STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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| In the Matter of the Petition | : | |
| of | : | |
| **ELOISE A. TOOMER** | : | DECISION<br>DTA NO. 819279 |
| 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, 1996 through May 31, 1999. | : | |

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Petitioner Eloise A. Toomer, 220-30 Merrick Boulevard, Springfield Gardens, New York 11413, filed an exception to the determination of the Administrative Law Judge issued on March 25, 2004. Petitioner appeared by Leonard L. Fein, CPA. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Michael P. McKinley, Esq., of counsel).

Petitioner filed a brief in support of her exception and the Division of Taxation filed a 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's determination of additional sales and use tax due from petitioner was proper.

## *FINDINGS OF FACT*

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

The Division of Taxation ("Division") began an audit of the retail liquor business operated by petitioner, Eloise Toomer, on or about August 2, 1999, when the auditor visited the store location and informed petitioner of the audit and the records she would be required to produce. Petitioner took over operation of the business from her estranged husband in 1998.

By letter dated August 3, 1999, the Division requested all books and records pertaining to the sales and use tax liability of petitioner's business for the period June 1, 1996 through May 31, 1999. Records requested by the Division included financial statements, journals, ledgers, sales invoices, purchase invoices, cash register tapes, sales and use tax returns, Federal income tax returns and exemption certificates. Included with the letter was Publication 130-F, "The New York State Tax Audit – Your Rights and Responsibilities," which stated that if, after audit, there were changes in the amount of tax due, the auditor would meet with the taxpayer and explain the findings, accept further information from the taxpayer and then issue a statement of proposed audit changes.

Subsequently, the auditor determined that the records available were not sufficient to perform a complete audit. He resorted to using petitioner's records to identify third-party suppliers. His log reflected that he requested purchase records from third-party suppliers on August 19, September 1, and 8, 1999, from which it was determined that petitioner made purchases of $625,431.00 during the audit period. Based on this information, the auditor prepared a statement of proposed audit change for sales and use tax for the period June 1, 1996

through May 31, 1999, dated January 6, 2000, which set forth additional tax due of $45,831.96 and interest of $8,214.77 for a total amount due of $54,046.73.

Prior to sending the statement of proposed audit change, the auditor spoke with petitioner by telephone and informed her of the results of his audit, which were consistent with the tax and interest figures in the January 6, 2000 statement of proposed audit change. This telephone communication was not reflected in the auditor's log, form "DO-220.5," but petitioner's use of the information prior to January 6, 2000 in her attempt to obtain financing to pay the tax confirmed that she had received the information.

After an unsuccessful attempt to obtain financing from Fleet Bank, petitioner responded to an advertisement from American Business Credit, Inc. for funds to pay the additional taxes determined to be due by the Division, purchase inventory and make some repairs at the retail location. The loan was more costly for petitioner who incurred a 16 percent interest rate.

On Friday, January 14, 2000, a real estate closing took place between American Business Credit, Inc. ("ABC") and petitioner at her store. A check in the amount of $54,046.73 was cut from the proceeds of the mortgage and forwarded by Mortgage Escrow Services, Inc., ABC's closing company, on January 19, 2000, to the Division's Queens District Office to the attention of the auditor, Mr. Alvin Licorish.

The cover letter ("payoff letter") sent with the check by Mortgage Escrow Services, dated January 19, 2000, indicated that the mode of delivery to the Division was Federal Express, and bore an in-date stamp of the Queens District Office of January 20, 2000. The letter referenced petitioner, her case number, Mr. Licorish, and a description of the check enclosed with the letter. Also included was the following statement:

> In accordance with our telephone conversation, we enclose check as follows:
> Date 1-19-00 Check No. 3162 Amount $54,046.73
> Payable to: NYC Dept of Tax + Finance
> In full satisfaction of __ Mortgage _x_ Judgment __ Lis Pendens

> Please forward to the attention of the undersigned, the Satisfaction of Judgement and or stipulation canceling Lis Pendens (if applicable).
>
> . . .
>
> Please acknowledge receipt of this letter and check(s) on the enclosed copy of same.

The letter was signed by a representative of the title company.

Mr. Licorish did not remember how the letter, check and statement of proposed audit change was delivered to his office and stated that he "probably discarded [the envelope] if [he] got it. Because I get Federal Express, I get UPS, I just can't hold on to boxes and letters, you know."[1] In addition, Mr. Licorish had no recollection of speaking with the title company prior to receiving the documents as recited in the letter, but conceded that they may have called to confirm the payoff. He did not acknowledge receipt of the letter or respond to the company in any manner, although requested to do so.

The certified check, dated January 18, 2000, in the sum of $54,046.73 was endorsed by the "Commissioner of Taxation and Finance" on January 20, 2000. On the face of the check were petitioner's "ID" number and case number from the statement of proposed audit change.

Mortgage Escrow Services also forwarded to the Division with the cover letter and check a copy of the statement of proposed audit change. The copy submitted in evidence by petitioner, which she received from the mortgage company, and which the company maintained was an exact copy of the document sent to the Queens District office on January 19, 2000,[2] bore her

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[1]The Division's Exhibit "I", a Statement of Receivable Deposit Record, TX-120, indicated that payment was received on account of Charles F. and Eloise A. Toomer, in the sum of $54,046.73, on January 21, 2000. A note on the top of the form stated that "the envelope, if any, in which payment was made **must** be attached to this form." No such envelope was attached.

[2]Realty Reports, Inc. sent petitioner a letter signed by R. Thomas Masters, dated June 19, 2003, in which it stated that it forwarded a signed copy of the statement and payoff check to the Division "on or about" January 14, 2000.

signature and the date of January 14, 2000. The Division submitted an unsigned copy of the same document, bearing a Division in-date stamp of January 20, 2000. Further, petitioner submitted a third copy of the same document with her petition which bore her signature and the date January 6, 2000.

The Statement of Proposed Audit Change, dated January 6, 2000, was received from Mr. Licorish by petitioner at some unknown time prior to the real property closing on January 14, 2000. The statement asserted that it was based on an audit of petitioner's records and that petitioner's failure to either agree or disagree with it by February 3, 2000 would result in the issuance of a notice of determination.

The statement asserted that petitioner could agree by merely signing the form and returning it to the Queens District Office by February 3, 2000. In the alternative, the form provided that petitioner could disagree with the tax set forth on the statement by providing "contact information" and a precise explanation for the disagreement by February 3, 2000.

On or about April 18, 2000, some 89 days after receiving payment, payoff letter and statement of proposed audit change, the auditor met with his superior to close the file in this matter. At that time, it was discovered that the audit was not complete and that purchases from an additional vendor, Premier, had not been considered in determining the additional tax due. The auditor had written and called Premier several times prior to issuing the January 6, 2000 statement but received no responses.

Once the auditor discovered his omission, he identified purchases made by petitioner from Premier in the cash disbursements journal between January and July of 1999 and calculated a monthly purchase figure of $6,135.00. After applying this purchase figure to each month of the

audit period, the auditor determined purchases for the audit period of $846,305.00. After a ten percent adjustment for inventory and pilferage, total purchases were determined to be $761,675.00. These purchases were then marked up by 25 percent, a markup percentage utilized on prior audits and on the 1993 Federal partnership return, to arrive at taxable sales of $952,093.00. After subtracting reported sales of $181,000.00, additional sales of $771,093.00 yielded additional tax due of $63,615.00, or $17,783.04 more than the tax previously determined and set forth on the statement of proposed audit adjustment.

At the time the auditor decided to close the case in April of 2000, he was aware that petitioner had agreed to the original assessment in full. The Division issued a Notice of Determination, dated May 30, 2000, to petitioner in the amount of $63,615.27, plus interest of $13,310.76, less the payment of $54,046.73, for a total due of $22,879.30.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

In his determination, the Administrative Law Judge first examined the propriety of the Division's audit methodology. The Administrative Law Judge noted that the Division made a proper request for the books and records of Toomer Liquors in its letter of August 3, 1999, and there is no dispute that petitioner did not produce adequate records. The Administrative Law Judge found that it was impossible for the Division to verify taxable sales receipts and conduct a complete audit.

The Administrative Law Judge observed that when a taxpayer's records are inadequate, the Division may select an audit method reasonably calculated to reflect the sales and use taxes due and it was only necessary that sufficient evidence be produced to demonstrate that a rational basis existed for the auditor's calculations. In this case, the Division had used petitioner's

disbursements journal to discern petitioner's suppliers. The Administrative Law Judge found that the Division had established a rational basis for choosing to perform a markup on purchases to project sales and calculate taxes due.

Although petitioner specifically challenged the Division's assumption that Toomer Liquors made purchases from Premier throughout the audit period based on purchases listed in the disbursements journal for the months of January to July of 1999, the Administrative Law Judge concluded that the Division properly used purchases from outside the audit period because petitioner failed to provide purchase figures for the entire audit period.

The Administrative Law Judge noted that petitioner bore the burden to show by clear and convincing evidence that the Division's audit methodology was unreasonable or that the amount assessed was erroneous. The Administrative Law Judge held that petitioner failed to meet her burden of proof because she offered no evidence to contradict the Division's chosen methodology and did not demonstrate that the results were erroneous, other than to provide mere allegations that the result was incorrect or that a different methodology would have been more accurate.

The Administrative Law Judge next considered whether petitioner properly completed and filed a statement of proposed audit change. The Administrative Law Judge observed that if petitioner had signed and filed the consent, then the Division's recomputation more than 60 days after it issued the statement of proposed audit change would be invalid.

The Administrative Law Judge found that petitioner failed to meet her burden to prove that a signed consent was filed with the Division. Although the Administrative Law Judge found that petitioner credibly testified that she executed a consent at her closing on January 14, 2000, and

entrusted the title company with her duty to file the consent and payment with the Division, the Administrative Law Judge determined that the record does not support a conclusion that the proper documents were forwarded to the Division. As a result, the Administrative Law Judge held that the Division was not constrained by the 60-day limit on changes to the assessment set forth on the consent.

The Administrative Law Judge criticized the actions of the Division in conducting the audit. The Administrative Law Judge noted instances in which the auditor did not follow the guidelines set forth in Publication 130-F, which he provided to petitioner on August 3, 1999. The Administrative Law Judge found the Division's behavior "deplorable" and held that its competency was "questionable in certain instances on this audit." However, the Administrative Law Judge held that the facts did not rise to the level of "exceptional" so as to justify the implementation of the doctrine of equitable estoppel against the Division. The Administrative Law Judge found that while petitioner justifiably relied on the representations made to her by the Division, the detriment she suffered was due to her failure to file with the Division a "signed" statement consenting to the tax as required by Tax Law § 1138(c). The Administrative Law Judge noted that it was petitioner's responsibility to assure that the title company delivered a signed copy of the consent she signed on January 14, 2000 and she could not delegate it to another and avoid the consequences.

***ARGUMENTS ON EXCEPTION***

On exception, petitioner argues that she accepted the amount of tax and interest set forth on the statement of proposed audit change. Petitioner maintains that she made payment of it in full and that the Division was aware that she consented to the payment. Petitioner maintains that

a signed consent was sent to the Division by the mortgage company along with additional notification that her payment was intended to discharge her tax liability. Petitioner asserts that the Administrative Law Judge noted the auditor's negligence in throwing away papers and the Division did not prove that the signed consent was not actually received.

Petitioner contends that the audit was flawed because the Division assumed that petitioner made purchases from Premier prior to January 1999. Petitioner maintains that the Division should not have relied on purchases from Premier made outside the audit period in preparing its markup test.

Petitioner also argues that the Division should be estopped from assessing tax in excess of that to which she agreed in the statement of proposed audit change. Petitioner claims that she had the right to rely on the Division's representation as to the amount of the assessment; that she did rely on it; and that she was injured as a result of the auditor's negligence.

The Division, in opposition, argues that the Administrative Law Judge properly determined the issues in this case. The Division believes that the audit was properly conducted given petitioner's inadequate records and that the additional tax determined to be due was a reasonable estimate arrived at using available records and information. Further, because petitioner failed to return a signed copy of the statement of proposed audit change, the Division maintains that it was not precluded from continuing its audit and increasing the amount of tax due. Finally, the Division asserts that petitioner was not entitled to estoppel as the detriment she suffered was due to her own failure to submit a signed statement of proposed audit change in accordance with Tax Law § 1138(c).

## *OPINION*

Tax Law § 1138(c) provides as follows:

> A person liable for collection or payment of tax (whether or not a determination assessing a tax pursuant to subdivision (a) of this section has been issued) shall be entitled to have a tax due assessed prior to the ninety-day period referred to in subdivision (a) of this section, by filing with the tax commission a signed statement in writing, in such form as the tax commission shall prescribe, consenting thereto.

Had petitioner demonstrated that she signed the January 6, 2000 Statement of Proposed Audit Change and returned the signed copy to the Division on or before February 3, 2000 as required, the amount of tax set forth on that Statement would have been rendered fixed and final (***see***, ***Matter of BAP Appliance Corp.***, Tax Appeals Tribunal, May 28, 1992; ***see also***, ***Matter of Rosemellia***, Tax Appeals Tribunal, March 12, 1992).

If it was petitioner's intent to proceed pursuant to Tax Law § 1138(c), it is regrettable that she failed to sign the Statement of Proposed Audit Change before it was returned to the Division. The Administrative Law Judge has appropriately criticized the auditor's actions in this matter both in the conduct of the audit and on receipt of petitioner's unsigned statement. Despite that, it is petitioner's failure to follow the instructions contained on the Statement of Proposed Audit Change that prevents her from prevailing in this case.

The Administrative Law Judge found the audit methodology proper and, in the absence of any evidence being presented by petitioner to the contrary, upheld the audit results. Further, he found that although petitioner paid the Division the amount shown on the Statement of Proposed Audit Change, she did not sign that Statement as was required in order to indicate her agreement to the assessment of tax and interest and to preclude the Division from assessing her an

additional amount of tax and interest for the periods at issue above what was contained in that Statement.

Petitioner has offered no evidence below, and no argument on exception, that demonstrates that the Administrative Law Judge's determination is incorrect. We find that the Administrative Law Judge completely and adequately addressed the issues presented to him and we see no reason to modify them in any respect. As a result, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Eloise A. Toomer is denied;

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

3. The petition of Eloise A. Toomer is denied; and

4. The notice of determination, dated May 30, 2000, is sustained.

DATED: Troy, New York
November 18, 2004

/s/Donald C. DeWitt
Donald C. DeWitt
President

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