STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
E.J. STEIGER, INC.	:	DETERMINATION
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, 1979 through May 31, 1980.	:	

Petitioner, E.J. Steiger, Inc., 489 Stewart Avenue, Bethpage, New York 11714, 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, 1979 through May 31, 1980 (File No. 806770).

A hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on June 19, 1990 at 1:15 P.M., with all briefs to be submitted by September 24, 1990. Petitioner appeared by William Slivka, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Peter J. Martinelli, Esq., of counsel).

ISSUES

I. Whether representations made during a conference held by the former Tax Appeals Bureau and its issuance of a Partial Withdrawal of Petition and Discontinuance of Case, that noted that the sales tax audit period at issue was for a three-year period including the four sales tax quarters at issue herein, serve to estop the Division from further proceeding with an earlier assessment for the same four sales tax quarters, thereby cancelling the earlier assessment.

II. Whether the Division of Taxation entered into an accord and satisfaction with petitioner so as to be barred from proceeding with the assessment.

III. Whether the doctrine of res judicata bars the Division of Taxation from proceeding with the assessment.

FINDINGS OF FACT

Edward J. Steiger is the sole shareholder of petitioner, E.J. Steiger, Inc., which operates a service station known as S&S Service Station in Bethpage, New York. Mr. Steiger, who graduated from high school in 1958, testified that he "worked in the sewers and...in a service station at night" from 1958 until 1962, when he started his service station business. As of the date of the hearing, Mr. Steiger had operated his Long Island service station for 29 years.

In the early 1980's, petitioner's sales subject to sales tax for the three-year period (or twelve sales tax quarters) June 1, 1979 through May 31, 1982 were audited.[1] The Division of Taxation issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated September 20, 1982 against petitioner asserting sales and use taxes due of $78,698.67 plus a fraud penalty and interest for the period June 1, 1979 through May 31, 1980. At the bottom of the notice, taxes, penalty and interest due were itemized for four sales tax quarters as follows:

Period Ending	Per Desig.	Tax Due	Penalty Due	Interest Due
8/31/79	180[2]	$18,412.02	$ 9,206.01	$5,764.26
11/30/79	280	18,679.05	9,339.52	5,452.04
2/28/80	380	19,739.61	9,869.80	5,347.86
5/31/80	480	21,867.99	10,933.99	5,456.06

Mr. Steiger received this notice and turned it over to his prior representative, Joel Berkowitz, without reviewing it himself since Mr. Berkowitz had possession of all of petitioner's books and records and was representing petitioner in the sales

---

[1]Neither the Division of Taxation nor petitioner introduced into the record herein any evidence concerning the substantive nature of the audit. The petition does not expressly contest the merits of the audit although the protest filed by Joel A. Berkowitz, petitioner's prior representative, on behalf of petitioner described the audit results as "ludicrous, absurd, etc."

[2]180 means the first sales tax quarter for 1980; 280, the second sales tax quarter for 1980; 380, the third sales tax quarter for 1980; and 480, the fourth sales tax quarter for 1980. The first sales tax quarter for 1980 is the three-month period ending August 31, 1979; the second is for a three-month period ending November 30, 1979; and the third includes December 1979.

tax audit. Mr. Steiger had hired Mr. Berkowitz, a public accountant, to protect petitioner's interests in the audit because of Mr. Berkowitz's reputation as an expert in audits of gasoline service stations. Mr. Berkowitz timely protested the notice of determination dated September 20, 1982 by filing a written protest dated September 22, 1982 with the Division's district office in Mineola. Mr. Berkowitz submitted the protest to the attention of C. Alfaro and A. Jenson, "Sales Tax". This notice of determination was subsequently reduced to tax due of $40,893.13, plus fraud penalty and statutory interest, pursuant to a Notice of Assessment Review dated July 13, 1983.

The Division of Taxation also issued two notices of determination against the corporate petitioner and Edward J. Steiger, as an officer of the corporation, both dated July 26, 1983, which asserted sales

and use taxes due of $65,203.95 and $64,193.33, respectively[3] for the period described as June 1, 1979 through May 31, 1982. The notice against petitioner included the following explanation:

> "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. In addition, fraud penalties of 50 percent of the amount of the tax due plus statutory interest have been added pursuant to Section 1145(a)(2)."

The notice against Edward J. Steiger, as an officer of petitioner, included the following explanation:

> "You are personally liable as officer of E.J. Steiger, Inc., under Sections 1131(1) and 1133 of the Tax Law for the following taxes determined to be due in accordance with Section 1138(a) of the Tax Law. In addition, fraud penalties of 50 percent of the amount of the Tax due plus statutory interest have been added pursuant to Section 1145(a)(2)."

At the bottom of both of the notices dated July 26, 1983, taxes, penalty and interest due were itemized for eight sales tax quarters as follows:

---

[3]For the third sales tax quarter of 1981, tax asserted due against the corporation was $7,218.34 and against Mr. Steiger, as officer was $6,207.72. There is no explanation in the record for this variance.

Period Ending	Tax Due	Penalty Due	Interest Due
8/31/80 - 181	$10,863.62	$5,431.81	$3,992.92
11/30/80 - 281	9,883.94	4,941.97	3,337.11
2/28/81 - 381	6,207.72	3,103.86	1,912.22
5/31/81 - 481	5,224.25	2,612.12	1,451.24
8/31/81 - 182	5,237.42	2,618.71	1,285.31
11/30/81 - 282	9,127.16	4,563.58	1,921.35
2/28/82 - 382	8,574.08	4,287.04	1,511.26
5/31/82 - 482	9,075.14	4,537.57	1,290.75

Although the period, as described in a prominent place on the notice, was for three years, June 1, 1979 through May 31, 1982 (or 12 sales tax quarters), only two years, June 1, 1980 through May 31, 1982 (or 8 sales tax quarters) were actually itemized on the notices dated July 26, 1983.

By the time the notices dated July 26, 1983 were issued, Mr. Steiger had become wary of Joel Berkowitz's ability to represent him.

Edward J. Steiger timely protested the notice dated July 26, 1983 issued against the corporation[4] by filing a petition dated October 14, 1983. Although Mr. Steiger signed the petition, his attorney/friend, Anthony Sabino, assisted him, and Mr. Sabino wrote by hand the following grounds upon which relief was claimed and the facts relied upon:

> "I have always paid my sales tax on time for the quarters due on figures I felt were accurate. This audit result is unfair and I do not feel the figures given here are accurate. I hired an account [sic] to represent me on this audit but I do not agree with the results of the audit and would very much appreciate a hearing."

On April 12, 1984, a conference was held before Kathleen Beruard, a conferee in the conference unit of the former Tax Appeals Bureau at which the corporate petitioner was

[4]The petition describes the taxpayer as Edward J. Steiger. However, the "Notice/Assessment No." referenced on the petition was the number for the corporate assessment, not the assessment of Edward J. Steiger, as officer. Consequently, the petition was treated as the corporation's petition.

represented by Edward J. Steiger, its officer.[5] Ms. Beruard proposed a Partial Withdrawal of Petition and Discontinuance of Case (hereinafter, "partial withdrawal"),[6] which referenced the three-year audit period June 1, 1979 through May 31, 1982 as the period in dispute. The statutory notice referenced in the partial withdrawal was the notice of determination dated July 26, 1983 issued against petitioner.

Although petitioner did not execute the partial withdrawal prepared by Ms. Beruard, it returned the partial withdrawal to Ms. Beruard along with a check in payment of tax due of $65,203.95 which was accepted by the Division of Taxation. Upon further consideration and discussions between Ms. Beruard and Mr. Sabino, as well as between Ms. Beruard and Mr. Steiger, petitioner was offered a Withdrawal of Petition and Discontinuance of Case (hereinafter, "withdrawal") showing tax of $65,203.95[7] plus penalty of $16,300.99 and statutory interest. Although the withdrawal referenced the same notice of determination as the partial withdrawal, the one dated July 26, 1983 issued against petitioner, it designated the period at issue as June 1, 1980 through May 31, 1982, not June 1, 1979 through May 31, 1982. Mr. Steiger signed the withdrawal on behalf of the corporation on or about February 7, 1985 and submitted it to Ms. Beruard. Mr. Steiger did not notice the change in the designated period:

> "When she sent it [the withdrawal] to me, the only thing I was interested in was this number here [indicating the $65,203.95], and I signed it and sent it back to her."

Ms. Beruard's Report of Conference dated March 18, 1985, reflected her acceptance of

---

[5]Although the stipulation entered into by the parties stated that Mr. Steiger represented the petitioner at the conference, Mr. Steiger testified that he was not present at the conference.

[6]The partial withdrawal had shown agreement between the parties concerning tax due of $65,203.95 and the imposition of statutory interest, but no agreement concerning the imposition of the fraud penalty.

[7]The withdrawal indicates that "(p)ayment of $65,203.95 was received on October 3, 1984 and applied to the tax due, leaving a balance due of $45,685.08 to date."

petitioner's withdrawal. The report also included the following findings of fact[8] concerning the underlying audit:

> "2....The tax due was based on information obtained from Sun Oil Co., estimated selling prices of gasoline and estimated repair sales since it was determined that petitioner's records were inadequate.
>
> 3. Petitioner contends that the estimated gasoline selling prices and repair sales do not reflect the correct sales for the audit period."

Ms. Beruard reduced the civil fraud penalty of 50% to statutory penalty of 25% "since petitioner has established that there was no intent to underpay the tax due." The Division's advocate concurred in this reduction of penalty. Ms. Beruard also advised Mr. Steiger that petitioner could apply for tax amnesty with reference to the penalty and statutory interest. Under tax amnesty, the penalty could be cancelled and interest reduced to minimum interest. Mr. Steiger did not seek to contest the amount of tax claimed due on the advice of Mr. Sabino who thought that the resolution was "the best deal" petitioner could get. Further, Mr. Steiger testified that he "had a lot of pressure and personal problems at the time."

Petitioner thereafter applied to the Division of Taxation for tax amnesty with regard to the notice of determination dated July 26, 1983 issued against petitioner. The Division accepted petitioner's Tax Amnesty Installment Request by a letter dated March 18, 1986 noting tax and interest due on the notice dated July 26, 1983 of $29,321.93, of which $14,661.00 was paid with the application for Tax Amnesty leaving a balance due of $14,660.93, which was to be paid in two installments.

Over a year later, on July 15, 1987, the Division of Taxation forwarded to the former Tax Appeals Bureau the protest dated September 22, 1982 filed by Joel Berkowitz on behalf of petitioner, as detailed in Finding of Fact "2", supra. The Division has not provided any explanation, by the introduction of any evidence, for this approximately five-year delay in

---

[8]The conferee's findings of fact are not binding herein. However, given the lack of any evidence in the record concerning the substance of the audit, they provide some relevant background for the events at issue herein.

forwarding the protest.

Subsequently, a conference was scheduled with reference to the earlier assessment, and a conciliation order dated January 6, 1989 was issued to petitioner showing tax due of $40,893.13 plus minimum interest as the result of the conference held on December 15, 1987. According to the report of tax conference dated December 15, 1988,[9] the Division of Taxation's advocate "admitted that because of this delay [in the Division's filing of the protest with the Tax Appeals Bureau] the requester [petitioner] was unable to take advantage of amnesty due to the fact that it appeared that all of the assessments were included at the first conference." Consequently, the conferee ruled that penalties should be waived and minimum interest charged. The Division of Taxation's advocate so agreed.

In order to pay the tax of $65,203.95, as noted in Finding of Fact "7", supra, and the minimum interest due thereon, petitioner sold his house

and used "what was left over after the mortgage was paid, plus Mr. Sabino lent me some money through Capitol Funding...."

Mr. Steiger believed that after he made the payments under tax amnesty, petitioner's liability for sales and use taxes for the three-year period, June 1, 1979 through May 31, 1982 was completely satisfied. Mr. Steiger was shocked and sickened when he received notice in 1987 that the notice of determination dated September 20, 1982 for the period June 1, 1979 through May 31, 1980 was still pending. Mr. Steiger indicated that petitioner would not have settled with Ms. Beruard if he had been aware that the total tax sought for the three-year period was approximately $105,000.00 and not $60,000.00.

By the time of the conference held on December 15, 1988, petitioner was unable to retrieve any of its books and records. Earlier, Mr. Berkowitz had become seriously ill and moved to Florida after giving up his accounting practice. Mr. Steiger never requested the return

[9]Although the report is dated December 15, 1988, it refers to the conciliation order dated January 6, 1989 in the past tense.

of his books and records because after he terminated his relationship with Mr. Berkowitz, they were "on bad terms."

Ms. Beruard, Mr. Steiger, and Mr. Sabino all believed that the payment of $65,203.95 was payment in full for taxes due for the three-year period, June 1, 1979 through May 31, 1982. Ms. Beruard in her affidavit noted as follows:

> "(I)t was my belief that the Notice of Determination, No. 830726145C, encompassed all the issues and liabilities relating to the period 6/1/79 through 5/31/82 [the three-year period]."

Further, Mr. Steiger's attorney/friend, Anthony Sabino, who negotiated on behalf of petitioner with Ms. Beruard, observed in his affidavit:

> "It was my understanding and I was so led to believe by Ms. Beruard, that said check in said amount represented payment in full of taxes assessed against E.J. Steiger, Inc. for Sales Tax for the period June 1, 1979 through May 31, 1982 [the three-year period]...."

Petitioner by its representative and the Division of Taxation by its representative on June 12, 1990 and June 14, 1990, respectively, executed a stipulation of facts. Relevant portions have been incorporated into this determination.

SUMMARY OF THE PARTIES' POSITIONS

The Division of Taxation argues that the notion of taxes being forgiven or annulled, with no showing of unreasonableness of the audit, is without any foundation in law. It further asserts that it is "incredible" to suggest that the delay in adjudication of the notice of determination dated September 20, 1982 prejudiced petitioner's ability to challenge the audit because petitioner has never attempted to present evidence, in the nature of its books and records, to challenge the audit. The Division also dismissed petitioner's argument that there was an accord and satisfaction concerning the notice of determination at issue herein, because it was never before the conferee. The Division further argues that the doctrine of res judicata is inapplicable because the liability at issue herein is separate and distinct from the matter settled as a result of petitioner's execution of the withdrawal. In sum, the Division argues that:

> "Petitioner would make the Division its malpractice insurer, by asking that the Division be deprived of the taxes asserted in Notice #1 because petitioner's responsible officer relayed all the notices that would have kept him apprised of

> petitioner's tax situation to an accountant by whom petitioner says it was ill served."

Petitioner contends, by contrast, that the Division of Taxation is properly estopped from proceeding with the earlier assessment because petitioner reasonably relied on the resolution of the later assessment as having resolved all of its liability for the three-year sales tax audit period: the period designated in the notices of determination for the later assessment was the three-year period; the partial withdrawal also designated the three-year period; and the conferee, Mr. Steiger and attorney Sabino all viewed the withdrawal as having resolved all liability for the three-year period. According to petitioner's brief:

> "Even if such concealment and misrepresentation were inadvertent, they existed and form the basis upon which...the Division...should now be equitably estopped."

Petitioner notes that it surrendered any rights of administrative or judicial appeal concerning the later assessment when it executed the withdrawal to its detriment if the Division is now permitted to assert tax due for four sales tax quarters it reasonably believed had been resolved.

Petitioner further contends that the conferee's acceptance of its withdrawal represented an accord and satisfaction of all liability for the three-year sales tax audit period since both parties shared the view that the matter before the conferee encompassed the entire period. Finally, petitioner asserts that the conferee's report of tax conference covered and closed the three-year audit period, and res judicata bars "the Division from now enforcing an assessment for a period (6/1/79 - 5/31/80) within said closed audit period."

CONCLUSIONS OF LAW

A. Estoppel is rarely granted against governmental entities, and particularly so with respect to matters involving taxation (Matter of Harry's Exxon Service Station, Tax Appeals Tribunal, December 6, 1988). In sum, petitioner must adduce "a showing of exceptional facts" which would require the application of estoppel to avoid a manifest injustice (Harry's Exxon Service Station, supra, citing Matter of Sheppard-Pollack, Inc. v. Tully, 64 AD2d 296, 298; Matter of Turner Construction Co. v. State Tax Commn., 57 AD2d 201, 203).

The Tax Appeals Tribunal in Harry's Exxon Service Station (supra), concluded that the

Division of Taxation should be estopped from further administratively proceeding with an assessment (and cancelled the assessment) because the Division issued a letter which bore the signature of the Chief of the Sales Tax Audit Section of the Buffalo District office, which indicated that the audit was completed and no additional sales or use taxes were due. In the one-year period between the issuance of the letter and the notice of prehearing conference to the taxpayer, the taxpayer's accountant had destroyed the taxpayer's records which would have been helpful to the taxpayer in challenging the liability asserted by the Division. The Tribunal held:

> "(W)e conclude petitioner relied on the letter to his detriment and that his ability to meet the burden of proof imposed upon him was severely impaired by the Division's actions. On these facts, we conclude it would be manifestly unjust to allow the Division to assert liability against the petitioner. In so concluding, we wish to make it clear that we are persuaded by the exceptional facts and circumstances of this case [emphasis added]."

B. The Tax Appeals Tribunal in Kayton Specialty Shop, Inc. decided January 17, 1991 estopped the Division of Taxation from proceeding administratively with the assessment of penalties on the basis that the taxpayer had been led to believe that its payment of tax and minimum interest had resolved all issues of liability related to a sales tax audit.

In Kayton (supra), the taxpayer's officer asserted that representatives of the Division of Taxation had agreed upon a resolution of Kayton's tax liability, which required the prompt payment of tax and minimum interest with the waiver of penalty and additional interest. Although the Division of Taxation did not concede this assertion (neither did it deny it), the taxpayer had been led to believe that its payment of tax and minimum interest had resolved all issues of liability related to a sales tax audit. The Tribunal held that it was improper for the Division to issue a notice of determination asserting penalties which it had earlier apparently agreed to abate:

> "This action also is inconsistent with the avowed philosophy of the Division that an equitable system of tax administration which respects and assists taxpayers is one which will encourage full compliance; a philosophy which has as one of its basic tenets the establishment of clear and effective communication with taxpayers informing them of their rights and liabilities."

C. In the matter at hand, the Division of Taxation is also properly estopped from proceeding with the earlier assessment described in Finding of Fact "2", supra, in order to avoid

a manifest injustice, based upon the exceptional facts and circumstances of this case. First, the manifest injustice to be avoided is petitioner's inability to now contest taxes of $65,203.95, which it believed represented taxes claimed due for a three-year period, but which the Division of Taxation asserts were for only a two-year period. The record is clear from Mr. Steiger's credible testimony that petitioner would not have paid the $65,203.95 to the Division of Taxation if such amount represented payment of taxes for a two-year period only. As noted in Finding of Fact "11", supra, not only Mr. Steiger believed such payment was for all three years, but Mr. Sabino and Ms. Beruard shared this understanding as well. Furthermore, documents issued by the Division of Taxation (the late assessments as well as the partial withdrawal) showed the period as the three-year period. The fact that the withdrawal designated only the two-year period is outweighed by the entire course of discussions and negotiations during the conference process where the period at issue was always understood by all to be the three-year period. In sum, the partial withdrawal, the conferee's report, the notices of determination dated July 26, 1983, Mr. Steiger's testimony, and the affidavits of Mr. Sabino and Ms. Beruard support the conclusion that petitioner's payment of $65,203.95 was made with its reasonable understanding that such payment represented the satisfaction of all sales tax due for the three-year period.

Finally, the Division of Taxation's argument that it should not be made responsible for the malpractice of petitioner's accountant or of Mr. Steiger is without merit. The fingerpointing at petitioner's accountant and/or Mr. Steiger is misplaced. The malpractice, in fact, occurred as a result of the apparent failure by the District Office to timely forward petitioner's protest of the assessment at issue to the former Tax Appeals Bureau. The nearly six-year delay resulted in the inequitable situation confronting petitioner. Therefore, it is fair to conclude that petitioner has adduced exceptional facts and circumstances that warrant estopping the Division of Taxation from proceeding with the earlier assessment.

D. A word is in order concerning petitioner's alternative arguments that the Division of Taxation was barred from proceeding with the earlier assessment based upon theories of res

judicata and accord and satisfaction. Clearly, petitioner did not obtain a final judgment on the merits in a verdict or decision, and therefore its res judicata argument is without merit (cf., Siegel, NY Prac § 444). The doctrine of accord and satisfaction is also not applicable to the matter at hand:

> "An accord and satisfaction is a method of discharging a contract, or settling a cause of action arising either from a contract or a tort, by substituting for such contract or cause of action an agreement for the satisfaction thereof and an execution of such substituted agreement." (19 NY Jur 2d, Compromise, Accord and Release, § 1 [emphasis added].)

E. The petition of E.J. Steiger, Inc. is granted, and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated September 20, 1982 is cancelled.

DATED: Troy, New York
3/28/91

ADMINISTRATIVE LAW JUDGE