NO. CV 07 4015060S	:	SUPERIOR COURT
YVON ALEXANDRE D/B/A J. P. ALEXANDRE, LLC	:	TAX SESSION
	:	JUDICIAL DISTRICT OF
v.	:	NEW BRITAIN
PAM LAW, COMMISSIONER OF REVENUE SERVICES	:	MARCH 17, 2009

MEMORANDUM OF DECISION

This action is a one-count tax appeal by the plaintiff, Yvon Alexandre, doing business as J. P. Alexandre, LLC (Alexandre), challenging the commissioner of revenue services' sales and use tax deficiency assessments, including penalty and interest. The plaintiff also claims that the jeopardy assessment levied against him was illegal and void.

The commissioner conducted an audit of the plaintiff's business for the period of October 1, 1999 through March 31, 2005 (the audit period). During this period of time, the plaintiff operated a night club/banquet facility located at 3155 North Main Street in Hartford selling liquor, beer and food to its customers.

The commissioner determined during the audit period that the plaintiff incurred a tax deficiency of $155,536.77, a 25% fraud penalty of $38,884.26 and interest. This amount was subsequently reduced as a result of the commissioner's Appellate Division remanding the plaintiff's appeal to the Examination Division for reconsideration. On October 24, 2006, the Examination Division revised the assessment and reduced the tax deficiency by $60,846.55, resulting in a deficiency assessment balance of $94,690.22 along with a 15% penalty[1] of $14,203.52 and interest.

The sole member of J. P. Alexandre, LLC, is the plaintiff Yvon Alexandre, an experienced businessman with a Bachelor of Science degree in Business Administration and a Masters in Business Administration. Mr. Alexandre is also designated as a certified manager from James Madison University.

The bookkeeping operation of the plaintiff's business breaks down as follows. Each day of operation, a daily sales reconciliation report (DSRR) is prepared from cash register tapes being utilized on the plaintiff's premises. These reports are prepared by the employees operating the cash registers. Attached to each DSRR is a copy of the cash register "Z tape"[2] that has the date, sequence number, the total amount run through the register since the last Z tape as well as the cumulative total of all receipts that were run through the register, including that tape's total. See plaintiff's Exhibit C. According to the plaintiff's testimony, the cash register tapes, for the most part, were discarded after the preparation of the Z tapes.

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The commissioner removed the fraud or intent to evade penalty of 25% that formed a basis of the jeopardy assessment issued on August 25, 2005.

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While the plaintiff refers to "Z tapes", the commissioner maintains that the correct term for the materials in question is "Z reports" and that these Z reports do not contain the same information as cash register tapes. See defendant's post-trial brief, p. 7.

The information contained within the DSRR was then entered into the plaintiff's general ledger which was maintained in the QuickBooks software system. QuickBooks serves as the plaintiff's general ledger with all other income and expenses as well as bank deposits being recorded therein. See plaintiff's Exhibit D.

The plaintiff's monthly reports are generated by updating QuickBooks to show the income by each source including liquor sales, hall rental, food sales, club door cover charges, etc. See plaintiff's Exhibit D.

From the commissioner's standpoint, § 12-2-12 (b) of the Regulations of Connecticut State Agencies (hereinafter the regulations) provides as follows:

> "(1) A taxpayer shall maintain all records necessary to a determination of correct tax liability under the affected tax law provisions. All required records shall be made available upon request by the commissioner . . . . Such records include, but are not limited to: . . . sales receipts, cash register tapes . . . .
>
> "(2) Failure to maintain such records will be considered evidence of negligence or intentional disregard of law or regulation and may, without more, result in the imposition of appropriate penalties."

Because the plaintiff has failed to produce the cash register tapes, the commissioner contends that the auditor is unable to verify the plaintiff's sales.

The plaintiff argues that although the cash register tapes record each individual sale, the Z tapes, which are a compilation of the information contained on the cash register tapes, provide all of the necessary information that is needed to establish a record of sales for the auditor to examine. In other words, the plaintiff contends that the Z tapes are a reflection of all of the information contained in the cash register tapes. However, as can be seen below, that was not the case.

Two issues are raised by this appeal: first, whether the plaintiff's failure to keep cash register tapes during the audit period not only violated agency regulations, particularly § 12-2-12 (b), but also deprived the commissioner's auditor of the ability to verify the sales activity of the business; and second, whether the commissioner improperly issued the jeopardy assessment. As to the first issue, both parties acknowledge that the regulations require taxpayers to maintain and make available all sales documents to the commissioner upon request.

General Statutes § 12-426 (3) provides, in relevant part, as follows:

> "**Records.** (A) Every seller, every retailer as defined in subparagraph (B) of subdivision (12) of section 12-407 and every person storing, accepting, consuming or otherwise using in this state services or tangible personal property purchased from a retailer *shall* keep such records, receipts, invoices and other pertinent papers in such form as the commissioner requires."

(Emphasis added.)

When a statute, such as § 12-426 (3), recites that a retailer "*shall* keep such records" and the regulation promulgated thereto § 12-2-12 (b) recites that a "taxpayer *shall* maintain *all* records", including sales receipts and cash register tapes, the use of the word "shall" is mandatory, not discretionary, upon the part of the taxpayer. (Emphasis added.)

In making such a determination, our courts look at what the legislature was essentially trying to accomplish by using the word *shall,* as a matter of substance, rather than as a matter of convenience. See Wysocki v. Ellington, 109 Conn. App. 287, 298, 951 A.2d 598 (2008).

Here the legislature specified what information or materials the commissioner shall use to verify taxpayer reporting and to ensure the proper application of state tax laws.[3] Where the legislature provides the commissioner with the ability to verify a taxpayer's reporting, interpreting "shall" in § 12-426 (3) as discretionary, rather than mandatory, would leave the reporting process subject to the taxpayer's whim instead of fulfilling the legislative objective of providing the commissioner with the means to enforce the tax laws of this state.

In addition, since § 12-2-12 (b) of the regulations includes the words "cash register tapes", it must be assumed that this term is not superfluous nor can it be arbitrarily discarded. See Teresa T. v. Ragaglia, 272 Conn. 734, 751, 865 A.2d 428 (2005) ([a]dministrative rules and regulations are given the force and effect of law. We therefore construe agency regulations in accordance with accepted rules of statutory construction"). (Citation omitted; internal quotation marks omitted.)

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[3] See General Statutes § 12-426 (4): **Examination of records.** "The commissioner . . . may examine the books, papers, records and equipment of any person selling services or tangible personal property and any person liable for the use tax, and may investigate the character of the business of the person in order to verify the accuracy of any return made or, if no return is made by the person, to ascertain and determine the amount required to be paid."

As the commissioner correctly points out, where the taxpayer's records are unavailable for verification of the tax returns, the commissioner may turn to alternative methods. The commissioner's method of using a mark up test period is recognized in the industry as a way to calculate gross receipts in the absence of a taxpayer maintaining sufficient records. See American Restaurant Group, Inc. v. Commissioner of Revenue Services, 1999 Conn. Sup. 4129 (1999); see also defendant's post-trial brief, p. 2.

In this case, the plaintiff took it upon himself to take information from the cash register tapes and record it onto its Z tapes as an alternative to keeping the cash register tapes as required by § 12-2-12 (b) of the regulations. However, in his examination of the Z tapes, the commissioner's auditor found discrepancies that could only be resolved by examining the original transactions shown on the cash register tapes.

As an example, for certain dates in December 2000, 29 out of 39 Z tapes showed a discrepancy. See plaintiff's Exhibit C, noting the following discrepancies:

> DSRR (Terry & Debbie), dated December 1, 2000, reported total sales (invoices, register receipt) of $972.00, showing a bottom line of $1,082.00, an overage of $110.00.
>
> DSRR (Erica), dated December 1, 2000, reported total sales (invoices, register receipt) of $1,219.03, showing a bottom line of $1,225.00, an overage of $6.00.
>
> DSRR (Dennis), dated December 1, 2000, reported total sales (invoices, register receipt) of $784.00, showing a bottom line of $800.50, an overage of $16.00.
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> DSRR (Terry & Debbie), dated December 7, 2000, reported total sales (invoices, register receipt) of $1,285.56, showing a bottom line of $1,274, an underreporting of $11.56.

> DSRR (Kyle, Dennis, Fernandez), dated December 8, 2000, reported total sales (invoices, register receipt) of $2,877.57, showing a bottom line of $2,907.25, an overage of $29.66.
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> DSRR (Renie & Deb), dated December 15, 2000, reported total sales (invoices, register receipts) of $759.50, showing a bottom line of $584.00, an underreporting of $175.50, although the Z tape reported a shortage of $200.00.

For the period of December 1-31, 2001, 48 out of 73 Z tapes contained discrepancies. For the most part, these discrepancies were of a minor nature, running from a few pennies to less than $100.00.

In addition to the above described discrepancies, Alexandre acknowledged that during the month of August 2002, food sales were not reported for sales and use tax purposes, and during the period of 2002 and 2003, liquor sales were underreported. As an example, Alexandre's explanation for not reporting $38,089 in food sales was that most of his business was on a cash basis.

Alexandre also acknowledged that free drinks were not recorded because bartenders used free drinks and over pouring of drinks to enhance their tips. As noted in <u>Constantine v. Commissioner of Revenue Services</u>, Superior Court, judicial district of Hartford, Docket No. CV 91 0390484 (May 23, 1994, *Aronson, J.*) (11 Conn. L. Rptr. 558, 559 n.2), "[t]o 'free pour' . . . is to pour hard liquor from the bottle without using a shot glass or a measuring device attached to the bottle. . . . [This is described] as a two-fisted pouring."

The problem with over pouring is that the generous pouring of the drink is a sale only as to the amount charged for the drink, not a sale based on the quantity of liquor sold. The imposition of a sales tax, as described in General Statutes § 12-408 (1), is "imposed on all retailers at the rate of six per cent of the gross receipts of any retailer from the sale of all tangible personal property sold at retail . . . ." In other words, the sales tax is based on the gross receipts, not the gross quantity. Because he did not have the cash register tapes to verify sales, the auditor implemented a test period during which he determined hard liquor and beer gross receipts by the use of mark ups.

General Statutes § 12-415 (a) provides, in relevant part, that "*[i]f the commissioner is not satisfied* with the return or returns of the tax or the amount of tax required to be paid to the state by any person, the commissioner may compute and assess the amount required to be paid *upon the basis of the facts contained in the return or returns or upon the basis of any information which is in or that may come into the commissioner's possession.*" (Emphasis added.) The italicized phrases dominate this statutory provision and are key points in this appeal.

This broad and liberal command to the commissioner, in regard to the collection of taxes, is contrary to the plaintiff's argument that "[t]he records of the Plaintiff were kept in the normal course of business and must be examined, and errors or under reporting must be based upon a showing that such records are substantially incorrect and inadequate and not based upon a general computational scheme." (Plaintiff's post-trial brief, p. 9.) In other words, if the taxpayer keeps records that it considers to be in the normal course of business, then the burden shifts to the commissioner to prove that the taxpayer's business records are substantially incorrect.

The plaintiff's position is not the correct statement of the law in Connecticut. The law in this state places the burden on the taxpayer to show that the commissioner's assessment is incorrect and there is no statutory or regulatory burden upon the commissioner to show that the taxpayer's records are substantially incorrect before the commissioner can act. As noted in Leonard v. Commissioner of Revenue Services, 264 Conn. 286, 302, 823 A.2d 1184 (2003), "[i]nadequate taxpayer records may be the basis for a prima facie finding that the taxing authority's tax assessment is correct. . . . The plaintiff must present clear and convincing evidence that the assessment is incorrect or that the method of audit or amount of tax assessed was erroneous or unreasonable." (Citations omitted; internal quotation marks omitted.)

The auditor for the state noted (in plaintiff's attachment to Exhibit B) as follows:

> "The taxpayer could not provide both selling prices for food and liquor of his establishment. Also, the liquor purchases provided by the taxpayer per profit and loss statement [were] smaller than the figures obtained from the Discovery Unit and Distributors (see information section).
>
> "The examiner asked the taxpayer what were the selling prices of the drinks. The taxpayer stated he did not remember any of the drink prices, and stated the drink prices fluctuate depending on the crowd. The examiner requested the drink menu. The taxpayer stated he never printed any. The examiner requested the cash register tapes, which would show the drink prices. The taxpayer stated he did not keep any cash register tapes, that he throws out the tapes after the totals are recorded."

Given these circumstances, the examiner was forced to use the next best method available. The examiner used drink prices obtained from an undercover examiner and actual drink cost to calculate an audited mark up for drinks. The examiner applied this audited mark up to the actual cost of liquor sold to the taxpayer per vendor records, resulting in taxable gross receipts. The examiner subtracted the gross receipts the taxpayer reported on the CT sales tax returns from the audited taxable gross receipts with the difference being the unreported gross receipts subject to CT sales tax.

The discrepancies disclosed in the various Z tapes, regardless of how significant or insignificant they might be, and the plaintiff's failure to retain the cash register tapes as required by General Statutes § 12-426 (3) and § 12-2-12 (b) of the regulations, preclude the plaintiff from successfully challenging the commissioner's deficiency assessment. Without the cash register tapes, the plaintiff has not sustained its burden of proof of showing that the action of the commissioner, imposing a deficiency assessment upon him, was incorrect.

The second part of the plaintiff's appeal is the claim that "[t]he issuance by the Commissioner of a jeopardy assessment in this matter was illegal or void due to there being no basis for such an assessment in this case and the assessment should be abated in its entirety." (Plaintiff's post-trial brief, p. 20.) The plaintiff claims that the commissioner issued the jeopardy assessment because the plaintiff refused to sign an extension of the statute of limitations and not for any conduct by the plaintiff which would place the collection process in jeopardy.

The cause for the issuance of a jeopardy assessment lies within General Statutes § 12-417 (1) which provides, in relevant part, that "[i]f the commissioner believes that the collection of any tax or any amount of tax required to be collected and paid to the state or any assessment will be jeopardized by delay, the commissioner shall make the assessment of the tax or amount of tax required to be collected, noting that fact upon the assessment and serving written notice thereof . . . on the person against whom the jeopardy assessment is made."

"Jeopardy assessment" has been defined as "a special assessment under the U.S. income-tax laws levied to collect an alleged deficiency when the taxing officer believes that delay may jeopardize the collection of the claim." Webster's Third New International Dictionary, p. 1213.

"Jeopardy assessment" is also defined as "[w]henever proceedings to collect income tax for the current or the immediately preceding taxable year are or may be prejudiced or rendered ineffectual due to actions of a taxpayer who designs quickly to depart from the United States or remove his property or conceal himself or his property, or other such act, the I.R.S. may immediately make a determination of tax for the current taxable year or for the preceding taxable year, or both, and that such tax is immediately due and payable." West's Tax Law Dictionary (2009 Ed.), p. 583.

Although the definition of jeopardy assessment in both Webster's and West's dictionaries reference federal tax law and concepts, the language of § 12-417 (1), namely, that the collection of tax will be "jeopardized by delay", embodies the same concepts that were expressed in the dictionaries. Although federal tax principles are not incorporated wholesale into Connecticut tax law and require an express reference to the federal tax code, there is a close similarity to the federal jeopardy process and the state jeopardy process.[4] Both are concerned with the ability of the taxpayer to interfere with or defeat the collection process of the tax collector.

The factual basis to consider in dealing with the jeopardy assessment issue revolves around the perceived threat by the tax department to the plaintiff that if he did not sign a special consent to extend the statute of limitations, a jeopardy assessment would be issued against him.

This perceived threat was expressed in a letter, dated July 14, 2005, from the plaintiff to the DRS tax unit manager in which the plaintiff stated as follows:

> "[W]hat was most troubling was your threat that if I did not sign your department's waiver you would immediately conclude the audit and move to place a lien on my business property and my personal residence. You said this would be done before I would have an opportunity to file an appeal to the courts. Once again your bias has [led] you to believe that I would be a flight risk in that I would either sell or close my business to avoid paying any penalty.
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> "I am a stakeholder in the Hartford community. I have been in business for more that 14 years. I own property in Hartford and I am very involved in the community. I sit on a number of community based boards including the Northeast Revitalization Association, Hartford Enterprise Zone Business Association, Upper Albany Business Network, Hartford Police/Department of Justice Weed and

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[4] See Bell Atlantic NYNEX Mobile, Inc. v. Commissioner of Revenue Services, 273 Conn. 240, 262, 869 A.2d 611 (2005).

> Seed Committee and the Mayors Task Force on Economic Development."

(Plaintiff's Exhibit R.)

As discussed above, the plaintiff owns the real estate and property at 3155 North Main Street in Hartford, consisting of 2.2 acres of land improved with a club and banquet facility containing 37,000 square feet of gross building area. As of 2002, the subject property was valued at approximately $1,600,000, with an equity of approximately $1,000,000.

After the plaintiff refused to sign another extension of the statute of limitations, a tax warrant was issued on December 13, 2005 and a collection notice was issued to a state marshal demanding the immediate payment of $155,536.77, as well as $68,544.22 in interest, a penalty of $38,884.26 and the marshal's fee of $15,777.92, for a grand total of $278,743.17 due. See plaintiff's Exhibit Q.

The tax warrant recites as follows:

> "By authority of the State of Connecticut, in accordance with Conn. Gen. Stat. § 12-35, you are commanded to collect the taxes, penalties, and interest immediately in the amount certified by the attached itemized bill as due from the debtor named above, plus (1) any additional statutory interest due to the State of Connecticut from the debtor, and (2) your fees and charges. . . . If the debtor fails to pay the taxes, penalties, and interest, or your fees and charges upon demand, you are to distrain the debtor's real or personal property, tangible, or intangible property. The debtor's intangible property includes, but is not limited to, the debtor's bank and investment accounts, receivables, rents, royalties, legacies, distributive shares of trusts or estates, corporate stock and securities, proceeds of insurance policies, and debts. You are then to

> dispose of the property as the law directs, returning any surplus, after satisfying taxes, penalties and interest, and your fees and charges, to the debtor. . . . [Y]ou are further commanded to collect weekly the amount of execution . . . from an employer or debtor, including any debt due to the debtor for personal services rendered to the employer, from the date when this warrant is served to the date when the amount of taxes, penalties, and interest and your fees and charges have been collected."

(Plaintiff's Exhibit Q.)

General Statutes § 12-35 grants authority to the commissioner, with the issuance of a jeopardy assessment, to immediately place in jeopardy the taxpayer's real and personal property and intangible property such as bank accounts, investments, rents, royalties, shares in trusts, estates, stocks and securities. Furthermore, the jeopardy assessment subjects a taxpayer to wage executions and fees incurred by the state marshal for services and charges. Not only does this process subject the taxpayer to the cost and notoriety of the execution, but it also impairs the public image of the taxpayer, which in this case, is very much a community-minded individual.

In view of the consequences that result from the issuance of a jeopardy assessment, the issue here is whether there was a reasonable or rational basis for the commissioner to act against the plaintiff. Recognizing that General Statutes § 12-417 (1) grants the commissioner a broad authority to issue a jeopardy assessment by the use of the words "if the commissioner believes," this "belief" is tied into the question of whether or not there is a "reasonable belief" that the taxpayer's action will impair the collection of the tax.

From the facts developed in this case, it is clear that there was no basis for the auditor to conclude that the plaintiff contemplated removing assets from this jurisdiction. There also was no evidence that the collection process itself would be delayed or impaired once the final determination of the amount of taxes due was issued.

The commissioner's removal of the fraud and intent to evade penalty is consistent with this finding. On October 24, 2006, the total amount of taxes due was reduced from $155,536.77 to $94,690.22.

Although the commissioner correctly argues that it is the plaintiff's burden to prove that there was no factual basis for the issuance of the jeopardy assessment, the commissioner's removal of the original fraud penalty and Alexandre's civic ties to the community and substantial fixed assets provide such a factual basis.

By issuing the jeopardy assessment, the commissioner's action placed all of the plaintiff's assets in jeopardy and subject to paying the state marshal's commission, in this instance, $15,777.92, based on a total tax due of $155,536.77, not the reduced amount of $94,690.22. See plaintiff's Exhibit Q.

Recognizing that a jeopardy assessment is a powerful tool in the commissioner's hands, and further recognizing that the issuance of a jeopardy assessment must be based upon the commissioner's belief, as set forth in § 12-417 (1), that belief must be based on the existence of facts supporting a conclusion that the plaintiff's action would delay or hamper the collection process. In this sense, a reasonable belief is not one made arbitrarily. As noted in State v. Carter, 733 N.W.2d 333, 336 (Ia. 2007), "[a] jeopardy assessment, which is in the nature of an emergency-collection procedure, is defined as [a]n assessment by the [taxing authority]-without the usual review procedures-of additional tax owed by a taxpayer who underpaid, based on the [tax authority's] belief that collection of a deficiency would be jeopardized by delay." (Internal quotation marks omitted.)[5]

In considering the scope of the term "belief", the court in Stone v. United States, 405 F.Supp. 642, 645 (1975), was faced with a similar issue where the plaintiff claimed that the "jeopardy assessment was imposed arbitrarily and capriciously and not to collect taxes that were due." Similar to the present case, the plaintiffs in Stone argued that "the assessment was illegal because the District Director did not entertain a good faith belief that collection of the taxes would be jeopardized by delay, but rather acted to coerce plaintiffs into a settlement . . . ." Id., 648. The Stone court pointed out that "[t]he broad discretion vested in the District Director to make a jeopardy assessment[,] where he believes that the ultimate collection of the tax will be jeopardized by delay[,] must be viewed against [plaintiffs'] . . . entire course of fraudulent conduct with respect to . . . [the] use of Swiss bank accounts to conceal . . . derelictions. . . . To contend, under the

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In State v. Carter, 733 N.W.2d 335, the Iowa Code, § 422.30, which is similar to Connecticut General Statutes § 12-417 (1), provided that "[i]f the director believes that the assessment or collection of taxes will be jeopardized by delay, the director may immediately make an assessment of the estimated amount of tax due, together with all interest, additional amounts, or penalties, as provided by law. The director shall serve the taxpayer . . . [with] a demand for immediate payment."

facts here presented, that the District Director's concern for the collection of a potential deficiency of $7,000,000 was feigned[,] borders on the fatuous." Id.

In the present action, contrary to Stone, Alexandre was a solid citizen with many community ties and a going business with substantial assets. There was no evidence to suggest that Alexandre was leaving the jurisdiction or removing property or other assets to hamper or defeat the commissioner's efforts at the collection of taxes.

Although the Stone court considered the issue of whether the District Director abused his discretion in issuing the jeopardy assessment, the court decided the case on the basis that the Tax Injunction Act, 26 U.S.C. § 7421, prohibits a taxpayer's suit to enjoin the collection of tax .[6] However, in Connecticut, General Statutes § 12-39n, the Taxpayer's Bill of Rights, specifically affords taxpayers: "(6) The right to have all other collection actions attempted before a jeopardy assessment unless delay will endanger collection and, after a jeopardy assessment, the right to have an immediate review of the jeopardy assessment."

The court recognizes that a taxpayer is entitled by § 12-417 (3) to take an appeal from the commissioner's jeopardy action within ten days from the date of notice. However, this truncated[7] ten-day notice requires the taxpayer to furnish to the

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The Stone court quoted 26 U.S.C. § 7421 (a) as follows: "[N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." Stone v. United States, 405 F.Supp. 646.

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commissioner, within that ten-day period, "a bond of a surety company authorized to do business in this state or other security acceptable to the commissioner in such an amount not exceeding double the amount as to which the stay is desired, as the commissioner deems necessary . . . ." Section 12-422 permits an aggrieved taxpayer to take an appeal to the superior court from the actions of the commissioner under § 12-418, § 12-421 or § 12-425. Section 12-422 authorizes a judge of the superior court to "grant such relief as may be equitable."

In the present case, in view of the court's finding of a lack of basis for the commissioner to believe that the collection process against the plaintiff was in jeopardy of delay or impairment, and the resultant unnecessary expense incurred by the taxpayer for the state marshal's charges and fees, it is a fair and equitable resolution for the plaintiff not to bear the burden of the state marshal's expense of $15,777.92.

The final determination of taxes due the state of Connecticut for the audit period, as calculated by the auditor, was $94,690.22. In addition to the taxes due, the auditor also levied a 15% penalty plus interest on the plaintiff. However, the audit period, as noted above, was conducted by the auditor during the period of October 1, 1999 through March 31, 2005. During the audit period, the auditor's main complaint was that he was unable to verify sales reflected on the Z tapes without examining the cash register tapes. This problem existed over the entire audit period.

As noted in the Taxpayer's Bill of Rights, a taxpayer is normally given a thirty-day right to review the commissioner's actions.

As noted in the plaintiff's post-trial brief, pp. 13-14, the auditor "could have at the first meeting in December 2001 inspected the continuous tapes that were in the registers at that time or requested that such tapes were kept. (Tr. 78, lines 23-37.) (Tr. 79, lines 1-12.) (Exhibit H.) He did not even raise the lack of tapes as an issue until his letter of April 1, 2005 which is after the audit period and over three and one-half years later. (Exhibit P.)"

There is no excuse for the plaintiff to consider the Z tapes as an appropriate substitute for the cash register tapes. However, once the auditor recognized, at the early stages of the audit, that the plaintiff needed to keep the cash register tapes, it would have brought the plaintiff into compliance for the balance of the audit period if the auditor had alerted the plaintiff at the beginning of the audit, in December 2001, of the necessity of keeping cash register tapes. For this reason, it is equitable to relieve the plaintiff of the penalty levied by the commissioner against him. See <u>Sharper Image Corp. v. Miller</u>, Superior Court, judicial district of Hartford, Docket No. CV 94 0536540 (Feb. 1, 1995, *Aronson, J.*) [13 Conn. L. Rptr. 391, 396], aff'd, 240 Conn. 531, 692 A.2d 774 (1997) ("[w]here an honest difference of opinion exists between the taxpayer and the commissioner on an interpretation of a tax statute, we cannot say that the difference of opinion rises to the level of negligence or intentional disregard of the tax law"). (Internal quotation marks omitted.)

Here the plaintiff misinterpreted the regulations to conclude that the Z tapes were an acceptable substitute for the cash register tapes by assuming, incorrectly, that all of the information on the cash register tapes were incorporated into the Z tapes.

Accordingly, the plaintiff's appeal, as to the total tax due of $94,690.22 plus interest, is denied. However, the plaintiff's appeal as to the 15% penalty and the state marshal's fee of $15,777.92 is sustained. Judgment may enter accordingly without costs to either party.

Arnold W. Aronson
Judge Trial Referee