STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
FRANCIS J. CRISPO	:	DECISION DTA No. 811362
for Revision of Determinations or for Refund of Sales and use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 1989 through November 30, 1990.	:	
	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on June 9, 1994 with respect to the petition of Francis J. Crispo, 175 West 92nd Street, New York, New York 10025. Petitioner appeared by Jackson & Nash (Joseph Michaels IV, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Christina L. Seifert, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioner filed a brief in opposition. The Division of Taxation submitted a letter stating it would not be filing a reply brief. This letter was received on October 26, 1994, which date began the six-month period for the issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether petitioner timely filed a request for a conciliation conference.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "2," "3(c)" and "4(e)" which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

Petitioner, Francis J. Crispo, was an officer of 1991 Broadway Restaurant Corp., as well as the chief chef of the restaurant it operated until he resigned in July 1990. A Mr. Terrance Singleton was also an officer.

We modify finding of fact "2" of the Administrative Law Judge's determination to read as follows:

> The Division of Taxation ("Division") issued four notices of determination and demands for payment of sales and use taxes due to petitioner on August 27, 1991 for the four quarters ended February 28, 1990 through November 30, 1990, stating that petitioner was liable as an officer of 1991 Broadway Restaurant Corporation for sales and use taxes in the aggregate amount (for all four determinations) of $100,457.48, penalty of $25,463.25 and interest of $13,787.86, for a total amount due of $139,708.59.[1]

Mr. Crispo believes that in late 1991 his attorney at the time properly and timely filed a request for a conciliation conference. However, on May 19, 1992, Mr. Crispo called the tax examiner who had issued the notices, Mr. Ryan, and was told that as far as the examiner knew no request for a conference had been made.

On May 22, 1992, Mr. Crispo, now represented by Mr. Michaels of Jackson and Nash, requested a conference. On August 7, 1992, a conciliation conferee issued an order denying Mr. Crispo's request as untimely made.

We modify finding of fact "3(c)" of the Administrative Law Judge's determination to read as follows:

> A petition for a hearing with the Division of Tax Appeals was filed on November 5, 1992.[2]

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[1] We modify finding of fact "2" of the Administrative Law Judge's determination by indicating the total penalty amounted to $25,463.25, not $25,454.25. As a result, the total tax, penalty and interest amounted to $139,708.59 and not $139,699.59. We would like to take this opportunity to caution the Administrative Law Judge to be more attentive when drafting findings of fact.

[2] We modify finding of fact "3(c)" of the Administrative Law Judge's determination to reflect the fact that the petition was filed on November 5, 1992 and not on November 9, 1992. The petition was United States postmarked November 5, 1992 and received by the Division of Tax Appeals on November 9, 1992 via certified mail. Had the

On August 31, 1991, the Division issued four notices of determination, nearly identical to the notices sent to petitioner, to Terrance Singleton, who had been for a time the secretary and a director of 1991 Broadway Restaurant Corporation.

Mr. Singleton, by his attorney, Mr. Michaels of Jackson and Nash, requested a conciliation conference by a request dated November 18, 1991.

In a statement attached to his request for conference, Mr. Singleton named Mr. Lewis Futterman as president and chief executive officer of the corporation, owner of 65% of the stock and also owner of the building leased to the corporation. Mr. Crispo was named as "chief chef", a minority shareholder and formerly a director and vice-president. Amy Yue, a bookkeeper, was said to have filed all tax returns and a Mr. Lewin was identified as the certified public accountant. Mr. Singleton identified himself as Mr. Futterman's "surrogate" with limited check-writing and signing authority. Mr. Singleton clearly points to Mr. Futterman as being responsible for sales taxes.

The determinations against Mr. Singleton were cancelled on May 15, 1992.

We modify finding of fact "4(e)" of the Administrative Law Judge's determination to read as follows:

> Mr. Crispo's petition includes a copy of a letter from Mr. Singleton, dated August 23, 1990, referencing "Francis J. Crispo/1991 Broadway Restaurant Corp.", to his then attorney stating that "Frank" and he had resigned as officers and directors but were keeping their stock. He stated "[a]s per instructions from Frank" he was enclosing materials necessary to have his and Frank's name removed from the liquor license.[3]

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petition been filed on November 9, 1992, it would have been untimely filed. We would like to take this opportunity to caution the Administrative Law Judge to be more attentive when drafting findings of fact.

[3] We modify finding of fact "4(e)" of the Administrative Law Judge's determination by deleting the first two sentences of such finding which originally read as follows:

> "Mr. Crispo and Mr. Singleton have common interests in the transactions involved in this case. They had the same attorney during the months immediately after the issuance of the August 1990 notices of determination."

The first sentence was deleted because it is more in the nature of a conclusion than a fact. The second sentence

OPINION

The Administrative Law Judge held that although it was conceded Mr. Crispo's direct request for a conciliation conference was not timely filed, the Division was fairly advised of petitioner's claim by virtue of the fact that petitioner's name appeared on Mr. Singleton's timely filed request for a conciliation conference.

On exception, the Division, quoting Matter of Halperin v. Chu (138 AD2d 915, 526 NYS2d 660, appeal dismissed in part, denied in part 72 NY2d 938, 532 NYS2d 845), contends that:

> "[t]he statutory requirement that a petition for administrative redetermination of petitioner's personal liability be filed within 90 days is absolute and, in the absence of such timely application, the original determination shall finally and irrevocably fix the tax . . . ." The Division contends that "there must be something more than the mere reference to the petitioner's name in Terrence Singleton's request for conference to make the Department of Taxation and Finance aware that the petitioner has also requested a conference."

In response, petitioner contends that Mr. Singleton's request for a conciliation conference was sufficient to put the Division on notice of petitioner's claim and that this informal request was remedied by the May 1992 filing of a formal request. Petitioner asserts that the Administrative Law Judge properly relied on Matter of Miles (Tax Appeals Tribunal, September 13, 1990). Petitioner contends that although the ninety-day filing period is absolute, the failure to file within such time may be excused as a matter of discretion.

We reverse the determination of the Administrative Law Judge.

Section 1138(a)(1) of the Tax Law provides that a notice of determination:

> "shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the division of tax appeals for a hearing, or unless the

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was deleted because: (1) Mr. Crispo and Mr. Singleton did not have the same attorney during the months following the issuance of the notices of determination; according to petitioner, Jackson & Nash (Mr. Singleton's attorneys) was not retained until May 19, 1992 after the alleged malfeasance of petitioner's former representative was discerned; and (2) the notices of determination were issued in August 1991, not August 1990.

> commissioner of taxation and finance of his own motion shall redetermine the same."

Such person may, in the alternative, request a conciliation conference with the Bureau of Conciliation and Mediation Services "if the time to petition for . . . a hearing [with the division of tax appeals] has not elapsed" (Tax Law § 170[3-a][a]).

> "The statutory requirement that a petition for administrative redetermination of petitioner's personal liability be filed within 90 days is absolute and, in the absence of such timely application, the original determination 'shall finally and irrevocably fix the tax'" (Matter of Halperin v. Chu, supra, 526 NYS2d 660, 661, quoting Tax Law § 1138[a][1]).

Here it is conceded that petitioner's formal request was untimely as it was filed more than 90 days after notice was given, but petitioner contends that the Division was fairly advised of his claim. In support of this contention, petitioner asserts that "[n]otice came in the form of Singleton's Request [footnote omitted] because in his request, Singleton alleged inter alia, that the only individual liable for such tax was Futterman" (Petitioner's brief, p. 6). We disagree.

Tax Law § 170(3-a)(b) provides that "[a] request for conciliation conference shall be applied for in the manner as set forth by regulation of the commissioner . . . ." The regulations provide that the request for a conciliation conference should contain:

"(i) the name and address of the requester;

(ii) the name and address of the requester's representative, if any;

(iii) if applicable, the taxable years or periods involved and the amount of tax in controversy;

(iv) the action or actions of the operating division or bureau which are being protested;

(v) the facts and law which the requester asserts are relevant to the controversy;

(vi) the signature of the requester or the requester's representative beneath a statement that the request is made with knowledge that a willfully false representation is a misdemeanor punishable under section 210.45 of the Penal Law;

(vii) a legible copy of the statutory notice being protested; and

(viii) the original or a legible copy of the power of attorney" (20 NYCRR § 4000.3[b][1]).

The information contained in Mr. Singleton's request, inasmuch as it relates to petitioner, does not satisfy any of the requirements specified in the Division's regulations nor can it be said that it fairly advised the Commissioner of petitioner's claim so as to constitute an informal request. The only mention of petitioner in Mr. Singleton's request for a conciliation conference was in a document describing the corporate structure of 1991 Broadway Restaurant Corporation.

Petitioner argues that since Mr. Singleton alleged in his timely request that Mr. Futterman was the only person responsible for payment of the tax, it should have been clear that "Crispo by virtue of the similarity of their positions, would also claim and establish that Futterman was the only individual who was a responsible person" (Petitioner's brief, p. 9). We find this argument meritless.

In analyzing whether a taxpayer has made an informal claim for refund, the Supreme Court has stated:

> "a notice fairly advising the Commissioner of the nature of the taxpayer's claim, which the Commissioner could reject because too general or because it does not comply with formal requirements of the statute and regulations, will nevertheless be treated as a claim where formal defects and lack of specificity have been remedied by amendment filed after the lapse of the statutory period" (United States v. Kales, 314 US 186, 194).

Lower courts, applying this standard, have held that:

> "[i]t is not enough that the Service have in its possession information from which it might deduce that the taxpayer is entitled to, or might desire, a refund; nor is it sufficient that a claim involving the same ground has been filed for another year or by a different taxpayer" (American Radiator & Standard Sanitary Corp. v. United States, 318 F2d 915, 63-2 USTC ¶ 9525, at 89,179; see also, Rosengarten v. United States, 181 F Supp 275, 60-1 USTC ¶ 9303, cert denied 364 US 822).

We find that the situation where the taxpayer is claiming a timely, yet informal, request for refund has been made to be analogous to the situation where the taxpayer is claiming a timely, yet informal, request for a conciliation conference has been made. Therefore, we hold that the analysis employed in the refund situation is applicable in determining whether there has

been a timely request for a conciliation conference. As a consequence, it is not enough for petitioner to claim that the Division might have deduced that he too would claim Mr. Futterman as the only responsible person for payment of the tax.

In his determination, the Administrative Law Judge stated that:

> "[a]lthough one Federal case has held that one taxpayer cannot rely on the claim of another, that same case also decided that a taxpayer cannot rely on his own informal claim for a different year (Rosengarten v. U.S., 149 Ct Cl 287, 181 F Supp 275, 60-1 USTC [CCH] ¶ 9303, cert denied 364 US 822), a propositiion [sic] rejected by the Tribunal in the Miles case" (Determination, conclusion of law "A[2]").

Although unnecessary to the disposition of this matter, we believe it is necessary to rectify the Administrative Law Judge's conception of our holding in Matter of Miles (supra).

In Matter of Miles (supra), we held that an informal claim for refund of an overpayment of tax existed and was timely filed where the taxpayer applied the overpayment for 1970 against the tax liability on the 1971 return and requested a refund of the overpayment shown on the 1971 return. The overpayment applied to the 1971 filed return put the Division on notice that the taxpayers were claiming a credit for the previous year regardless of whether the subsequent year's return claimed a refund for that year. Rosengarten v. United States (supra), the case relied upon by the Administrative Law Judge, presented a dramatically different situation than the situation presented in Miles. In Rosengarten, plaintiffs were asserting claims made in 1944:

> "formed an ample basis on which the Commissioner might have surmised that plaintiffs were also claiming for 1945 since a favorable determination of the . . . question presented in the claims actually filed would have entitled them to a refund for 1945 as well as 1944" (Rosengarten v. United States, supra, 60-1 USTC ¶ 9303, at 75,772).

Thus, contrary to the Administrative Law Judge's belief, we find Miles to be in harmony with Rosengarten. We also find Rosengarten to be consistent with our conclusions in this case.

Next, petitioner asserts that although the 90-day period for filing is absolute, the Tax Commission may, in its discretion, review petitioner's request pursuant to Tax Law § 1138(a)(3)(B). Thus, petitioner asserts that the Administrative Law Judge was within his

discretion in remanding this matter to the Bureau of Conciliation and Mediation Services for a conciliation conference. We disagree.

The discretionary authority in Tax Law § 1138(a)(3)(B) which allows the Tax Commission to redetermine taxes on its own motion is given to the Commissioner of Taxation, not to the Administrative Law Judge, nor to the Tax Appeals Tribunal (Matter of Perillo, Tax Appeals Tribunal, August 2, 1990; see also, Tax Law § 1138[a][1]).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted;

2. The determination of the Administrative Law Judge is reversed; and

3. The petition of Francis J. Crispo is denied.

DATED: Troy, New York
April 13, 1995

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

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