

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ROBERT TRUSNOVEC	:	DECISION
D/B/A YAPHANK COMMUNITY SHOP	:	DTA No. 805982
	:	
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, 1981	:	
through November 30, 1986.	:	

Petitioner Robert Trusnovac d/b/a Yaphank Community Shop, P.O. Box 674, Wading River, New York 11792, filed an exception to the determination of the Administrative Law Judge issued on July 19, 1990 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 June 1, 1981 through November 30, 1986. Petitioner originally appeared by Clarke and Lovell, P.C. (James F. Clarke, Esq., of counsel), concluding this matter, however, pro se. The Division of Taxation appeared by William F. Collins, Esq. (Angelo Scopellito, Esq. and Michael B. Infantino, Esq., of counsel).

After the exception was filed in this matter, a motion was made by petitioner to the Administrative Law Judge to re-open the record. This motion was denied by an order dated October 17, 1991. No exception was filed to such order. The papers filed by both parties in support of, and in opposition to, the motion before the Administrative Law Judge were accepted by this Tribunal as briefs in support of, and in opposition to, the original exception. Oral argument, requested by petitioner, was denied and the case was forwarded to the Tribunal for decision. At the request of petitioner's representative, the case was placed on hold until August 4, 1992 to allow time to determine whether a new petition (concerning different sales tax periods) could somehow be combined with the case before the Tribunal. The Division of

Taxation filed a letter advising that they would not consent to a combining of the two cases. This letter was received by the Tax Appeals Tribunal on November 17, 1992.

The Tax Appeals Tribunal's six-month time period to issue this decision began November 17, 1992.

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

ISSUE

Whether, upon field audit, the Division of Taxation properly concluded that petitioner owed additional sales and use taxes.

FINDINGS OF FACT

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

On June 1, 1987, following a field audit, the Division of Taxation (hereinafter the "Division") issued to petitioner, Robert Trusnovec d/b/a Yaphank Community Shop, three notices of determination and demands for payment of sales and use taxes due for the period spanning June 1, 1981 through November 30, 1986. Two of these notices assessed tax due for the noted period in the aggregate amount of \$103,523.40, plus penalty (Tax Law § 1145[a][1][i]) and interest. The third such notice assessed additional "omnibus" penalty (Tax Law § 1145[a][1][vi]) for the period June 1, 1985 through November 30, 1986. The record reveals that validated waivers extending the statute of limitations on assessment had been executed such that the timeliness of the notices of determination described herein is not at issue. In this regard, it is noted that sales tax returns had not been filed for the period June 1, 1981 through February 28, 1983 until all such returns were filed in April of 1983, and that returns for June 1, 1985 through August 31, 1986 were filed at various times in 1986.

Petitioner owns and operates as a sole proprietorship a delicatessen located on Main Street in Yaphank, New York. Petitioner has owned and operated this business since 1970.

The store facility contains a counter with four stools, plus 6 tables with 3 chairs at each thus providing an interior seating capacity of 22 people. In addition, six outside picnic tables seat (approximately) an additional 36 people. Sales of merchandise consist principally of delicatessen meats and salads, as well as cigarettes, soda, beer, other prepared foods, newspapers, magazines, and a comparatively small amount of grocery items.

On October 15, 1985, the Division issued to petitioner a letter indicating that petitioner's sales tax returns "for the period June 1, 1981 to date" (i.e. through October 15, 1985) would be subject to a field audit. This letter indicated that petitioner should have available for examination all books and records pertaining to sales tax liability, specifically including "income tax returns, journals, ledgers, sales invoices, purchase invoices, cash register tapes, exemption certificates and all Sales Tax records." A subsequent letter dated December 11, 1985 indicated an audit appointment date of January 8 and 9, 1986 at 9:30 A.M. and listed the audit period as "June 1, 1981 through the present" (i.e. through December 11, 1985). This follow-up letter provided the same specifics as to those records the Division would expect petitioner to have available for examination. The record reveals that subsequent correspondence between petitioner and the Division, from the date of these first letters through and beyond the end of the audit period, resulted in an audit period which spanned, as noted, June 1, 1981 through November 30, 1986. In fact, the last of the noted letters between the Division of Taxation and petitioner, dated March 25, 1987, specifically notes an audit period of June 1, 1981 through November 30, 1986 and schedules an audit appointment for April 9, 1987.

On the initially scheduled audit dates of January 8 and 9, 1986, petitioner met with the Division's auditor and gave the auditor permission to review and utilize certain of petitioner's records which were in the possession of Division income tax auditors in connection with a then-ongoing income tax audit. Those records provided pursuant to this permission included copies of a "receipts and disbursements journal" for 1983 as well as Federal Schedule C ("Profit or [Loss] from Business or Profession") for the years 1981, 1982 and 1983. No additional records were supplied at such time. Shortly thereafter, on January 15, 1986, petitioner was requested to

provide more complete and current records. Despite this additional request, no further records were provided. The auditor specified that those records requested but not made available included sales tax worksheets, Federal income tax returns, general ledger, cash register tapes, sales journals, purchase journals, day books, purchase invoices and sales invoices.

Petitioner indicated that his cash register tapes are destroyed at the end of each day after petitioner enters certain totals, including gross sales and sales tax collected, in a receipts journal. Petitioner filed his sales tax returns by consistently estimating that 40% of gross sales were taxable sales.

Faced with the lack of records as described, the auditor concluded that petitioner's records were inadequate for purposes of performing an audit and determined to resort to external indices, including specifically an observation test, to calculate petitioner's sales and sales tax liability. Accordingly, on September 25, 1986,¹ the auditor (and one assistant) conducted an observation of petitioner's sales of prepared foods between the hours of 6:00 A.M. and 2:00 P.M. The results of this observation test included the following:

(a) Gross sales for the observation, per cash register summary, totalled \$2,137.54. Taxable prepared food sales, as observed, totalled \$718.81. The difference between these two amounts (\$1,418.73) represented "other sales" (taxable and nontaxable).

(b) The auditor calculated weekly gross sales of \$13,884.00 as follows:

observed taxable prepared food sales of \$718.81 x 5.5 days per week.....	\$ 3,953.00
plus	
other sales of \$1,418.73 x 7.0 days per week....	<u>9,931.00</u>
= Gross Sales.....	<u>\$13,884.00</u>

(c) The auditor calculated weekly and quarterly taxable sales as follows:

weekly taxable prepared food sales.....	\$ 3,953.00
plus	
other sales of \$1,418.73 per day x	

¹The auditor advised petitioner, on September 18, 1986, that the observation test would be performed on Thursday, September 25, 1986 between 6:00 A.M. and 2:00 P.M.

31.18% ² taxable x 7 days per week.....	<u>3,097.00</u>
= weekly taxable sales.....	\$ 7,050.00
number of weeks per quarter.....	x 13
= quarterly taxable sales.....	<u>\$91,650.00</u>

(d) The auditor compared weekly taxable sales (\$7,050.00) to weekly gross sales (\$13,884.00), determining a taxable ratio of 51%. In turn, by extension, the auditor computed gross sales of \$4,021,003.00 and taxable sales of \$2,057,387.00 for the audit period. This latter figure resulted in sales tax liability of \$150,823.35 which, after credit for tax paid (\$47,299.95) leaves additional tax due of \$103,523.40.

Among other additional steps, the auditor divided petitioner's reported gross sales per returns for the quarterly period ended November 30, 1986, (\$71,855.00), by the 91 days in such three-month quarterly period, yielding an average daily gross sale amount of \$790.00. The auditor compared such resulting daily gross sale amount to the \$718.81 in taxable sales of prepared foods as determined during the 8-hour observation test, concluding that petitioner's returns were inaccurate and incorrect as filed. Accordingly, the auditor recommended assessment of the \$103,523.40 of tax found due on audit, plus penalty and interest, and the notices of determination described above, were issued.

Petitioner objected to the results of the observation test claiming the same to be unrepresentative of his business, and requested that a second observation test be conducted. On January 15, 1987, Division auditors appeared at petitioner's premises, unannounced, to conduct a second observation test. However, telephone conversations between petitioner and his representative and the Division's auditors resulted in the auditors being asked to vacate the premises. The auditors moved to petitioner's parking lot, after which the local police (at petitioner's request) asked the auditors to leave. In turn, the auditors relocated across the street and counted the number of persons entering petitioner's premises. However, since the auditors were left with no means by which to verify purchases, if any, by the persons entering the premises, the results of such count were deemed essentially worthless and were not used in any of the calculations at issue.

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The estimate that 31.18% of other sales represent taxable grocery sales is based on Division of Taxation experience. There is no evidence that petitioner challenges such estimate.

Petitioner timely protested the assessments and a conciliation conference was held on this matter. As a result of such conciliation conference, certain recalculations were made and a conciliation order was issued on May 27, 1988, the effect of which was to reduce the amount of tax due to the aggregate total of \$59,369.35, plus penalty and interest, including the noted (recalculated) "omnibus" penalty. The basis for the conciliation conference reduction is set forth as follows:

- (a) 30% of total Lotto sales of \$2,427.50 for the week during which the observation was conducted was attributed to the observation day. Such resulting amount (\$728.28) was treated as nontaxable receipts hence reducing observation day gross sales from \$2,137.54 to \$1,409.29.
- (b) Taxable prepared food sales, as observed, (\$718.81) were multiplied by 5.0 days (as opposed to 5.5 days) yielding weekly taxable prepared food sales of \$3,594.05.
- (c) "Other sales" of \$690.48 (the difference between gross sales of \$1,409.29 [item "a" above] and observed prepared food sales of \$718.81) were further reduced by \$52.70 based on one substantiated exempt sale. The resulting amount of \$637.78 was multiplied by 31.18% (see Footnote "2") to arrive at taxable other sales of \$198.86 per day, which was then multiplied by 7 to arrive at weekly taxable other sales of \$1,392.02.
- (d) Weekly taxable prepared food sales (\$3,594.05) plus weekly taxable other sales (\$1,392.02) results in revised total weekly taxable sales of \$4,986.07 and quarterly taxable sales of \$64,819.00.
- (e) Comparing audited quarterly taxable sales (\$64,819.00) to quarterly reported taxable sales (\$28,742.00) results in a margin of error of 2.2552 and, by extension audited taxable sales of \$1,455,082.00 for the audit period. In turn, tax due thereon of \$106,658.00 was reduced by the amount of tax paid, to arrive at the recalculated amount of \$59,369.35 remaining at issue (exclusive of penalty and interest).

Petitioner continues to protest the reduced assessment at issue herein seeking certain additional items of allowance or reduction. More specifically, petitioner is located near the Suffolk County office buildings as well as several other business buildings and the day of observation (a Thursday) was a pay day for County workers and various other business workers, thereby leading petitioner to argue that the observation test day would show inordinately high sales and therefore would not be representative of the balance of petitioner's business. Petitioner testified that a Thursday pay day represents approximately 40% of the total volume of sales for a given week. In addition, petitioner alleges that taxable prepared food sales of

\$718.81 as actually observed should be disregarded in favor of taxable sales per cash register summaries on the observation day (\$398.93), and that the attribution of 30% of total weekly Lotto sales as observation day sales should be increased to 34%. Petitioner also points out that his cash register is cleared each day at 2:00 P.M. when petitioner takes cash to the bank for deposit. Thus petitioner alleges that the 6:00 A.M. to 2:00 P.M. observation test would reflect in the cash register totals of gross sales certain sales from the previous day. Finally, petitioner argues that tax exemption was improperly disallowed on a particular sale to St. John the Baptist Church, as described hereinafter. Petitioner argues that the proper margin of error, if petitioner's adjustments are accepted, should be 1.2310, as opposed to the Division's post-conference 2.2552 margin of error, and would result in a tax liability of only \$9,462.00. Finally, petitioner argues that the Internal Revenue Service conducted an in-depth audit of his 1982 and 1983 Federal income tax returns which resulted in only \$570.00 of additional tax due.

Petitioner testified that, during the audit period, he retained his purchase invoices, a listing of his gross sales total for each day, a list of total Lotto sales for the day and his bank statements. He admitted that he destroyed cash register tapes at the end of each day, and that certain purchases were made by cash payouts from the cash register. Petitioner submitted certain Lotto receipts records for various periods during and after the audit period in support of his argument that on average 34% of weekly Lotto sales should be deemed Thursday sales. Other resulting averages of Wednesday/Thursday Lotto sales compared to weekly Lotto sales included 37%, 45%, 30% and 26%. Particular records of Lotto sales for the day of observation were not submitted by petitioner.

Petitioner's business opens each day at 6:00 A.M. and remains open through 10:00 P.M. during the summer months and until 9:00 P.M. during the winter months. In extending its totals from the daily observation results to arrive at weekly taxable prepared food sales, the auditors utilized a factor of 5.5 days on audit and 5.0 days in connection with the conference reduction. By contrast, and in connection with his contention that 40% of total weekly sales occur on

Thursdays, petitioner argues that such observation results should be multiplied by a factor of only 2.5 days.

With respect to the claimed disallowed exempt sale, petitioner provided a sales invoice indicating the delivery of 110 sandwiches to St. John's Over Fifty Club. This delivery ticket indicates a date of September 24, 1986 (the day before the observation), an amount of \$466.00, and a 1:00 P.M. delivery time. Petitioner personally delivered the sandwiches, returned to the deli at approximately 2:30 P.M. and allegedly entered the \$466.00 in the cash register. Petitioner argues that because the cash registers are cleared each day at 2:00 P.M., the \$466.00 would appear in the register totals on the following day (i.e. September 25, 1986) when the observation test was conducted. Therefore, petitioner argues that the allowance for exempt sales should be increased by the \$466.00 amount of such sale. In turn, petitioner also alleges the sale to be properly exempt as made to a club of St. John the Baptist Church.

Petitioner submitted an exemption certificate dated January 19, 1988 from the Roman Catholic Community of St. John the Baptist Church together with a letter from the church's pastor stating that "the Over Fifty Club of St. John's is part of St. John the Baptist Roman Catholic Church, and has been in existence since 1981." Petitioner also submitted a letter from one Marion Boomer, president of the Over Fifty Club. This letter, dated September 19, 1989, provides as follows:

"[p]lease be advised that our club 'Over Fifty Club of St. John the Baptist', Wading River received 110 dinners in the amount of \$466.00 on September 24, 1986. We are a tax-exempt organization of the church and use their tax number EX122611. These dinners were paid for in cash that day as monies were collected from the members."

The audit report in this matter indicates that petitioner had been previously audited for the period March 1, 1978 through May 31, 1981 and that an assessment was issued as a result thereof in the amount of \$38,330.97. The disposition of such assessment is not specified on the record.

OPINION

In the determination below, the Administrative Law Judge held that, despite repeated requests for records over an extended period of time, petitioner maintained and made available only limited books and records which, in their entirety, were not adequate for purposes of conducting an audit to determine the accuracy of petitioner's sales tax returns as filed. The Administrative Law Judge, therefore, held that the Division was entitled to resort to indirect methods and estimates as a means of determining petitioner's sales and calculating his sales and use tax liability.

The Administrative Law Judge further held that: 1) utilization of estimates in arriving at petitioner's liability is even more clearly justified when it is noted that petitioner's own filings were made utilizing an estimation; 2) petitioner's argument regarding records vis-a-vis a Federal income tax audit in no way suffices to establish that petitioner maintained adequate records for sales tax purposes; 3) petitioner's arguments as they relate to the amount of Lotto Sales, the percentage of his business that was conducted on Thursdays, claimed exempt sales, and the register clearing times are insufficient to warrant further reductions to the assessments; and 4) as to the penalty issue, petitioner has offered no specific argument for the abatement thereof and has failed to meet the burden to establish reasonable cause as well as an absence of willful neglect.

On exception, petitioner is in total disagreement with all of the findings of fact and conclusions of law as found by the Administrative Law Judge. Petitioner alleges that: 1) the assessment should have been reduced; 2) there was too much credibility given to the auditor whose intent was to harass and not to audit; 3) it is impossible for a person to have unreported sales of this magnitude; 4) the Internal Revenue Service did a line-by-line audit and the State did an indepth audit which took over two years and included techniques still not revealed to petitioner; 5) no consideration was given to the fact that petitioner's wife ran the business with family and friends as he was disabled for the entire period due to a hit-and-run accident; and 6) the observation utilized by the Tax Department was skewed and not representative of petitioner's business.

The Division argues that the record of the hearing indicates that upon audit petitioner did not produce books and records which would be sufficient to determine the taxes due for the audit period. The Division further argues that petitioner failed to meet his burden of proof to establish that the deficiency assessed, based on the audit performed, was incorrect and that the decision herein must be sustained.

We find no basis in the record before us for modifying, in any respect, the determination of the Administrative Law Judge. However, we must address the issue of petitioner's apparent attempt to introduce new evidence.

We reject petitioner's attempt, at this late date, to introduce new evidence relating to petitioner's and family members' medical and health problems after the record has been closed.

As we held 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 (see, Matter of Oggi Rest., Tax Appeals Tribunal, November 30, 1990; Matter of Morgan Guar. Trust Co. of N.Y., Tax Appeals Tribunal, May 10, 1990; Matter of International Ore & Fertilizer Corp., Tax Appeals Tribunal, March 1, 1990; Matter of Ronnie's Suburban Inn, Tax Appeals Tribunal, May 11, 1989; Matter of Modern Refractories Serv. Corp., Tax Appeals Tribunal, December 15, 1988)" (Matter of Schoonover, supra).

As previously stated, we find no basis in the record before us for modifying the Administrative Law Judge's determination in any respect. Therefore, we affirm the determination of the Administrative Law Judge for the reasons stated in said determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Robert Trusnovec d/b/a Yaphank Community Shop is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Robert Trusnovec d/b/a Yaphank Community Shop is denied; and

4. The notices of determination and demand for payment of sales and use taxes due, dated June 1, 1987, as reduced, however, in accordance with the results of the conciliation conference, together with penalty and interest are sustained.

DATED: Troy, New York
May 6, 1993

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

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

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