

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
FRIENDLY COFFEE SHOP, INC. AND	:	
STYLIANOS LOPARNOS, AS OFFICER	:	DECISION
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 March 1, 1983	:	
through November 30, 1985.	:	

Petitioners, Friendly Coffee Shop, Inc. and Stylianos Loparnos, as Officer, 26 South Broadway, Yonkers, New York 10701, filed an exception to the determination of the Administrative Law Judge issued on November 22, 1989 with respect to their 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 March 1, 1983 through November 30, 1985 (File No. 804862). Petitioners appeared by Ernest Rahman, Public Accountant. The Division of Taxation appeared by William F. Collins, Esq. (Angelo A. Scopellito, Esq., of counsel).

Petitioners did not file a brief on exception. The Division filed a letter in opposition to the exception.

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

ISSUE

Whether an observation test properly determined sales and use taxes due from petitioner Friendly Coffee Shop, Inc.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and such facts are stated below.

Petitioner Friendly Coffee Shop, Inc. operates a luncheonette at 26 South Broadway, Yonkers, New York. It serves breakfast and lunch and also sells donuts for off-premises consumption. Petitioner Stylianos Loparnos is president of the corporation.¹

THE AUDIT

The audit of the business was conducted as follows.

The auditors made an unannounced survey of the corporation's place of business on January 24, 1986. They found it to be a fairly large, modern, establishment situated in a busy, centrally located area, i.e., the Getty Square section of Yonkers. At the time of their visit, the business closed at 4:00 P.M.

At a subsequent field appointment, the corporation's accountant stated that not all records were available for audit as some had been destroyed in a fire in the business's premises on August 11, 1985. The records available for audit included sales tax returns, Federal and State income tax returns and worksheets, cash receipts journal, check disbursements journal, monthly bank statements and a day book. Records requested but not made available were purchase invoices for the period March 1, 1983 through November 30, 1985, cash register tapes and guest checks.

An observation test of the business was made on Monday, March 3, 1986. The auditors recorded the amounts rung up on the cash register and kept track of nontaxable sales (e.g., donuts or juice sold in containers for take-out). Early in the day, Mr. Loparnos indicated that

¹While the petitions were filed in the corporate name, the notices of determination issued to Stylianos Loparnos as president of Friendly Coffee Shop, Inc. were attached to the petitions and, thus, Mr. Loparnos will also be deemed to have protested the assessments. There is no issue, however, as to Mr. Loparnos' status as a person required to collect tax on behalf of the corporate petitioner.

March 3rd was a bad day for the observation, due to the fact that it was the first business day of the month and welfare and social security checks would be cashed at a bank located near the place of business. The auditor observed the clientele and acknowledged that some persons appeared to be such once-a-month customers, but also noted that the regular clientele far outnumbered those who were there only for one day. Gross sales were \$1,116.97. Nontaxable sales were found to be \$271.20, resulting in a taxable percentage of 75.72%. The corporation's accountant protested that the sales figure was too high, because the auditors used the first business day of the month when traffic is unusually high. The auditors noted, however, that in the corporation's day book, the first day of the month did not show a dramatic increase when compared to the other days in the month.

A second observation test was performed on Friday, March 21, 1986. Gross sales were \$660.88.

At the time of the second observation test, Mr. Loparnos was asked the amount of sales made on the previous day, Thursday, March 20, 1986, and he replied that the amount was \$790.00.

An average of the three days, March 3rd, March 20th, and March 21st, resulted in average daily gross sales of \$855.95. The corporation had reported average daily gross sales of \$315.80.

After application of the 75.72% taxable percentage found on March 3rd, the average daily taxable sales were found to be \$648.13. This resulted in additional sales tax of \$22,634.73. Allowance was made for the business being closed due to the fire on August 11, 1985. Only 26 working days were used for the quarter ending November 30, 1985.

The auditors noted that the corporation's records indicated the business had only two employees. However, four persons were observed working there at the time of the unannounced visit on January 24, 1986, five persons were seen working there on March 3, 1986 and six persons were seen working there on March 21, 1986. The auditors also noted that the entire payroll for three years as per the Federal income tax returns was approximately

\$46,000.00.

Fixed asset purchases as per the Federal income tax returns were \$54,000.00. The auditor saw \$18,000.00 in invoices with sales tax shown as paid. Thus, \$36,000.00 in fixed asset purchases were deemed as having no tax paid. This resulted in \$2,970.00 in tax due.

On May 30, 1986, the Division of Taxation issued the following notices of determination and demands for payment of sales and use taxes due:

(a) To petitioner Friendly Coffee Shop, Inc. \$25,604.73 in tax, \$5,716.14 in penalty, and \$5,717.39 in interest, for a total of \$37,038.26 for the period March 1, 1983 through November 30, 1985. A similar notice was issued to petitioner Stylianos Loparnos, president of Friendly Coffee Shop, Inc.

(b) To petitioner Friendly Coffee Shop, Inc. in the amount of \$529.47 in penalty for the period March 1, 1983 through November 30, 1985. A similar notice was issued to petitioner Stylianos Loparnos, president of Friendly Coffee Shop, Inc.

OPINION

In the determination below the Administrative Law Judge held (1) that, pursuant to the authority granted to it in Tax Law § 1138(a), the Division of Taxation had properly resorted to an observation audit because petitioners' records were inadequate and, (2) that petitioners had failed to sustain their burden of proving that the method of audit or the amount of the assessment was erroneous. The Administrative Law Judge modified the assessment by applying an inflation adjustment to reflect the lower prices that existed prior to the time of the audit, but in all other respects sustained the assessments.

On exception, petitioners object to the "State's denial of the inflation adjustment" (petitioners' exception). Petitioners also assert that: one of the observation days was not typical for the business; the assessment was too high; and, the number of working days used per quarter was too high.

In response, the Division argues that the record contains no evidence to support petitioners' exception to the adjustment granted for inflation. Further, although it did not file an

exception, the Division argues that the Tribunal should modify the Administrative Law Judge's determination by removing the adjustment for inflation. The Division also requests that all of petitioners' other exceptions be denied.

We find no basis in the record before us for modifying the Administrative Law Judge's determination in any respect. Therefore, we affirm the determination of the Administrative Law Judge for the reasons stated in his determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioners Friendly Coffee Shop, Inc. and Stylianos Loparnos, as Officer is denied;
2. The determination of the Administrative Law Judge is sustained;
3. The petition of Friendly Coffee Shop, Inc. and Stylianos Loparnos, as Officer is granted to the extent indicated in conclusions of law "C" and "E" of the Administrative Law Judge's determination but is otherwise denied; and
4. The Division of Taxation is directed to modify the notices of determination dated May 30, 1986 in accordance with paragraph "3" above but such notices are otherwise sustained.

DATED: Troy, New York
June 14, 1990

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

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

/s/Maria T. Jones
Maria T. Jones
Commissioner