STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
SHNOZZ'Z INC. AND DAVID CULTRARA AND THOMAS PLANTONE, AS OFFICERS	:	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 Periods June 1, 1984 through February 28, 1985 and March 1, 1985 through May 31, 1987.	:	

Petitioners Shnozz'z Inc. and David Cultrara and Thomas Plantone, as officers, 41 Elm Grove Road, Rochester, New York 14626 filed an exception to an order of the Administrative Law Judge issued on April 19, 1990 denying a motion by petitioners pursuant to section 3000.4(c) of the Tax Appeals Tribunal's regulations for permission to amend their petition or, in the alternative, for leave to file a request for late hearing (File No. 807348). Petitioners appeared by Culley, Marks, Corbett, Tanenbaum, Reifsteck & Potter (Walter R. Capell, Esq. of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Mark F. Volk, Esq. of counsel).

Petitioners filed a brief. The Division of Taxation filed 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 Administrative Law Judge properly denied petitioners' motion for permission to amend their petition or in the alternative for leave to "file out of time a request for a hearing."

FINDINGS OF FACT

We find the following facts.

On September 29, 1989, the Division of Tax Appeals acknowledged receipt of the timely filed original petition, which sought to challenge the following June 20, 1988 notices of

determination: S880620003R, S880620004R, S880620005R, S880620006R, S880620007R, and S880620008R. Petitioners subsequently submitted their amended petition to the Division of Tax Appealson February 23, 1990, incorporating the aforementioned June 20, 1988 notices, and adding to their petition Notice No. S880317004R, dated March 17, 1988. When the Division of Tax Appeals raised the issue that it did not have evidence of a timely original petition for Notice No. S880317004R, petitioners, by their representative, Culley, Marks, Corbett, Tanenbaum, Reifsteck and Potter, brought a motion to amend the petition, or in the alternative sought leave to file a request for a hearing on the notice dated March 17, 1988. The Division of Taxation received the Notice of Motion and supporting documents on March 28, 1990, and responded on April 4, 1990, by its Letter in Opposition to the Motion.

In support of their motion to amend their petition, petitioners assert that the March 17, 1988 notice arose out of the same audit as the June 20, 1988 notices. Each notice indicates that: "The following taxes have been determined to be due in accordance with section 1138 of the Tax Law, and are based on an audit of your records."

Petitioners assert that, in March 1988, they were contacted by the Division and informed that an audit would be conducted. Shortly thereafter, the auditor requested petitioners to provide all the books and records for the period June 1, 1984 through May 31, 1987. Petitioners then received the March 17, 1988 notice which covered the period August 31, 1984 through February 28, 1985. Petitioners assert that prior to the expiration of the 90-day period in which to protest the notice, petitioners contacted the auditor concerning the notice. Petitioners assert that they were informed to disregard the notice and that additional notices would be forthcoming which would incorporate the sales tax asserted to be due in the March 17, 1988 notice.

The additional notices were issued in June 1988 and were timely petitioned by petitioners. These additional notices did not encompass the period covered by the March 17, 1988 notice. Petitioners assumed they did. Petitioners assert that at a conciliation conference on March 9,

1989, they were informed that only the six notices issued in June 1988 were outstanding, and that no other notices had been issued for the period June 1, 1984 through May 31, 1987.

OPINION

The Administrative Law Judge determined that the original petition did not challenge the March 1988 notice "and being time barred by Tax Law section 1138, the amended pleading cannot revive it." Relying on Matter of Connie's Delicatessen (State Tax Commn., February 18, 1986), the Administrative Law Judge determined that even if petitioners had been able to prove that they had received the oral instructions on which they claimed to rely, this was not sufficient grounds to allow petitioners to file a petition for a hearing on the March 17, 1988 notice. Therefore, the Administrative Law Judge did not provide petitioners with an opportunity to attempt to prove their assertions.

The Division asserts that the petition was time barred and that the Division of Tax Appeals is without jurisdiction to hold a hearing on the notice.

Petitioners reiterate the arguments made in their motion, namely that the March 17, 1988 notice resulted from the same audit as the June 20, 1988 notices, that the intent of their petition was to challenge the results of that audit and that the Division should be estopped from asserting the liability represented by the March 17, 1988 notice because of the statements of the auditor concerning the notice.

We remand this matter for proceedings consistent with this decision.

We deal first with petitioners' motion to amend their petition.

Tax Law § 1138 provides that a notice of determination shall irrevocably fix the tax asserted unless the person against whom the tax is assessed shall within 90 days after the giving of such notice request a hearing.

Tax Law § 1147(3)(b) provides generally that no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of the return. The notice in question was dated March 17, 1988, and covers the period August 31, 1984 through

February 28, 1985. In their original petition, petitioners did not list notice number S80317004R nor state the period covered by this notice.

The Rules of Practice and Procedure of the Tax Appeals Tribunal prescribe the procedure for amended pleadings and provide as follows:

> "Either party may amend a pleading once without leave, within 20 days after its service, or at any time before the period for responding to it expires, or within 20 days after service of a pleading responding to it. After such time, a pleading may be amended only by consent of the supervising administrative law judge or the administrative law judge or presiding officer assigned to the matter ... No such amended pleading can revive a point of controversy which is barred by the time limitations of the Tax Law, unless the original pleading gave notice of the point of controversy to be proved under the amended pleading" (20 NYCRR 3000.4[c], emphasis added).

This is a case of first impression for this Tribunal with regard to the interpretation of these regulations. The gist of petitioners' argument under the above language is that their original petition "gave notice of the point of controversy to be proved under the amended pleading." In this regard, petitioners assert that only one audit of the business was conducted, that the notice at issue was the result of that audit, and that the "point of controversy" of the original petition was to challenge, in its entirety, the result of the audit. Accordingly, petitioners conclude that they should be allowed to amend their petition to include the notice.

We cannot agree. The audit, in and of itself, is not the point of controversy. The notices of deficiency issued by the Division pursuant to section 1138 are the critical documents which, if not challenged by petitioners within 90 days from their issuance by the Division, irrevocably fix the tax. Thus, it is the tax asserted in the notice which is the "point of controversy" which had to be noticed in the original petition. Since the original petition did not refer to the March 17, 1988 notice, it cannot be concluded that it gave notice of the "point of controversy" and, thus, cannot be amended (see, O'Neil v. Commr., 66 T.C. 105 [interpreting Rule 41-A of the U.S. Tax Court which is similar in nature to the Tribunal's regulation]).

We deal next with the second portion of petitioners' motion, that is, to "serve and file out of time a request for a hearing." In essence, petitioners are asking permission to file a petition more than 90 days after the issuance by the Division of the March 17, 1988 notice.

The crux of petitioners' request is that if not for the misinformation provided by the auditor, they would have timely filed a petition challenging the asserted deficiency, and that they should not now be denied such opportunity because of the misinformation. In short, petitioners argue that the Division should be estopped from challenging the inclusion of the notice in the amended petition on the grounds of timeliness.

The Administrative Law Judge indicated that she gave more than casual attention to petitioners' assertion of misinformation, but that "even if petitioners had been able to verify the oral instructions on which they relied, absent reliance upon an authoritative source, it seems likely that the same result would ensure."

To the extent that the Administrative Law Judge held that the application of estoppel against the Department of Taxation is rare and limited to truly unusual facts, we agree (see, Schuster v. Commr., 312 F2d 311, 62-2 USTC ¶ 12,121 at 86,585; Matter of Maximilian Fur Co., Tax Appeals Tribunal, August 9, 1990). However, the record here is not sufficient for us to make any judgment concerning the merits of petitioners' estoppel argument nor to decide whether the notice issued on March 17, 1988 was a valid notice which would have required petitioners to file a timely petition. We remand the matter to the Administrative Law Judge for a consolidated hearing on the notices challenged in the original petition and on petitioners' assertion concerning the March 17, 1988 notice. In addition, in the interests of a full and complete adjudication of this matter, without undue delay, and with regard to an economic use of resources, the parties should address the merits of the March 17, 1988 notice but this does not mean that we have concluded that petitioners are entitled to a decision on the merits with respect to this notice.

Accordingly, it is ORDERED ADJUDGED and DECREED that this matter is remanded for a hearing to be held in accordance with this decision.

DATED: Troy, New York
February 22, 1991

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

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

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