

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GIUSEPPA AND BENEDETTE ROMANO	:	DETERMINATION
(PARTNERS) BENNIE'S PIZZA	:	
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, 1976	:	
through November 30, 1984.	:	

Petitioners, Giuseppa and Benedette Romano (Partners), Bennie's Pizza, 141-75 11th Avenue, Malba, New York 11357, filed a 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, 1976 through November 30, 1984 (File Nos. 802464 and 802465).

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on December 5, 1988 at 1:15 P.M., with all briefs to be submitted by March 13, 1989. Petitioners appeared by Murray Appleman, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Michael Gitter, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly determined upon field audit that petitioners owed additional sales tax and failed to remit the same during the period June 1, 1976 through November 30, 1984.

II. Whether all or any part of the assessment issued by the Division of Taxation is barred by operation of the statute of limitation.

FINDINGS OF FACT

1. On June 3, 1985, the Division of Taxation issued a series of notices of determination and demands for payment of sales and use taxes due to petitioners, Giuseppa Romano d/b/a Bennie's Pizza and Benedette Romano, Partner of Bennie's Pizza. These notices span in the

aggregate the period June 1, 1976 through November 30, 1984, and reflect the assessment of sales tax against each of the petitioners in the aggregate amount of \$171,441.51, plus penalty (Tax Law § 1145 former [a][1]), plus interest. These notices are based on the results of a Division of Taxation field audit of the operation of a pizzeria located at 44-13 Queens Boulevard, Sunnyside, New York, as described hereinafter.

2. In or about mid-July of 1984, the Division of Taxation determined to conduct an audit of the operation of a pizzeria located at 44-13 Queens Boulevard, Sunnyside, New York. On July 16, 1984, a Division of Taxation auditor issued an audit appointment letter to Bennie's Pizza at the 44-13 Queens Boulevard address indicating that an audit was scheduled for Friday, August 3, 1984 at 9:30 A.M. at the business premises. This letter requested that petitioner have available all books and records pertaining to its sales tax liability for the period under audit. These records were to include all journals, ledgers, sales invoices, purchase invoices, cash register tapes, exemption certificates and all other sales tax records. The letter further specified that the period under audit covered March 1, 1982 through May 31, 1984.

3. On July 19, 1984, the auditor visited the business premises. The auditor noted that the business was located on a busy thoroughfare, and that the premises included four tables and a counter for ordering, as well as a window to the outside from which take-out orders could be placed. The auditor observed that the business sold pizza (whole and by the slice), soda, ices and some other foods including veal parmesan, eggplant parmesan and sausage rolls.

4. On or about July 30, 1984, the auditor was contacted by one Laurie Russo, a Certified Public Accountant, who advised that she was petitioners' representative and requested cancellation of the scheduled August 3, 1984 audit appointment. The auditor agreed to the cancellation and rescheduled the matter for audit examination on August 24, 1984. This rescheduled date was confirmed by a second audit appointment letter dated August 1, 1984. This letter again requested that petitioners have available all books and records pertaining to its sales tax liability and also specified that the period under audit spanned March 1, 1982 through May 31, 1984.

5. In response to the second audit appointment letter, the auditor was again contacted by Ms. Russo, by telephone on August 21, 1984, requesting a second postponement until September 10, 1984. Again, postponement was granted with the audit rescheduled for September 10, 1984. This third scheduled audit appointment was thereafter cancelled by Ms. Russo on September 7, 1984. At this time, the auditor was also advised that there were no records available relative to the operation of Bennie's Pizza, and was given no indication as to when any records would be available. By letter issued to Ms. Russo and to Bennie's Pizza dated September 13, 1984, the auditor advised that failure to furnish the required records for audit within a two-week period would result in the use of external indices in an effort to verify the accuracy of petitioners' sales tax liability as reported. No records were submitted within such two-week period, nor have any records been submitted at any time through the present.

6. On January 15, 1985, the auditor issued a letter to petitioners at the 44-13 Queens Boulevard address indicating that the auditor had been attempting for several months to contact the owners of Bennie's Pizza to conduct an audit. The letter noted the auditor had not been given any records for the business and explained that failure to immediately provide such records would result in the issuance of an assessment based upon external indices. This letter specifically noted that the sales tax audit period spanned March 1, 1982 through November 30, 1984 (an extension to the audit period from the original ending date of May 31, 1984).

7. Faced with the unavailability of any records, the auditor determined to utilize external indices in conjunction with a test period as a means of verifying the accuracy of petitioner's sales tax liability as reported. The auditor obtained third-party information from one of petitioner's suppliers, specifically verification of the amount of flour and cheese purchased by petitioner for the quarterly period ended May 31, 1982. On September 20, 1985, the auditor conducted an observation of sales by petitioner at the premises during the hours 11:00 A.M. through 4:00 P.M.

Finally, the auditor obtained from petitioners' landlord a copy of the lease to the premises.

8. The auditor based his computation of sales upon the amount of flour purchased, the amount of flour used in the production of one pizza (one pound), and projections as to the number of whole pizzas, slices of pizza and other items sold, based on the September 20, 1985 observation. Using this method, the auditor determined taxable sales for the test quarter ended May 31, 1982 to be \$31,803.50. Comparing this amount to the sales reported for such quarter (per sales tax returns filed by petitioner) revealed that petitioner underreported sales by some 837.59 percent. The auditor projected this underreporting percentage against reported sales for the period spanning March 1, 1982 through November 30, 1984 (\$86,008.00) to arrive at additional taxable sales for such period in the amount of \$720,396.00.

9. The auditor was uncertain as to when petitioners had commenced doing business. Accordingly, the auditor reviewed the lease to the premises. Said lease, in the name of 44-13 Queens Boulevard Corporation ("the corporation"), commenced June 1, 1976 and was to continue through May 31, 1986. Under the terms of the lease, the corporation was to operate a pizzeria at the premises. The auditor thus assumed that petitioners began doing business on June 1, 1976, notwithstanding that petitioners had not registered as vendors for sales tax purposes until March 1, 1982. The auditor estimated sales for the period spanning June 1, 1976 through March 1, 1982 by taking the total rent paid under the lease for the period March 1, 1982 through November 30, 1984 and dividing such amount by the amount of total sales (both audited and reported) for the same period to arrive at a rental ratio of 2.52 percent. The auditor then divided the rent paid per lease for the period June 1, 1976 through February 28, 1982 by said rental ratio to arrive at additional taxable sales for the period June 1, 1976 through February 28, 1982 in the amount of \$1,395,832.00. The auditor combined this latter amount with the amount of additional sales found for the period spanning March 1, 1982 through November 30, 1984 to arrive at total sales for the entire period in the amount of \$2,116,228.00. In turn, sales tax due on this amount was computed to be \$171,441.51, and was assessed against petitioners. In addition to the sales tax assessment, the auditor recommended the inclusion of a penalty in view of the fact that the petitioners "did not cooperate" in the conduct of the audit, failed to submit any records, had substantially underreported taxable sales and tax liability, and had apparently failed to register for sales tax purposes immediately upon the commencement of business.

10. Petitioners offered no specific challenge to the audit methodology employed herein. Further, neither of the individual petitioners (the Romanos) appeared or gave testimony at the hearing. The only evidence submitted by petitioners at hearing was a certificate of incorporation for the corporation indicating that the corporation was incorporated on June 9, 1976 and that, as noted, among its purposes was the operation of a restaurant and pizzeria business.

11. The lease to the premises was initially entered into between one Felice Schwartz d/b/a Plymouth Apartments and 44-13 Queens Boulevard Corporation. However, also introduced in evidence was a cover sheet indicating an assignment of the lease from the corporation to Giuseppa Romano. This cover sheet indicates that the assignment was consented to by Felice Schwartz on behalf of Plymouth Apartments in "June-July 1978". The specifics of the assignment were not included, with the only other documentation attached thereto being a page for acknowledgement of signatures before a notary public. Such acknowledgements indicate the persons signing to be Giuseppa Romano and Nicola Romano, respectively. Each indicates the assignment date as June 30, 1978, and bears the signature of a notary public. However, the actual signature page on the assignment was not included in evidence and the signatures of Giuseppa Romano or Nicola Romano are not shown on those documents in evidence. On the acknowledgement, Nicola Romano is listed as president of the corporation. No further evidence as to Nicola Romano or her relationship if any to petitioners herein was furnished.

12. No sales and use tax returns were filed for Bennie's Pizza prior to the quarterly period beginning March 1, 1982. Returns filed for the quarterly periods ended May 31, 1982, August 31, 1982, February 28, 1983 and May 31, 1983 were filed in the name of "Giuseppa

Romano; Bennie's Pizza" or "Benny's Pizza". Each of such returns bears the signature of Benedette Romano and reflects the title owner.

13. The auditor observed a sign at the premises indicating the name "Boulevard Pizza". However, neither Boulevard Pizza nor 44-13 Queens Boulevard Corporation were registered as vendors for sales tax purposes, and the auditor found no evidence of sales tax returns having been filed for either of such entities.

SUMMARY OF THE PARTIES' POSITIONS

14. Petitioners did not contest the methodology employed by the auditor in computing the assessment, or the dollar amount of the assessment, but did argue that the notices may have been issued to parties who were not operating the pizzeria. Petitioners note that the lease was in the name of the corporation, and that neither the specifics of the assignment nor the signatures of either petitioner in connection therewith were offered in evidence. Petitioners also raised but offered no argument on the issue of the statute of limitations on assessment.

15. The Division of Taxation asserts, by contrast, that there is sufficient evidence including the assignment document and the sales tax returns to conclude that petitioners Giuseppa and Benedette Romano operated Bennie's Pizza during the entire period covered by the notices. The Division further maintains that its method of determining the amount of tax due was reasonable and was timely issued for the entire period in question. Finally, the Division would justify extension of the audit period beyond that for which records were requested upon the rationale that since petitioner had no records, any request would have been futile. The Division further justifies the extension by noting that petitioners were issued and acknowledge receiving a Notice of Proposed Deficiency (a 30-day letter) encompassing the earlier period prior to issuance of the notices of determination herein at issue. The Division would apparently equate such 30-day letter to a request for records.

CONCLUSIONS OF LAW

A. Petitioners assert, by their petition, that some or all of the assessments may be invalid as not timely issued. Tax Law § 1147(b) provides that notices such as those at issue herein must be issued within three years from the filing of the tax return. However, said three-year period of limitation does not apply and an assessment may be issued at any time in instances where no return has been filed. In turn, Tax Law § 1136(b) provides that returns such as those to be filed by petitioners are due to be filed within twenty days after the last day of the last month in the sales tax quarterly period covered by each such return.

B. Applying the foregoing to the facts at hand reveals that the assessments in question were entirely timely. Since no returns were filed for any periods prior to the quarterly period ended May 31, 1982, there is no time bar against assessments issued for any periods prior thereto. Further, the subject assessments, which cover, inter alia, the quarterly periods ended May 31, 1982 and thereafter through November 30, 1984, were issued on June 3, 1985. Petitioners' return for such earliest quarterly period for which a return was not filed, May 31, 1982, was due to be filed on June 20, 1982. Since the assessment at issue was issued within three years thereof (i.e., June 3, 1985) the assessment is, for such quarterly period and all subsequent periods covered thereby, timely.

C. Tax Law §§ 1135 and 1142.5 provide that a taxpayer is under a duty to maintain complete, adequate and accurate records of its sales and to make the same available for audit upon request. Tax Law § 1138(a), as well as a multitude of cases decided thereunder, establish clearly that where a taxpayer fails to keep adequate, complete and accurate records and make the same available for audit upon request, the Division of Taxation is entitled to resort to indirect audit methodologies and external indices, including test periods, in arriving at its determination of tax.

D. In this case the record makes clear that the auditor made many requests for records, but was furnished with no records at any time. Therefore, the auditor was entitled to resort to indirect audit methodologies, including the use of test periods, in arriving at a determination of

petitioner's liability. Further, given that no challenge to the method of determining such liability or the result derived from its application is raised, the methodology employed by the auditor in this matter and the result thereof is accepted. Further, in light of the assignment document, the acknowledgement by the notary and the manner in which the sales tax returns were filed, petitioners' argument that other parties operated the business is rejected as completely unsubstantiated.

E. Notwithstanding the foregoing, however, the period specified in the latest issued audit appointment letter for which records were requested was specifically March 1, 1982 through November 30, 1984. As noted, petitioners have offered no challenge to the methodology or the results of its application, nor any other basis upon which to refute or reduce the assessment for this period. However, the auditor impermissibly extended the audit period back to encompass the earlier period June 1, 1976 through February 28, 1982. The Division admits that the auditor did not request any records for the business for this earlier period. Accordingly, without such a request for records for the period June 1, 1976 through February 28, 1982, the Division of Taxation exceeded its authority in assessing petitioners for such earlier period (Matter of Adamides v. Chu, 134 AD2d 776, lv denied 71 NY2d 806; Matter of Anton's Car Care Service, Inc., Tax Appeals Tribunal, November 11, 1988). The Division's asserted rationale, that any such request would have been futile because no records were presented when requested for a different period, is rejected as illogical. Further, the Division's argument regarding the 30-day letter is also rejected (see ___ Finding of Fact "14"). Not only is there no evidence that the 30-day letter is a request for records, but in fact its issuance reveals that the audit work had been completed prior thereto and absent any request for records for the earlier period. Moreover, there is evidence that petitioners herein commenced business only as of March 1, 1982 (see ___, e.g., certificate of vendor registration indicating a March 1, 1982 registration date coupled with the filing of sales tax returns in the name of Bennie's Pizza commencing with such date). Accordingly, so much of the assessment that covers the period June 1, 1976 through February 28, 1982 is cancelled.

F. The petition of Giuseppa and Benedette Romano (Partners), Bennie's Pizza, is granted to the extent indicated in Conclusion of Law "E", but is in all other respects denied and the notices of determination and demand issued on June 3, 1985, as reduced in accordance herewith, together with such penalty and interest as is lawfully due and owing, are sustained.

DATED: Albany, New York

ADMINISTRATIVE LAW JUDGE