STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	SMALL CLAIMS DETERMINATION DTA NO. 820215
FRANK PETRELLI	:	
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 September 1, 1981 through November 30, 1981.	:	

Petitioner, Frank Petrelli, 1010 Scotchtown Collabar Road, Montgomery, New York 12549, 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 September 1, 1981 through November 30, 1981.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 90 South Ridge Street, Rye Brook, New York, on April 6, 2005 at 3:30 P.M. Petitioner appeared *pro se*. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Peter Ennis).

Petitioner had until May 13, 2005 to present additional evidence and written argument; however, no additional evidence or written argument was submitted. Accordingly, the three-month period for the issuance of this determination commenced as of May 13, 2005.

ISSUE

Whether the Division of Taxation properly denied petitioner's application for credit or refund on the basis that the application was filed beyond the applicable statute of limitations for credit or refund.

FINDINGS OF FACT

1. Save More Oil, Inc., ("Save More") was a business engaged in the sale and delivery of home heating fuel. Save More's business address was listed as 169 Mill Street, Liberty, New York 12754, and it commenced business operations in the fall of 1979 and ceased operations in late 1981 or early 1982. On or about December 20, 1981, the Division of Taxation ("Division") received an unsigned New York State and Local Sales and Use Tax Return bearing Save More's name and address for the quarter ending November 30, 1981. The return reported, inter alia, that $3,736.46 of sales and use taxes were due; however, payment of the tax due as shown on the return was not remitted with the return.

2. On May 4, 1983, the Division issued a Notice and Demand For Payment of Sales and Use Taxes Due ("Notice") to petitioner asserting that $3,736.46 of tax was due, together with penalty of $747.28 and interest of $631.76. The Notice explained that petitioner was "personally liable as officer of Save More Oil, Inc. under Sections 1131(1) and 1133 of the Tax Law " for the taxes due for the quarter ending November 30, 1981. The Notice was addressed to petitioner at "390 Thornycroft Avenue, Staten Island, New York 10312." In the instant matter petitioner does not dispute that he was an officer of Save More; that he was a person under a duty to collect sales tax for the corporate entity; and that he is personally liable for any sales and use taxes that the corporation failed to remit.

3. The Division's records reflect that a warrant was docketed against petitioner on April 30, 1985 in the Richmond County Clerk's office and that a Tax Compliance Agent's levy was also issued on July 30, 1990. From December 17, 1990 to March 31, 1992, the Division,

apparently as the result of an income execution, received 15 payments totaling $2,034.80. The Division applied the 15 payments to the Notice issued to petitioner on May 4, 1983.

4. When petitioner's employer first started withholding funds on December 17, 1990 pursuant to the Division's income execution, petitioner questioned his employer concerning the origin and basis of the income execution. One year later, on December 17, 1991, petitioner's employer, apparently as the result of an inquiry it had made to the Division on petitioner's behalf, received a letter from a Mr. W. Wall, a tax compliance agent. The letter, which made reference to an income execution and petitioner's social security number, indicated that it was returning petitioner's employer's check in the amount of $400.00 as there was no balance due. Notwithstanding the Wall letter dated December 17, 1991, the Division received six more payments, the last one being dated March 31, 1992, from petitioner's employer pursuant to the income execution. On May 6, 1991, Tax Compliance Agent Wall issued a second letter to petitioner's employer stating that "there is no collection case against F. Petrelli . . . please redeposit check in your fund." On June 4, 1992, the Division issued a release of the Tax Compliance Agent's levy dated July 30, 1990.

5. In 1991, the Division started a conversion of its accounts receivable system to a new computer system. The conversion was accomplished over a two-year period with priority given to newer assessments and less preference given to older bills, such as the Notice issued to petitioner dated May 4, 1983. The May 4, 1983 Notice issued to petitioner was actually converted to the Division's new accounts receivable system on August 11, 1992.

6. On July 8, 1993, some 11 months after it converted the Notice issued to petitioner on May 4, 1983 to its new accounts receivable system, the Division once again resumed collection action against petitioner. It appears that as late as April 27, 1994, the Division was still under

the impression that petitioner was living at the 390 Thornycroft Ave., Staten Island, New York address to which it had mailed the Notice dated May 4, 1983 since a tax compliance agent made a field visit to this address in an attempt to contact petitioner. Some three months later, on July 15, 1994, the Division made a field visit to petitioner's residence located at 1391 Hill Road, RR 1, Goshen, New York, the address to which petitioner had moved in late 1981 or early 1982.

7. Petitioner contested the Division's renewed collection action, and in support of his position he sent copies of the two Wall letters and the June 4, 1992 release of the Tax Compliance Agent's levy. On July 10, 1995, the Division corresponded with petitioner indicating that the two Wall letters were erroneous because Mr. Wall had apparently checked only the Division's new accounts receivable system, and since the assessment issued to petitioner had not yet been converted to the new system, Mr. Wall found no open assessments against petitioner. Had Mr. Wall also checked the old system, he would have found the open assessment issued to petitioner on May 4, 1983. The Division's letter of July 10, 1995 sustained the May 4, 1983 assessment since it had not yet been fully paid.

8. Minimal collection action continued without success over the next three years. However, starting August 12, 1998, and continuing through August 28, 2002, petitioner made weekly payments of $150.00 for 200 weeks, for a total payment of $30,000.00, until the liability was paid in full.

9. On February 20, 2003, petitioner filed with the Division Form AU-11, Application for Credit or Refund of Sales and Use Tax. The application encompassed the period "1981 to 2002" and requested a refund in the sum of $28,058.87. Petitioner attached to his application copies of the two Wall letters and the release of levy, indicating that these were the only documents that he had left. At the hearing held herein, petitioner stated that he was seeking a refund of only the

interest and penalty he paid on the Notice dated May 4, 1983. A Division document entitled "Carts - Assessments Receivable Assessment Summary - Balances" reveals that as of March 14, 2005, the assessment at issue shows the following balances:

ITEM	AMOUNT
Tax	$3,736.46
Penalty	926.52
Interest	24,285.48
Total	28,948.46
Payments	28,948.46
Balance	-0-

10. The assessment summary also indicates that payments totaling $32,034.80 ($2,034.80 for the 15 payments made between December 17, 1990 and March 31, 1992 and $30,000.00 for the 200 weekly payments of $150.00 per week) had been applied to the Notice dated May 4, 1983. The record does not disclose what, if anything, has happened to the $3,086.34 difference between the amount paid ($32,034.80) and the amount shown due ($28,948.46).

11. Pursuant to a letter dated August 13, 2004, the Division denied petitioner's application for refund on the basis that it was filed beyond the applicable statute of limitations for credit or refund. Petitioner disagreed with the Division's denial of his application for credit or refund and this small claims proceeding ensued.

SUMMARY OF THE PARTIES' POSITIONS

12. Petitioner maintains that when Save More ceased operations in late 1981 or early 1982 he and his accountant made every effort to ensure that all bills, including taxes, were paid. It is petitioner's belief that Save More paid the $3,736.46 of tax due as shown on the return it filed

for the quarter ending November 30, 1981; however, he concedes that he can not produce any evidence of payment because of the significant lapse of time in this matter.

13. Petitioner also asserts that because he moved from his Staten Island residence to Goshen, New York in late 1981 or early 1982 he never received the Division's Notice dated May 4, 1983 since it was mailed to an old address. Petitioner first became aware of the Division's allegation that monies were due in December 1990, when his employer started to withhold funds as the result of the Division's income execution. While petitioner reluctantly concedes that he is liable for the $3,736.46 of tax due which the Division asserts Save More never paid, he believes that he should not be held liable for the penalty and significant interest charges which have accrued over the more than 21 years which have elapsed from the date the tax was due to the date the tax, penalty and interest was finally paid. Given the facts of this case, petitioner argues that it is simply unfair and inequitable to subject him to the penalty and interest charges asserted due by the Division.

14. The Division maintains that for the period at issue, Tax Law former § 1139(a)(ii) provided that an application for credit or refund is required to be filed "within three years after the date when such amount was payable under this article. . . ." Since there is no dispute in the instant matter that the tax for the quarter ending November 30, 1981 was payable by December 20, 1981, the Division argues that any application for credit or refund for this period was required to be filed by December 20, 1984. The Division argues that since petitioner's application for credit or refund was not filed until February 20, 2003, a date which is clearly beyond that which is provided for in the statute, no credit or refund can be granted. The Division also notes that the amendment to Tax Law § 1139(c) which permits a claim for credit or refund of sales tax to be filed "within . . . two years from the time the tax was paid . . ." is not relevant

here since the amendment was applicable prospectively only for taxable years commencing on or after January 1, 1997.

15. The Division alternatively argues that if the merits of the case are reached, petitioner has failed to show that Save More actually paid the $3,736.46 of tax due as shown on its return or that it was improper for the Division to conclude that petitioner was a responsible officer of Save More and, as such, was personally liable for the taxes not remitted by the corporation.

CONCLUSIONS OF LAW

A. The Division is correct with respect to its position that petitioner's application for credit or refund is barred by the time limitations set forth in Tax Law former § 1139(a)(ii). Said section requires that any application for credit or refund for the quarter ending November 30, 1981 would have to have been filed on or before December 20, 1984, and as there is no dispute that petitioner's application for credit or refund was not filed until February 20, 2003, it is clear that said application was indeed filed well beyond the applicable statute of limitations for credit or refund. The Division also correctly points out that the amendment to Tax Law § 1139(c) which permits a claim for credit or refund of sales and use taxes to be filed within two years of the date the tax was paid is of no benefit to petitioner since the amendment was applicable to tax years beginning on or after January 1, 1997 and therefore cannot be applied retrospectively to the period at issue herein. Although petitioner's application for credit or refund is time barred, my analysis does not end there.

B. While at first glance it would appear that administrative review of the Notice would be precluded by the Appellate Division's decisions in ***Matter of Parsons v. State Tax Commn.*** (34 NY2d 190, 356 NYS2d 593), and ***Matter of Hall v. New York State Tax Commn.*** (108 AD2d 488, 489 NYS2d 787) and the Tribunal's decisions in ***Matter of Stern*** (Tax Appeals Tribunal,

September 1, 1988) and ***Matter of Sergold*** (Tax Appeals Tribunal, May 23, 1991), I conclude that administrative review of the Notice is appropriate for the following reasons. The above cited cases provide that, prior to the amendment to Tax Law § 1138(a), the Division was without authority to proceed administratively against taxpayers where correct returns were filed without payment of the tax due. Here, an unsigned return was submitted to the Division for the period at issue and without a signature it can not be found that a return has been filed (***see***, Tax Law § 1136[d]; 20 NYCRR 533.3[b][3][ix]). When a return is not filed, the Division, pursuant to Tax Law § 1147(b), can assess the tax due at any time; however, it is required to assess the tax pursuant to Tax Law § 1138(a). Assessments issued pursuant to Tax Law § 1138(a) are subject to administrative review. Furthermore, the Appellate Division's decision in ***Matter of Meyers v. Tax Appeals Tribunal*** (201 AD2d 185, 615 NYS2d 90, ***lv denied*** 84 NY2d 810, 621 NYS2d 519) may have *sub silentio* reversed or modified its earlier decisions in ***Parsons*** and ***Hall***, thus providing additional authority for administrative review.

C. Having concluded that administrative review of the Notice is appropriate, it must next be determined if a timely protest was made within 90 days of the issuance of the Notice. Petitioner has established that he moved from his Staten Island residence in late 1981 and that the Notice dated May 4, 1983, which was addressed to the former residence, was never received. Inasmuch as petitioner never received the Notice mailed on May 4, 1983, and since the record herein does not reflect the date of actual receipt of the Notice by petitioner, the 90-day period for filing a petition with the Division of Tax Appeals never began to run (***Matter of Ruggerite, Inc. v. State Tax Commn***. 97 AD2d 634, 468 NYS2d 945, ***affd*** 64 NY2d 688, 485 NYS2d 517; ***Matter of Karolight, Ltd.***, Tax Appeals Tribunal, February 8, 1990). Accordingly, it is

concluded that the petition filed on October 4, 2004 constitutes a timely protest of the Division's Notice dated May 4, 1983.

D. Turning next to the merits of the case, it is noted that petitioner does not dispute that he was an officer of Save More and is personally liable for any sales and use taxes not remitted by the corporation. Although petitioner believes that all taxes were paid when Save More ceased business operations, I cannot conclude on this record that petitioner has established that the $3,736.46 due for the quarter ending November 30, 1981 was ever paid by the corporation. Accordingly, petitioner is personally liable for this amount.

E. With respect to the issue of interest and penalties, I believe that given the unique and unusual circumstances involved in this controversy that it is fair and equitable (Tax Law § 2012) to cancel the penalties and reduce interest from the statutory rate to minimum rates. However, petitioner's request to have all interest charges waived or abated must be denied. By requesting that all interest charges be abated, petitioner, in essence, seeks an interest-free loan from the State of New York. As noted by the Tribunal in ***Matter of Rizzo*** (Tax Appeals Tribunal, May 13, 1993):

> Failure to remit tax gives the taxpayer the use of funds which do not belong to him or her, and deprives the State of funds which belong to it. Interest is imposed on outstanding amounts of tax due to compensate the State for its inability to use the funds and to encourage timely remittance of tax due. . . . It is not proper to describe interest as substantial prejudice, as it is applied to all taxpayers who fail to remit . . . tax due in a timely manner. Rather, a more accurate interpretation would be to say that interest represents the cost to the taxpayer for the use of the funds. . . .

If interest charges were routinely waived or abated, there would be little or no incentive for a taxpayer to remit the proper tax due since he or she would have the use of the State's funds interest-free. In fact, such a practice or policy would promote and encourage taxpayers not to remit the proper tax due and reward them for such actions.

F. Also, in accordance with Finding of Fact "10", the Division is directed to determine if the $3,086.34 difference between the amount paid ($32,034.80) and the amount shown due ($28,948.46) has been properly accounted for, such as applied to other assessments or previously refunded to petitioner. If the apparent overpayment of $3,086.34 has not been properly accounted for, the Division is directed to refund said amount to petitioner, together with such interest as allowed by law.

G. The petition of Frank Petrelli is granted to the extent indicated in Conclusions of Law "E" and "F," and, except as so granted, the petition is in all other respects denied.

DATED: Troy, New York
August 4, 2005

/s/ James Hoefer
PRESIDING OFFICER