

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ANTONIO DIMICELI	:	
D/B/A TONY'S PIZZA AND RESTAURANT	:	DECISION
	:	DTA NO. 804798
for Revision of Determinations or for Refunds of	:	
Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period May 1, 1969	:	
through November 30, 1982.	:	

Petitioner, Antonio Dimiceli d/b/a Tony's Pizza and Restaurant, 261 Avenue X, Brooklyn, New York 11223, filed an exception to the determination of the Administrative Law Judge issued on September 3, 1987 with respect to his petition for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period May 1, 1969 through November 30, 1982 (File No. 804798). Petitioner appeared by Anthony S. Caronna, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Kevin A. Cahill, Esq., of Counsel).

Neither petitioner nor the Division filed briefs on the exception. Oral argument was not requested.

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

ISSUES

I. Whether the Division properly determined additional sales tax due from the petitioner based upon the use of external indices.

II. Whether the Division of Taxation should be estopped from the assessment and collection of sales taxes

from petitioner for the period prior to September 1971 by reason of the fact that it allegedly accepted a sales tax payment from petitioner in September 1971 without informing petitioner that his liability for sales tax remittances was not current as of the date of this alleged payment.

FINDINGS OF FACT

We find the facts in this matter as stated in the Administrative Law Judge's determination and such facts are incorporated herein by this reference.

In summary, petitioner owned and operated Tony's Pizza and Restaurant for the period May 1, 1969 through November 30, 1982. The Division has no record of ever having received any sales tax return or a payment of sales tax liability by petitioner.

Petitioner did not comply with the Division's request for books and records.

The Division used external indices to determine the sales tax liability of petitioner relying principally on third party information from suppliers of flour and soda syrup to estimate the level of petitioner's business activity and the amount of sale tax due and owing to the State. An observation test was also performed. As a result, petitioner was assessed \$54,503.71 in tax, \$27,251.84 in fraud penalty and \$56,548.24 in interest for a total of \$138,303.79.

OPINION

Petitioner essentially bases his plea for relief on the grounds he justifiably relied on the professional advice of two accountants and that, in any event, the methodology used by the Division to calculate sales tax liability was improper.

The Administrative Law Judge determined that petitioner was liable for the amount of sales tax asserted by the Division and the interest but that the Division did not sustain its burden of proof with regard to the fraud penalty. The disallowance of the fraud penalty was not contested by the Division on exception.

We affirm the determination of the Administrative Law Judge in its entirety.

Section 1135 of the Tax Law, in effect during the period at issue, requires every person required to collect sales tax to keep records of every sale and of the tax payable thereon. “Such records shall include a true copy of each sales slip, invoice, receipt, statement or memorandum” (Tax Law § 1135). Section 1138(a) 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 tax commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices....” “When records are not provided or are incomplete and insufficient, it is [the Tax Commission’s] duty to select a method reasonably calculated to reflect the taxes due.... 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 Organization, Inc. v. Tully*, 85 AD2d 858 [citations omitted]). The Administrative Law Judge determined that petitioner failed to sustain this burden and we concur.

Petitioner’s other argument is that the State Tax Commission should be estopped from the collection and assessment of sales tax from petitioner for the period prior to September 1, 1971, because it accepted payment for a particular sales tax quarter in that period.

We find no merit in petitioner’s argument. Acceptance of a single, randomly filed check, can in no way be construed as estopping the Commission from collecting taxes properly due and owing the State for prior periods.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the petitioner, Antonio Dimiceli d/b/a Tony’s Pizza and Restaurant, is in all respects denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Antonio Dimiceli d/b/a Tony’s Pizza and Restaurant

granted to the extent indicated in conclusions of law “C” and “E” of the Administrative Law Judge’s determination; the Notices of Determination and Demand for Payment of Sales and Use Taxes Due issued on October 4, 1984 are modified accordingly; and except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

May 26, 1988

John P. Dugan
President

Francis R. Koenig
Commissioner