STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions	:	
of	:	
RONNIE'S SUBURBAN INN, INC. and RONALD BOARD, AS OFFICER	:	DECISION
for Revision of Determinations or for Refunds of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1981 through February 29, 1984.	:	

Petitioners, Ronnie's Suburban Inn, Inc. and Ronald Board, as officer, 80 River Meadow Drive, Rochester, New York 14623, filed an exception to the determination of the Administrative Law Judge issued on April 7, 1988 with respect to their petitions filed for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1981 through February 29, 1984 (File Nos. 801622 and 801731). Petitioners appeared by Fix, Spindelman, Turk, Himelein and Shukoff, Esqs. (Howard H. Weston, Esq., of counsel). The Division of the Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation filed a brief in opposition to the exception. Oral argument at the request of the petitioner was heard on November 15, 1988.

After reviewing the entire record in this matter the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether the Division of Taxation correctly concluded petitioners had insufficient records for the audit period, thereby justifying use of an unweighted markup to determine sales and use taxes due arising from petitioners' sales of beer, liquor and food.

II. Whether the markup audit was unreasonably conducted.

FINDINGS OF FACT

We find the facts as stated by the Administrative Law Judge and such facts are incorporated herein by this reference except that we modify finding of fact "7" as indicated below. We also find an additional fact asindicated below. The pertinent facts found by the Administrative Law Judge, the modified fact and the additional fact are as follows.

Petitioners Ronnie's Suburban Inn, Inc. ("Ronnie's") and Ronald Board, as Officer[1], together constituted and managed a tavern located in Rochester, New York during the audit period. Its clientele consisted primarily of construction workers during the day and college students in the evening. In addition to its sales of beer and liquor, it sold food items such as pizza and submarine sandwiches.

On September 20, 1984 the Division, on the basis of a field audit, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Ronnie's, assessing a deficiency of sales and use taxes for the period June 1, 1981 through February 29, 1984 in the amount of $9,274.35 plus penalty of $2,186.38 and interest of $2,588.01 for a total amount due of $14,048.74. On December 20, 1984 the Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner Ronald Board, as president of

[1]Petitioners Ronnie's Suburban Inn, Inc. and Ronald Board, as officer, are hereinafter referred to jointly as "petitioner."

Ronnie's, assessing the same amount of tax as had been assessed against Ronnie's plus accrued penalty and interest for a total amount due of $14,545.30.

At the outset of the audit, the Division requested all of Ronnie's books and records pertaining to the sales tax liability for the period under audit. In particular, the Division requested access to Ronnie's journals, ledgers, sales invoices, exemption certificates and all sales tax records. The Division also requested all cash register tapes and guest checks.

In response, the Division received Ronnie's sales journal, purchase journal and some purchase invoices. No cash register tapes or guest checks were provided. Upon review of Ronnie's sales and purchase journals for the period June 1, 1981 through August 31, 1982, the Division found that petitioner's records reflected food purchases of $39,711.20 and food sales during the same period of $8,211.14. Petitioner's records also showed that the markup on beer and liquor was 95 percent. The Division also found that petitioner's purchase journal did not distinguish beer purchases from liquor purchases. The Division concluded that it was unable to utilize a weighted markup methodology to ascertain beer and liquor sales since it did not have access to all of petitioner's purchase invoices.

We find in addition to the facts found by the Administrative Law Judge that the auditor reviewed all purchase invoices supplied to him, and determined that they were not complete for any specific time period.

We modify finding of fact "7" to read as follows:

> In order to calculate the amount of sales and use taxes due, the Division applied a markup of 150 percent over cost to petitioner's purchases of beer and liquor. The markup of 150 percent was premised, in part, on Division experience in conducting audits of other taverns. The Division corroborated the markup of 150 percent through a test markup on beer and liquor sales. The test markup on beer revealed that upon the sale of a glass of beer for 50 cents, which was petitioner's practice, and the purchase of the same beer by the one-half keg for $22.50, the markup over cost would have been 273 percent. This estimated markup took into account a spillage factor of 15 percent. The Division performed a comparable analysis with respect to the purchase of a liter of liquor for $5.50.

> By estimating that 23 drinks would be sold at 90 cents a drink, the auditor determined that the over cost markup would have been 276 percent. Therefore, the Division concluded that its estimated markup of 150 percent over cost was reasonable since it was less than its test markups. On the basis of prior audit experience, the Division estimated a markup of 100 percent over cost on food purchases to calculate food sales. The estimated markups were applied to petitioner's purchases to determine audited taxable sales of $457,347.09 and the tax due thereon of $32,014.35. The tax due was then reduced by the tax paid of $22,740.00 to ascertain that additional tax was due of $9,274.35.

It was Mr. Board's practice to record the sales shown on Ronnie's cash register tapes in a journal. The journal would then be given to Ronnie's accountant to prepare the sales tax returns.

OPINION

The Administrative Law Judge held that: (1) petitioner's books and records were inadequate, thereby entitling the Division to use an unweighted markup audit to estimate the tax due herein, (2) petitioner failed to present sufficient evidence to ascertain the amount of any adjustment that petitioner's promotional discounts and sponsorship of softball teams may have warranted, and (3) petitioner's allegation that almost half of its beer was lost through waste was untenable in the absence of more complete documentation.

On exception, petitioner asserts that: (1) its sales and tax returns for the audit period should be accepted as filed because its procedure in recording taxable sales was reasonable under the circumstances, and (2) the use of an indirect audit method was unreasonable because the auditor made a substantial error in the computation of certain food and alcohol sales by failing to examine all the records made available for his review.

The Division responds to petitioner's exception by asserting that: (1) petitioner should not be allowed to introduce evidence into the record on appeal before the Tax Appeals Tribunal, (2) the Division's use of an unweighted markup audit was appropriate and (3) petitioner's penalty should not be abated.

We affirm the determination of the Administrative Law Judge.

We first address whether petitioner's books and records were adequate. We conclude they were not.

As a vendor of food, beer and other alcoholic beverages, petitioner was responsible for collecting sales tax on its retail sales (Tax Law §1105[d][i]). Petitioner was also obligated to keep records of every sale and the tax due thereon, including "a true copy of each sales slip, invoice, receipt, statement or memorandum" (Tax Law §1135[a]) upon which the sales "tax shall be stated, charged and shown separately on the first of such documents given to (the purchaser)" (Tax Law §1132[a]).

The Division has the authority to determine, "from such information as may be available," the amount of tax actually due from a taxpayer for a given period when any one of its sales tax returns is either not filed or states an incorrect or insufficient amount of tax due (Tax Law §1138[a][1]). When the vendor maintains a comprehensive set of books and records, "such information as may be available" (Tax Law §1138[a][1]) is restricted to his books and records, and not external indicia, because "the honest and conscientious taxpayer who maintains comprehensive records as required has a right to expect that they will be used in any audit to determine his ultimate tax liability" (Chartair Inc. v. State Tax Commn., 65 AD2d 44; 411 NYS2d 41, 43).

To determine the adequacy of a taxpayer's records, the Division must first request (Matter of Christ Cella v. State Tax Commn., 102 AD2d 352, 477 NYS2d 858, 859) and thoroughly examine (Matter of King Crab v. State Tax Commn., 134 AD2d 51, 522 NYS2d 978, 979-80) the taxpayer's books and records for the entire period of the proposed assessment (Matter of Adamides v. Chu, 134 AD2d 776, 521 NYS2d 826, 828). The purpose of the examination is to determine, through verification drawn independently from within these records (Matter of Meyer v. State Tax Commn., 61 AD2d 223, 402 NYS2d 74, 76, lv. denied 44 NY2d 645, 406 NYS2d 1025; Matter of Giordan, B & G v. State Tax Commn., 592 NY Reports __, 535 NYS2d 255,

256-57; Matter of Urban Liquors, Inc. v. State Tax Commn., 90 AD2d 576, 456 NYS2d 138, 139; see also, Matter of Hennekens v. State Tax Commn., 114 AD2d 599, 494 NYS2d 208, 209), that they are, in fact, so insufficient that it is "virtually impossible (for the Division of Taxation) to verify taxable sales receipts and conduct a complete audit" (Chartair Inc., supra, at 43; Matter of Christ Cella v. State Tax Commn., 102 AD2d 352, 477 NYS2d 858, 859), "from which the exact amount of tax can be determined" (Matter of Mohawk Airlines Inc. v. Tully, 75 AD2d 249, 429 NYS2d 759, 760).

Where the Division follows this procedure, thereby demonstrating that the records are incomplete or inaccurate, the Division may resort to external indices to estimate tax (Matter of Urban Liquors, Inc. v. State Tax Commn., supra). The estimate methodology utilized must be reasonably calculated to reflect taxes due, but exactness is not required from such a method (Matter of W.T. Grant Company v. Joseph, 2 NY2d 207, 159 NYS2d 150, 157; Matter of Markowitz v. State Tax Commn., 54 AD2d 1023, 388 NYS2d 176, 177).

We now consider whether the Division adequately requested and examined petitioner's books and records. We conclude that it did.

The Division requested all cash register tapes, guest checks, purchase invoices and the sales and purchase journals for the entire audit period. Petitioner, in turn, provided only some purchase invoices and its journals.

Petitioner's lack of guest checks or cash register tapes separately stating the tax due on each sale precludes it from claiming that the auditor was supplied with sufficient books and records (Matter of Licata v. Chu, 64 NY2d 874). Petitioner's claim that its record keeping methods were "reasonable under the circumstances" lacks merit because it does not begin to address how petitioner fulfilled its record keeping requirements under the Tax Law. Neither is it "reasonable" to expect that the Division will exclusively rely upon a taxpayer's non-source documentation and, in effect, determine the correct amount of tax due based upon the taxpayer's general ledgers

(Matter of Meyer v. State Tax Commn., 61 AD2d 223, 402 NYS2d 74, 76, lv. denied 44 NY2d 645, 406 NYS2d 1025). Finally, petitioner cannot bolster its claim that it maintained adequate records by attempting to introduce additional evidence on appeal (20 NYCRR 3000.13[a]).

Having established that the auditor properly resorted to external indicia, we now address whether petitioner has sustained its burden to demonstrate that this estimate method was not reasonably calculated to reflect the taxes due. We conclude that petitioner has not.

Petitioner claims that the auditor made a substantial error in the computation of certain food, beer and liquor sales. Petitioner asserts that its records for the audit period show food sales of at least $41,998.43 compared to the $8,211.14 the auditor found as food sales in petitioner's sales journal. On appeal petitioner has submitted exhibits purporting to be journal entries and summaries to support this point, which petitioner claims indicate that the auditor did not thoroughly review all records. Similarly as to beer and liquor sales, petitioner claims that had the auditor reviewed certain invoices it alleges were made available to him, the auditor would have replaced the combined beer and liquor purchase markup of 150 percent over cost applied against all alcohol sales with a system applying that percentage to liquor only and instead using a lower markup percentage on an estimated share of the beer sales.

We note that petitioner had the right at the hearing to cross-examine the auditor concerning these alleged failures to review "additional" invoices (20 NYCRR 3000.10[d][1]) and to offer the invoices and sales journals as evidence but failed to do so. We cannot at this point in the proceeding allow petitioner to submit new evidence into the record (Matter of Fred S. Dubin and Sarah K. Dubin, Tax Appeals Tribunal, April 21, 1988; Matter of Modern Refractories Service Corporation, Tax Appeals Tribunal, December 15, 1988.) The record that is before us indicates that the auditor did review all invoices supplied to him. Further, this record indicates that the markup percentages of 100 percent over cost for food and 150 percent for beer and liquor were reasonable in the circumstances. The beer and liquor markup was substantially less than the test

markups of the 273 percent and 276 percent over cost for beer and liquor, respectively, determined from petitioner's selling practices. Further, although the 100 percent over cost markup on food was based entirely on audit experience, this experience was specifically qualified by the auditor on direct examination and not controverted by petitioner through cross examination or otherwise (compare, Matter of Grecian Square v. State Tax Commn., 119 AD2d 948, 501 NYS 2d 219 and Matter of Willy Savino d/b/a Willy's Service Station, Tax Appeals Tribunal, September 22, 1988, where there was no description of the audit experience).

Finally, though not having formally excepted to the Administrative Law Judge's 15 percent allowance for waste spillage of beer, petitioner refers to the same in its brief and addendum thereto on appeal. Without deciding whether petitioner has properly stated its grounds within the exception to include this point (20 NYCRR 3000.11[b][1][ii]), we nevertheless conclude that the claim of 45 percent waste lacks merit.

We note that it is the petitioner's burden to prove that any allowance for waste is required on a markup audit (Matter of Ristorante Puglia v. Chu, 102 AD2d 348, 478 NYS2d 91, 93). In the record before us "absent is proof from a qualified expert establishing that such losses regularly occur, and there is no evidence that the figures contained in petitioner's records fall within the range of anticipated loss for the particular activity" (Matter of Petroleum Sales And Service, Inc. v. Bouchard, 98 AD2d 882, 470 NYS2d 865, 866; citing, Matter of Allied N.Y. Services v. Bragalini, 4 AD2d 802, 164 NYS2d 506). Furthermore, the only direct proof submitted by petitioner concerning the beer spillage was personal testimony from several witnesses and its Exhibit #3, the results of its test which determined a waste factor of 45 percent and which was conducted after the Division had already issued its first Notice of Determination and Demand.

We do not find the "study" persuasive without additional credible testimony to support its seemingly remarkable result. Finally, the Adminstrative Law Judge was in the best position to

assess the credibility of petitioner's witnesses and we will not disturb his conclusion that petitioner did not meet its burden on this point from their testimony. For these reasons, petitioner is not entitled to a credit for waste apart from the 15 percent used by the auditor.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the petitioners, Ronnie's Suburban, Inc. and Ronald Board, as officer, is in all respects denied;

2. The determination of the Administrative Law Judge is affirmed; and

3. The petitions of Ronnie's Suburban, Inc. and Ronald Board, as officer, are denied and the notices of determination and demand issued on September 20, 1984 and December 20, 1984 are sustained.

DATED: Troy, New York
May 11, 1989

/s/ John P. Dugan
John P. Dugan
President

/s/ Francis R. Koenig
Francis R. Koenig
Commissioner