STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ROBERT TRUSNOVEC	:	DECISION DTA NO. 818762
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, 1990 through May 31, 1993.	:	

Petitioner Robert Trusnovec, P.O. Box 674, Wading River, New York 11792, filed an exception to the determination of the Administrative Law Judge issued on November 24, 2004. Petitioner appeared *pro se*. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Michael B. Infantino, Esq., of counsel).

Petitioner filed a brief in support of his exception and the Division of Taxation filed a letter brief in lieu of a formal brief in opposition. Petitioner filed a reply brief. Petitioner's request for oral argument was denied.

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

ISSUE

Whether the Division of Taxation properly determined additional sales and use taxes due from petitioner for the period at issue.

FINDINGS OF FACT

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

Shortly before the commencement of the hearing held in this matter, Robert Trusnovec ("petitioner") requested an adjournment of the hearing which was scheduled for Thursday, December 16, 2003. By letter dated November 25, 2003, Assistant Chief Administrative Law Judge Daniel J. Ranalli denied petitioner's request on the basis that such hearing had been scheduled seven times over the one and one-half years immediately prior thereto. Apparently, petitioner had indicated that he would be having surgery each time that the hearing was scheduled and, once again, stated that he was to have surgery on or about December 16, 2003, the most recent scheduled date of the hearing. Judge Ranalli, therefore, proposed several alternatives to an adjournment of the hearing, to wit: (1) the hiring of a representative to appear at the hearing on petitioner's behalf; (2) proceeding with the hearing without petitioner's attendance in which case the Division of Taxation ("Division") would present its case, petitioner would be provided with a copy of the hearing transcript and copies of all evidence submitted by the Division and petitioner would then be provided with ample time to file evidence (documents and/or affidavits) in support of his position; (3) proceeding by means of a submission, i.e., both parties would submit their documents and written arguments according to a schedule and the matter would then be determined without a hearing; or (4) petitioner could elect not to appear at the hearing and a default order would then be entered.

At the hearing, the Division's representative, Michael B. Infantino, Esq., indicated that he had spoken with petitioner and that petitioner had stated that he wished to proceed with the

second alternative set forth above. Accordingly, petitioner was provided with a copy of the hearing transcript and copies of all evidence presented by the Division. Petitioner was then provided with a schedule for submission of his evidence and legal arguments pertaining to this matter; however, while numerous additional requests for extensions were made and two such requests were granted, petitioner submitted no evidence or legal briefs in support of his position.

Petitioner was the sole proprietor of a delicatessen known as Yaphank Community Shop ("YCS") located in Yaphank, New York.

On June 18, 1993, an audit of YCS was commenced by the Division. Prior to this audit, YCS had been audited by the Division on three other occasions. By letter dated June 18, 1993, the Division advised petitioner that an audit was being conducted for the period June 1, 1990 through May 31, 1993. The letter requested that the following books and records be made available: Federal income tax returns, State income tax returns, journals, ledgers, sales invoices, purchase invoices, fixed asset invoices, cash register tapes, guest checks, exemption certificates and all other sales tax records.

An additional letter dated October 20, 1993 was sent to petitioner which requested the following information needed to continue the audit: sales and purchase journals for the period June through September 1990 and July 1991, bank statements for the entire audit period, the last two Federal income tax returns filed, check purchase records for the audit period and "the entire box of 1993 records."

Additional letters, dated June 13, 1994 and January 9, 1995, were sent to petitioner requesting information necessary to complete the audit.

No general ledger, sales journal, cash receipts journal, purchase journal, monthly bank statements or sales invoices were provided by petitioner to the auditor. While purchase invoices were provided for the period June 1 through December 31, 1990, no journal to tie in such invoices was provided and the purchase invoices were loose invoices, in large envelopes. In addition, the purchases per records were $53,432.16 less than purchases per Federal income tax returns. Therefore, the purchase records were deemed inadequate by the auditor. The only cash register tapes provided were the "ring-out" or total tapes, not the entire tapes. Petitioner had no sales tax accrual bank account.

Due to the increase in reporting of gross sales which was attributed to the prior audit, gross sales for the period December 1, 1990 through May 31, 1993, totaling $863,789.00, were accepted as filed. However, for the period June 1, 1990 through November 30, 1990, gross sales were not accepted since they were very low when compared to other quarters. For that period, petitioner's purchases in the amount of $49,582.00 were marked up by petitioner's book markup ratio (per his Federal income tax returns) of 68 percent which resulted in audited gross sales of $122,496.00 for these two sales tax quarters. Therefore, total audited gross sales for the audit period were determined to be $986,285.00.

In order to determine a taxable ratio, an observation test was conducted, with the consent of petitioner, on Tuesday, March 12, 1996 from 6:00 A.M. until 7:00 P.M. (the business operated seven days per week, from 6:00 A.M. to 7:00 P.M.). The observation revealed a prepared food (sandwiches, breakfast sandwiches, etc.) ratio of 46.1 percent and other taxable sales (beer, soda, cigarettes, candy, etc.) ratio of 23 percent. The prepared food ratio of 46.1 percent was reduced

to 40.5 percent to account for the fact that delicatessens do not sell as much prepared food on weekends as is sold during the week.

The prepared food ratio of 40.5 percent was applied to the audited gross sales of $986,285.00 resulting in audited taxable prepared food sales in the amount of $399,445.45. The other taxable sales ratio of 23 percent was applied to the audited gross sales of $986,285.00 resulting in audited sales of $226,845.55. Total audited taxable sales for the audit period were, therefore, found to be $626,291.00.

For the audit period, petitioner had reported taxable sales in the amount of $447,492.00. Additional taxable sales were, therefore, determined to be $178,799.00 with tax due thereon in the amount of $14,101.51. Because of petitioner's prior audit history of underreporting, omnibus and statutory penalties as well as interest were imposed by the auditor.

During the course of the audit, petitioner executed a series of consents extending the period of limitation for assessment of sales and use tax, the last of which provided that such taxes for the audit period could be assessed at any time on or before June 20, 1997.

On May 5, 1997, the Division issued a Notice of Determination to petitioner assessing additional sales and use taxes in the amount of $14,220.91, plus penalty and interest, for a total amount due of $32,591.49 for the period June 1, 1990 through May 31, 1993.

Petitioner filed a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). In lieu of appearing at a conference, petitioner opted to have the matter decided by correspondence.

Contending that the taxable ratios determined by the auditor were too high, petitioner performed his own observation test which found the prepared food taxable ratio to be 35.2

percent (rather than the 40.5 percent determined by the auditor) and the other taxable sales ratio to be 20 percent (rather than the 23 percent determined by the auditor). It was determined by the conciliation conferee, pursuant to a Conciliation Order (CMS No. 162846) dated May 25, 2001, to utilize petitioner's taxable ratios which resulted in a reduction in the amount of tax due to $7,599.41. In addition, penalties were canceled and interest was computed at the applicable rate.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge noted that the Tax Law mandates that every person required to collect sales tax must maintain records sufficient to verify all transactions in a manner suitable to determine the correct amount of tax due. The Administrative Law Judge concluded that petitioner failed to maintain records sufficient to verify his delicatessen's daily sales. The Administrative Law Judge held that under these circumstances, the Division was authorized to estimate petitioner's sales tax liability.

The Administrative Law Judge noted that the audit methodology utilized by the Division to estimate sales must be reasonably calculated to reflect tax due, but exactness in the outcome of the audit is not required. The Administrative Law Judge pointed out that petitioner bears the burden of proving, by clear and convincing evidence, that the methodology was unreasonable or that the amount assessed was erroneous.

The Administrative Law Judge observed that the audit methodology utilized petitioner's gross sales where possible, or petitioner's purchases were marked up by his own book markup ratio to determine gross sales. In conducting an observation test, the Division allowed the results of petitioner's own observation test to alter its results. Further, penalties were canceled despite petitioner's underreporting of taxable sales in prior audits. The Administrative Law Judge also

pointed out that subsequent to the conciliation conference, petitioner offered no additional evidence at all which would serve to show that the amount assessed was erroneous. The Administrative Law Judge held that the audit methods utilized and the subsequent reduction to the results thereof were reasonably calculated to reflect tax due.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that he failed to attend a hearing in this matter due to emergency surgery on his leg. Further, he asserts that due to his health, he should have been afforded another hearing date. Petitioner also maintains that previous audits for sales and income tax were performed only to harass him as he did not owe additional tax to the State.

The Division, in opposition, argues that the Administrative Law Judge correctly decided this matter and asks that his determination be affirmed.

OPINION

Petitioner's main contention on exception is that he should have been afforded the right to a hearing. We believe, after reviewing the record in this matter, that petitioner was allowed every reasonable opportunity to have this matter heard.

The Rules of Practice of the Tribunal provide, in relevant part, that:

> At the written request of either party, made on notice to the other party and received 15 days in advance of the scheduled hearing date, an adjournment may be granted where good cause is shown (20 NYCRR 3000.15[b][1]).

Essentially, this regulation leaves it to the sound discretion of the Division of Tax Appeals whether or not to grant a request for an adjournment. It appears from the record of this matter maintained by the Division of Tax Appeals that on November 25, 2003, petitioner faxed a form from a doctor to the Assistant Chief Administrative Law Judge indicating that petitioner was to

have knee surgery the week prior to the scheduled hearing on December 16, 2003. Deeming this faxed form a request for an adjournment of the December 16, 2003 hearing, the Assistant Chief Administrative Law Judge wrote to petitioner on November 25, 2003 and denied petitioner's request for an adjournment. The Assistant Chief Administrative Law Judge noted in his letter that a hearing had been scheduled and postponed six times already due to petitioner's need for an operation of one sort or another in each instance. In his letter, the Assistant Chief Administrative Law Judge gave petitioner several alternatives to appearing in person at the hearing.

The record does not disclose any response by petitioner to the letter of the Assistant Chief Administrative Law Judge prior to the hearing. However, at the hearing held in this matter, the representative of the Division of Taxation indicated on the record that petitioner had spoken with him and had advised him that petitioner had chosen the offered alternative of having the hearing held, sending petitioner a copy of all evidence introduced by the Division as well as a copy of the transcript, and allowing petitioner time to submit documents on his behalf.

That is the procedure that was followed by the Administrative Law Judge and petitioner, in response, failed to submit any evidence on his behalf relevant to the merits of his case.

Given petitioner's continuing serious medical problems, it is very possible that there will never be a time when petitioner is free of infirmities and physically able to attend a hearing regarding a determination of his tax liability. As unfortunate as petitioner's circumstances are, it does not mean that petitioner's tax liability may never be determined.

We find that the Administrative Law Judge completely and adequately addressed the issues presented to him and correctly applied the relevant law to the facts of this case. Petitioner has offered no evidence below, and no argument on exception, that would provide a basis for us

to modify the determination in any respect. Thus, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Robert Trusnovec is denied;

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

3. The petition of Robert Trusnovec is denied; and

4. The Notice of Determination issued on May 5, 1997, as modified by the Conciliation Order dated May 25, 2001, is sustained.

DATED: Troy, New York
December 1, 2005

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Robert J. McDermott
Robert J. McDermott
Commissioner