STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
FORTUNALDO AND LILLIAN EVANGELISTA D/B/A LA HACIENDA RESTAURANT	:	DECISION
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 November 30, 1985.	:	

Petitioners, Fortunaldo and Lillian Evangelista d/b/a La Hacienda Restaurant, 3019 Pine Avenue, Niagara Falls, New York 14301, filed an exception to the determination of the Administrative Law Judge issued on August 31, 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 December 1, 1982 through November 30, 1985 (File No. 804933). Petitioners appeared by Mark S. Klein, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

Each party submitted a letter in lieu of a brief on exception. Petitioners submitted an additional letter on May 30, 1990. The Division was given 30 days to respond but did not. Petitioners' request for oral argument was subsequently withdrawn.

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

ISSUE

Whether the Division of Taxation properly denied petitioners' claim for credit or refund of tax because petitioners failed to maintain complete records of each sale so that the exact amount of the sales tax overpayment could be determined.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. The Administrative Law Judge's findings of fact are set forth below.

On March 19, 1986, petitioners, Fortunaldo and Lillian Evangelista, as general partners in a partnership known as La Hacienda Restaurant, filed an Application for Credit or Refund of State and Local Sales or Use Tax whereinpetitioners claimed a refund or credit of $5,115.81, plus interest, for the period December 1, 1982 through November 30, 1985.

Petitioners' claim had two components. First, petitioners claimed a refund or credit of $4,563.20 in tax paid on sales made in exchange for Canadian currency. The basis for this claim shall be more fully explained below. Petitioners also claimed a $552.61 refund or credit for tax claimed to have been collected on purportedly exempt sales. At hearing, petitioners withdrew their claim with respect to such sales.

By letter dated September 12, 1986, the Division of Taxation denied, in full, petitioners' claim.

As noted above, petitioners are partners in La Hacienda Restaurant, located at 3019 Pine Avenue, Niagara Falls, New York. Petitioners have owned La Hacienda since 1980. Petitioner Fortunaldo Evangelista ran the restaurant operation. Consequently, all references to petitioner herein shall refer to Fortunaldo Evangelista.

Located in Niagara Falls, New York, which borders Niagara Falls, Ontario, Canada and Southern Ontario, La Hacienda Restaurant caters to a large Canadian clientele. Approximately 50% of the restaurant's sales during the period at issue were to Canadian customers and were paid with Canadian currency. During this same period, the Canadian dollar was valued at a discount relative to U.S. currency.

Given the competitive nature of the restaurant business, petitioner offered his Canadian customers a "preferential" rate of exchange for their Canadian currency during the period

encompassed by the refund claim. That is, petitioner offered his Canadian customers a better rate of exchange for their currency than the rate available at local banks.

During the period in question, petitioner's customers were asked prior to receiving their bill whether they would be paying in Canadian or U.S. funds. If the customer responded that Canadian currency would be used, the waiter or waitress then totaled the purchases on the front of the check at La Hacienda's menu prices (listed in U.S. dollars) and added the applicable sales tax for a "total amount due". On the reverse side of the check, the preferential exchange rate in effect was applied to this "total amount due" (U.S. dollars) to reach a total amount due in Canadian currency.

On his cash register, petitioner or his employees rang up the "total amount due" in U.S. funds as the amount of the sale for all guest checks. Thus, checks paid in Canadian funds were rung up as if they had been paid in U.S. funds. At the end of each day, the cash in the register was counted and balanced against the cash register summary tape. For purposes of this daily summary, the Canadian currency in the register was counted and then multiplied by the restaurant's preferential rate of exchange for that day, so that on the daily summary (as on the register tape) sales in Canadian currency were totaled as if paid in U.S. currency at menu prices.

The net effect of petitioner's treatment of his Canadian receipts was to overstate on his register tape and daily summaries the value received by the restaurant in exchange for Canadian currency.

Petitioner deposited his Canadian receipts into an account he maintained at the Canadian Imperial Bank of Commerce ("CIBC") in Niagara Falls, Ontario. From time to time, as was necessary to pay bills, petitioner converted the Canadian currency in his account at CIBC into U.S. currency. These funds were then withdrawn from the CIBC account and deposited in an account maintained by petitioner in the U.S.

Petitioner maintained his account at CIBC because, in petitioner's opinion, its exchange rates were more favorable than those offered by banks in the U.S. Petitioner thus sought to minimize his loss incurred through his use of a preferential rate of exchange.

During the period covered by the refund claim, petitioner's sales tax returns were prepared by his accountant using sales figures as set forth on the daily summaries and cash register tapes.

Also during the period covered by the refund claim petitioner's accountant prepared income tax returns for the partnership. On these returns petitioner claimed deductions for "Canadian Exchange" in the amounts of $13,867.11 (1983), $18,589.00 (1984) and $34,529.00 (1985). These deductions were premised upon petitioner's cost of offering a preferential rate of exchange to customers paying with Canadian currency. That is, in theory, petitioner's cost of offering the preferential rate of exchange (and therefore the amount of the deduction) was equal to the difference between the total amount of Canadian sales for the year per the menu prices (U.S. dollars) and the value in U.S. dollars of the Canadian currency ultimately received by petitioner from his sales in Canadian currency at the preferential rate.

Petitioner's refund claim was premised upon the "Canadian Exchange" deductions claimed on the partnership's Federal income tax returns. The Canadian exchange deduction was apportioned to the various sales tax quarters based upon the percentage of annual Canadian sales (per the daily summaries) for that quarter. The portion of the Canadian exchange applied to each quarter was then multiplied by the prevailing sales tax rate of 7% to reach the refund claimed per quarter.

The amount of the "Canadian Exchange" per the refund claim was as follows:

12/1/82-11/30/83	12/1/83-11/30/84	12/1/84-11/30/85
$13,867.00	$18,589.00	$32,505.00

Petitioner either did not maintain or did not produce individual guest checks or cash register tapes for the period covered by the refund claim.

Petitioner maintained no record nor was any evidence introduced of the daily market rates of exchange during the period in question.

During the period in question, if a customer at the restaurant so requested, petitioner would exchange Canadian currency for U.S. funds and would deposit such Canadian funds into his cash register.

OPINION

The Administrative Law Judge concluded that because petitioner failed to maintain records of each sale petitioner's refund claim based on the "Canadian Exchange" was an estimate. Relying on our decision in Matter of Raemart Drugs (Tax Appeals Tribunal, July 8, 1988) the Administrative Law Judge held that a refund of sales tax could not be based on an estimate.

On exception, petitioner notes that the Appellate Division, Third Department reversed our decision in Raemart and held that estimates of refunds may be acceptable (Matter of Raemart Drugs v. Wetzler, 157 AD2d 22, 555 NYS2d 458). Petitioner asserts that he has accurate and complete records showing the amount of Canadian funds he collected during the period at issue and that is the only information needed to correctly compute the exact amount of sales tax liability. Petitioner also contends that the Administrative Law Judge erred when he found that the restaurant exchanged Canadian money for customers.

In response, the Division argues that the record supports the Administrative Law Judge's factual conclusion that the restaurant exchanged funds. The Division argues further, relying on the Tribunal decision in Raemart, that the refund claim was properly denied because petitioner did not have records of every sale. Although given the opportunity, the Division did not respond to petitioner's letter noting the reversal of Raemart by the Third Department.

We affirm the determination of the Administrative Law Judge.

First, we find no basis to alter the Administrative Law Judge's finding that petitioner exchanged Canadian money for United States funds for customers. Although the testimony of Mr. Evangelista on this point is susceptible to different interpretations, we conclude that the Administrative Law Judge, who was able to observe the witness while he testified, was in the best position to interpret this testimony. It is also noteworthy that petitioner's representative understood this testimony in the same way as did the Administrative Law Judge.[1]

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[1]On cross-examination, petitioner's CPA responded to a question by the Division as to how one would be able to distinguish money in the cash register that was attributable to sales from money attributable to currency exchange by stating:

"Based on your question; if he put money in his register that was not attributable to a

With respect to the principal issue, we do not agree with petitioner that the Third Department's decision in Raemart requires a refund here. In Raemart, the court stated that the petitioner maintained extensive records that were judged inadequate by the Division only because the cash register tapes did not identify each item sold. The court concluded that "[i]n accordance with the language contained in 20 NYCRR 533.2(b)(2) and 533.2(b)(2)(ii), petitioner kept extensive records that would allow for a fair and accurate substantiation of the tax due and amount of reimbursement" (Matter of Raemart Drugs v. Wetzler, supra, 555 NYS2d 458, 460). Clearly, the court in Raemart felt that the petitioner's records were in substantial compliance with the Division's requirements and that the area of noncompliance did not prevent an accurate determination of the tax due.

In contrast to the vendor described by the court in Raemart, petitioner did not establish that he maintained records that were in substantial compliance with the Division's regulations. Petitioner did not prove at the hearing that he had either individual guest checks or cash register tapes, thus petitioner did not establish that he maintained a record of each sale as required by section 1135(a) and the regulations at 20 NYCRR 533.2(b). Without such source documents it is not possible to verify petitioner's total sales tax liability.[2] The Division is not required to accept nonsource records, such as petitioner's daily summaries, to determine the tax liability (see, Matter of Club Marakesh v. State Tax Commn., 151 AD2d 908, 542 NYS2d 881, lv denied 74 NY2d 616, 550 NYS2d 616; Matter of Saltzman v. State Tax Commn., 101 AD2d 910, 475 NYS2d 610). If petitioner's total tax liability cannot be determined, the amount of any overpayment due

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> sale, he would be claiming as income, money that went into his registers that were not sales, and that's --"

Petitioner's representative interrupted this sentence with:

> "No, he exchanged money" (Tr., pp. 121, 122).

[2]Petitioner's suggestion that he need not maintain records of every sale because 100% of his sales are taxable is without merit. The requirement to maintain records of every sale is intended to allow the Division to verify the total amount of taxable sales, not merely to ascertain whether a vendor correctly identified taxable and nontaxable sales.

based on the Canadian exchange factor is a matter of sheer speculation. We conclude that under these circumstances petitioner is not entitled to the refund claimed.

Further, even if we were to assume that petitioner's inability to establish the amount of his total sales through original records of these sales was not fatal to his refund claim, we would still find the proof inadequate to prove his claim. The essence of petitioner's claim is that he accepted Canadian currency at more than its actual value and that he paid tax on this inflated value. Petitioner asserts that he can prove the amount of Canadian currency accepted and this is the only information necessary to prove the amount of his overpayment. We disagree with this contention for several reasons.

First, since petitioner exchanged currency for customers, the amount of Canadian currency deposited by petitioner must include funds that were obtained as the result of exchanges and not by sales. To calculate a refund on funds not obtained from sales would obviously overstate the refund.

Second, we do not believe that petitioner has introduced sufficient proof to establish the difference between the value at which he accepted the Canadian funds, the "preferential" exchange rate, and the actual value, in United States funds, of these amounts. Petitioner did introduce evidence indicating the first half of this equation, the daily "preferential" exchange he offered (Exhibit 6), but he failed to establish the second half, the actual exchange value on each day. Instead of daily exchange values, petitioner introduced evidence of the exchange rate at the times when petitioner made withdrawals from his accounts in Canadian banks, which appeared to occur about once or twice a month (Exhibit 8). While the imprecision in the exchange information alone might not be enough to reject petitioner's calculation, we conclude that coupled with the fact that the deposits may have included amounts not received on sales it renders petitioner's calculation of his overpayment unacceptably uncertain. Thus, even if we were able to conclude that petitioner had adequate records to determine the amount of his total sales, we conclude that an accurate substantiation of petitioner's overpayment cannot be

determined (cf., Matter of Raemart Drugs v. Wetzler, supra, 555 NYS2d 458, 459, 461 [where the Division agreed with the petitioner's calculation of its overpayment]).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioners Fortunaldo and Lillian Evangelista d/b/a La Hacienda Restaurant is denied;

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

3. The petition of Fortunaldo and Lillian Evangelista d/b/a La Hacienda Restaurant is denied; and

4. The Division of Taxation's denial of petitioners' refund claim is sustained.

DATED: Troy, New York
September 27, 1990

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

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