Division ascertained that the corporation did not remit any tax with the sales and use tax return which was filed for the quarterly period ending August 31, 1985. As a result, the Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated April 28, 1986 to petitioner which assessed sales and use taxes for the period June 1, 1985 through August 31, 1985 in the amount of $9,975.41 plus penalty of $1,097.30 and interest of $748.10 for a total amount due of $11,820.81.

Each of the foregoing notices explained that as an officer, petitioner was personally liable for the taxes determined to be due from the corporation.

In or about November 1982, Mr. Scotto and his associates purchased the stock of Waterset Enterprises. Mr. Scotto obtained 20 percent of the stock and held the office of vice-president. In this position, Mr. Scotto dealt with the immediate management needs of the restaurant and hired and fired personnel at the restaurant. Mr. Scotto was a signatory on the corporation's operating

account and payroll account. He signed the corporation's sales and use tax returns, franchise tax returns and payroll reporting documents. Mr. Scotto received a salary from the Harbor Club for the services he performed.

When Mr. Scotto and his associates originally acquired the restaurant, there was a period of time when it was not allowed to conduct sales. Therefore, the receipts from sales were given to the landlord who, in turn, disbursed the funds to suppliers. This situation continued until early 1983 when the Harbor Club obtained a liquor license.

When the Harbor Club began operating, it performed the purchasing function for other businesses. Harbor Club was able to perform this service because it had storage space available. The larger volume of its purchases enabled the Harbor Club to obtain price discounts. It also received preferential treatment in the quality of its merchandise. As compensation for its purchasing services, the Harbor Club received either repayments, merchandise or labor services from the other firms.

The Harbor Club had a controller who maintained records of the daily sales. These records were provided to the restaurant's accountant for the preparation of its sales tax returns.

At the end of January 1985, Mr. Scotto acquired all of the outstanding stock of Waterset Enterprises.

At the hearing, the Harbor Club's accountant testified that in June 1983 it and certain related corporations examined their financial position. The examination showed that the Harbor Club had an operating profit while two other entities, which were formed at the same time, had losses. Therefore, the principals of the corporations decided to file a consolidated return so that there would be no corporate income taxes due.

The Harbor Club's accountant explained that for the fiscal year ended June 1, 1984 the same corporations again filed consolidated Federal income tax returns. For the following tax periods, the corporations decided to be treated as small business corporations under Subchapter S of the Internal Revenue Code and filed separate returns.

In or about December 1985, Waterset Enterprises filed a petition for bankruptcy.[1] Thereafter, Waterset Enterprises' landlord padlocked the restaurant with the property of the Harbor Club left inside including the records of the Harbor Club.

The Harbor Club never filed a final sales and use tax return because it was denied access to its records. The Harbor Club's accountant no longer has access to his copies of the tax returns which have been filed because his office has moved and, as a result, some records have been misplaced, some have been thrown away and some are in storage.

At the hearing, petitioner's representative was given time to obtain and submit copies of the combined Federal returns to document and substantiate his testimony. These documents were never provided.

OPINION

The Administrative Law Judge determined that the bankruptcy proceeding pending against the corporation did not relieve petitioner of his personal liability for the taxes, penalty and interest that had been assessed. Further, the Administrative Law Judge held that petitioner did not prove that the audit methodology, which assumed that the gross receipts reported on the corporation's Federal income tax return for 1983 were all subject to sales tax, was unreasonable. The Administrative Law Judge noted that petitioner was unable to substantiate his claim that the corporation filed a consolidated return for 1983 with two other corporations and that petitioner did not submit a copy of the Federal return, although the record was left open for this purpose. The Administrative Law Judge also noted that petitioner had not explained his failure to provide this information. The Administrative Law Judge sustained the assessments against petitioner.

On exception, petitioner stated only the following:

> "1. Copies of the June 30, 1983 consolidated Federal Tax Returns have never been received from the Internal Revenue Service.
>
> "2. Representative send [sic] copy of 1984 Federal Income Tax to show that consolidated returns were filed.
>
> "3. Additional requests were sent to Internal Revenue Service for copies of 6/30/83 Tax Returns."

---

[1]The record does not disclose the current status of the bankruptcy proceeding.

In response, the Division made a motion to dismiss the exception, to strike extraneous matters not in the record and for such other relief as seems just and proper. In the event that the motion was denied, the Division requested 30 days in which to file a brief in opposition to the exception. In the affirmation in support of the motion to dismiss, the Division's attorney states that it is a motion to dismiss the petition made pursuant to 20 NYCRR 3000.5(b)(1)(vi) and 20 NYCRR 3000.11(b)(1)(i) through (iii) on the grounds that the notice of exception fails:

> "to allege any findings of fact or conclusion of law with which Petitioner disagrees (as required by section 3000.11[b][1][i]); fails to allege the grounds for the exception with references to the relevant pages of the transcript of hearing and exhibits (as required by section 3000.11[b][1][ii]); and fails to allege any alternative findings of fact or conclusions of law (as required by section 3000[b][1][iii]). Taken together, Petitioner has failed to allege any facts would entitle him to relief."

The affirmation further states that petitioner's points 1, 2 and 3 on exception refer to extraneous matters not in the record below, and should not be considered.

Petitioner did not respond to the Division's motion.

Although the Division's motion is to dismiss petitioner's exception, the Division relies on our regulations which provide for a motion to dismiss a petition for failing to state a cause for relief (20 NYCRR 3000.5[b][1][vi]). The Division has not advanced any theory or case law to support their premise that a motion to dismiss an exception is substantially the same as a motion to dismiss a petition and that the regulation is adequate to allow a motion to dismiss an exception.

In our view, there are significant differences between the function of the petition and the exception. The petition is intended to state the errors the petitioner alleges the Division has made and the facts which the petitioner intends to prove to establish these errors (20 NYCRR 3000.3[b][5]). The motion to dismiss the petition for failing to state a cause for relief is intended to eliminate the need for unnecessary hearings, by eliminating petitions that do not assert an error. On the other hand, the exception is filed after the hearing and is intended to state the

factual and legal points of the Administrative Law Judge's determination with which the party taking exception disagrees (20 NYCRR 3000.11[b][1][i]). If the exception does not state any errors made by the Administrative Law Judge, it appears to us that the appropriate remedy is to affirm the determination of the Administrative Law Judge. We perceive no greater efficiency that would be achieved for any party by dismissing the exception, rather than simply affirming the determination.

With respect to the contents of petitioner's exception, we agree with the Division that it attempts to introduce evidence that was not presented to the Administrative Law Judge and that we cannot consider such material. As we stated in Matter of Schoonover (Tax Appeals Tribunal, August 15, 1991):

> "[i]n order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing. Further, the submission of evidence after the closing of the record denies the adversary the right to question the evidence on the record. For these reasons we must follow our policy of not allowing the submission of evidence after the closing of the record (citations omitted)."

Since the only information contained in the exception is this new evidence, we see no basis for modifying the determination of the Administrative Law Judge in any respect. Therefore, we affirm the determination of the Administrative Law Judge based on the reasons stated in his opinion.

Accordingly, it is ORDERED ADJUDGED and DECREED that:

1. The exception of Ralph Scotto, Officer of Waterset Enterprises, Inc. T/A Harbor Club Restaurant, is denied;

2. The motion of the Division of Taxation is denied;

3. The determination of the Administrative Law Judge is affirmed;

4. The petition of Ralph Scotto, Officer of Waterset Enterprises, Inc. T/A Harbor Club Restaurant, is denied; and

5. The notices of determination and demand dated April 28, 1986 are sustained.

DATED: Troy, New York
January 16, 1992

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

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

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