STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SLIFORD RESTAURANT, INC. D/B/A EMERALD STONE	:	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, 1980 through February 28, 1983.	:	

Petitioner, Sliford Restaurant, Inc. d/b/a Emerald Stone, 610 8th Avenue, New York, New York 10010, 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, 1980 through February 28, 1983 (File No. 807301).

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 February 27, 1990 at 1:15 P.M., with all briefs to be submitted by July 31, 1990. Petitioner appeared by Stewart Buxbaum, CPA. The Division of Taxation appeared by William F. Collins, Esq. (Robert J. Jarvis, Esq., of counsel).

ISSUES

I. Whether petitioner may contest the Division of Taxation's denial of its refund claim for sales tax paid, pursuant to a consent which it executed approximately one year after the sales tax had become irrevocably fixed, because petitioner failed to apply for a hearing within 90 days of the mailing of the notice of determination.

II. Whether the Division of Taxation should be estopped from asserting a defense that the refund claim was untimely made due to various administrative errors including the failure to mail a copy of the statutory notice to petitioner's representative.

FINDINGS OF FACT

Petitioner, Sliford Restaurant, Inc., operates a bar and grill known as the Emerald Stone near the Port Authority in Manhattan. On February 11, 1983, a sales tax audit of petitioner was commenced which took 161½ audit hours over a period of 14 months, and on August 27, 1984 resulted in the issuance of a Notice of Determination and Demand for Payment of Sales and Use Taxes Due of $27,405.05 plus interest for the period June 1, 1980 to February 28, 1983 pursuant to Tax Law § 1138. This statutory notice was mailed to petitioner at its business address.

Petitioner's representative asserted that a copy of the notice was not mailed to Bernard Brown, petitioner's representative at the time of the audit. However, petitioner failed to introduce any evidence, such as a copy of a power of attorney executed by petitioner, to establish Mr. Brown's alleged status. Nor did petitioner present Mr. Brown's testimony or an affidavit from Mr. Brown to support its position. On the other hand, the auditor's log, which shows contacts during the course of the audit, does include numerous references to Mr. Brown as petitioner's accountant.

Petitioner did not file either a Request for Conciliation Conference or a petition for formal hearing within 90 days of the issuance of the notice of determination.

Nonetheless, on December 17, 1985, approximately a year after the issuance of the statutory notice, the Division of Taxation granted petitioner a so-called "courtesy conference" which resulted in the recommendation by a sales tax auditor (other than the auditor who conducted the audit) that an adjustment be made reducing petitioner's tax from $27,405.05 plus interest to $22,311.63 plus interest.

On January 9, 1986, petitioner by its president, John Clancy, executed a "Consent to Fixing of Tax Not Previously Determined and Assessed".[1]

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[1]It is observed that, in fact, the tax had been previously determined and assessed on November 25, 1984, which was 90 days after the issuance of the statutory notice on August 27, 1984. Consequently, this consent form was used in error. Further, the form included the following misleading, pre-printed advice to petitioner:

"The Tax Law provides that a taxpayer is entitled to have tax due finally and

About a month later, the Division of Taxation issued a Notice of Assessment Review dated February 11, 1986 which set forth the reduced amount of sales tax due of $22,311.63 plus interest.

On February 25, 1986, petitioner paid $33,698.41, the total amount of tax and interest due.

On February 2, 1988, petitioner filed a claim for refund of the total amount paid. Petitioner's refund claim asserted that the auditor utilized erroneous markups in estimating petitioner's sales during the audit period, and that the auditor failed to take into consideration that the selling price of liquor and beer sold at the bar included tax.

About a month later, the Division of Taxation denied the refund claim by the letter of L. Clark, Central Sales Tax Section, who wrote, in

part, "[s]ince you did not protest the assessment, the tax due was fixed and properly collected."

In response to the denial of its refund claim, on March 10, 1988, petitioner timely filed a Request for Conciliation Conference wherein petitioner noted that the original audit was erroneous, and "proper notification was not given to the taxpayer, officers and power of attorney."

The conferee, after reviewing information submitted at a conference held on March 7, 1989, sent a letter dated May 8, 1989 to petitioner's representative, Stewart Buxbaum, proposing the further reduction of sales tax due from $22,311.63 plus interest to $8,032.89 plus interest (which would result in a refund to petitioner of $14,278.74 plus interest). The conferee enclosed consent forms with his proposed adjustment.

On May 15, 1989, petitioner by its president, John Clancy, executed a consent agreeing to the terms suggested by the conferee.

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irrevocably fixed by filing a signed consent with the [former] State Tax Commission. Such consent waives the ninety (90) day period for fixing tax due but does not waive the taxpayer's right to apply for a credit or refund within the time limit set forth in the statute" (emphasis added).

However, by a letter dated June 9, 1989, the conferee reneged on his proposal:

> "I regret to inform you that upon a final review of the matter I have discovered a flaw in reasoning which had led to a determination contrary to the Tax Law.
>
> * * *
>
> In this instant matter the Consent to Fixing of Tax was filed subsequent to the issuance of the Notice of Determination and Demand.... The Audit Division erred in its issuance of a Consent to Fixing of Tax covering taxes which had been previously determined and assessed....
>
> ...[S]uch an error shall not entitle the taxpayer to rights that it would ordinarily not have if the error had not been made.
>
> ...Because Sliford Restaurant, Inc. failed to avail itself to [sic] the remedies therein [Tax Law § 1139(c)] provided, i.e., the determination was not timely petitioned, it is not entitled to a refund" (emphasis in the original).

The conferee then issued a Conciliation Order dated July 21, 1989 which sustained the statutory notice described in Finding of Fact "1", supra.

The copy of the Field Audit Record, which is the auditor's log of his "contacts and comments of all audit actions", discloses that from the very start of the audit the auditor had numerous contacts with Bernard Brown, petitioner's accountant. However, the auditor also had numerous direct contacts with John Clancy, petitioner's president. In fact, the last few entries in May 1984 disclose that the auditor was phoning Mr. Clancy to discuss the matter, and Mr. Clancy was contacting the auditor directly.

SUMMARY OF THE PARTIES' POSITIONS

Petitioner contends that the 90-day period for filing its petition challenging the statutory notice issued on August 27, 1984 never expired because its representative was not served with a copy of the notice. Petitioner also argues that if there is no statutory or regulatory requirement that petitioner's representative during the audit be sent a copy of the statutory notice, the Division of Taxation should nonetheless be estopped from asserting that the 90-day limitations period prohibits petitioner from challenging the statutory notice.

The Division of Taxation by its representative at the hearing contended that the Tax Law and/or the regulations do not require that copies of statutory notices be sent to representatives.

However, the Division reserved the right to submit evidence that a copy of the statutory notice was sent to Mr. Brown if it was persuaded by petitioner's brief that the Division had a legal obligation to send a copy of the statutory notice to petitioner's representative. The Division, in its answering brief to petitioner's brief, disagreed with petitioner's contention that the law required the Division to send a copy of the statutory notice to petitioner's representative. Furthermore, the Division contended that even if petitioner's contention were valid, petitioner failed to introduce any evidence that Mr. Brown had filed a notice of appearance and/or power of attorney at the time the statutory notice was issued.

CONCLUSIONS OF LAW

A. The Tax Appeals Tribunal has noted that a taxpayer's representative must be served with the statutory notice:

> "Matter of Bianca v. Frank (43 NY2d 168) would require a tolling of the 90 day period for filing of petitions if, in fact, petitioners' representative was not served with the notices" (Matter of Multi Trucking, Inc., Tax Appeals Tribunal, October 6, 1988).

Although petitioner's representative cited Matter of Bianca v. Frank (55 AD2d 642, 390 NYS2d 141, affd 43 NY2d 168, 401 NYS2d 29) in his brief, neither party cited the Tribunal's ruling in Matter of Multi Trucking, Inc. (supra). As noted in paragraph "15", supra, the Division's representative at the hearing reserved the right to submit evidence of the mailing of the statutory notice to Mr. Brown if he was persuaded by petitioner's representative that the Division of Taxation had a legal obligation to serve the taxpayer's representative with the statutory notice. However, in its brief, the Division indicated that it was not so persuaded and emphasized that, at any rate, petitioner failed to prove that Mr. Brown was its representative at the time of the audit and the issuance of the statutory notice. Petitioner did not reply to this contention, and a review of the administrative record does support the Division's contention that there is no proof that Mr. Brown had filed a notice of appearance and/or a power of attorney to represent petitioner. Nor did petitioner present the testimony of John Clancy (who was present at the hearing) concerning petitioner's relationship with Mr. Brown. As noted in Finding of Fact "13", supra, the auditor's last few contacts during his audit were directly with Mr. Clancy,

petitioner's president. It could well be that Mr. Brown's contacts with the auditor were more in the capacity of defending the accounting services he rendered petitioner than as petitioner's representative. Nevertheless, it was petitioner's burden to introduce evidence that Mr. Brown had filed a notice of appearance and/or power of attorney, and the party, upon whom the burden of proof rests, loses if no evidence is offered on the point at issue (cf. Matter of John Grace & Co., Tax Appeals Tribunal, September 13, 1990; State Administrative Procedure Act § 306).

B. Turning to the specific issue of whether petitioner's refund claim was properly denied, it is necessary to review the intricacies of the Tax Law. Tax Law § 1138(a)(1), as in effect during the period at issue, provides that a notice of determination of additional sales tax due:

> "shall finally and irrevocably fix the [sales] tax unless the person against whom it is assessed, within ninety days after giving notice of such determination, shall apply to the division of tax appeals for a hearing..." (emphasis added).

Tax Law § 1139(c), as in effect during the period at issue, provided, in part, as follows:

> "A person shall not be entitled to a refund or credit under this section of a tax, interest or penalty which had been determined to be due pursuant to the provisions of section eleven hundred thirty-eight where he has had a hearing, or an opportunity for a hearing, as provided in said section, or has failed to avail himself of the remedies therein provided" (emphasis added).

Tax Law § 1139(c) further provides an exception to the rule cited above for persons who file a Consent to Fixing of Tax Not Previously Determined and Assessed before a notice of determination is issued. Such persons do not lose their right to apply for a credit or refund. However, the consent executed by John Clancy on January 9, 1986, as noted in Finding of Fact "4", supra, was erroneously labeled a Consent to Fixing of Tax Not Previously Determined and Assessed. In fact, the tax had been previously determined and assessed. It is observed that the Division of Taxation's use of an incorrect form does not provide grounds for estopping the Division from asserting that petitioner's 90-day period for challenging the statutory notice had expired (cf. Matter of Harry's Exxon Service Station, Tax Appeals Tribunal, December 6, 1988).

C. It is of some concern that the Division of Taxation might have erred in a number of ways including the use of the incorrect consent form, the conferee's agreement to further reduce

the assessment, which he was then forced to disavow, and the Division's erroneous argument that the statutory notice was not required to be sent to the taxpayer's representative. Nonetheless, petitioner has failed to 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).

D. The petition of Sliford Restaurant, Inc. d/b/a Emerald Stone is denied. The Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on August 27, 1984 is sustained, except to the extent modified by the Notice of Assessment Review dated February 11, 1986, and the denial of petitioner's refund claim is also sustained.

DATED: Troy, New York
1/28/91

ADMINISTRATIVE LAW JUDGE