

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
COLISEUM PALACE, INC. : 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 December 1, :
1976 through May 31, 1982.

Petitioner, Coliseum Palace, Inc., 827 Broadway, Newburgh, New York 12550, 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 December 1, 1976 through May 31, 1982 (File No. 800346).

A hearing was held before Arthur S. Bray, Hearing Officer, at the offices of the State Tax Commission, W.A. Harriman State Office Building Campus, Albany, New York on July 21, 1987 at 10:45 A.M. Petitioner appeared by John J. McGraw, P.A. The Audit Division appeared by John P. Dugan, Esq. (Mark Volk, Esq., of counsel).

ISSUE

Whether, as the result of a field audit, the Audit Division correctly determined the amount of sales and use taxes due.

FINDINGS OF FACT

1. During the period in issue, petitioner, Coliseum Palace, Inc., operated a large restaurant and bar. On weekends, entertainment was provided at the restaurant.
2. At the outset of the audit, the Audit Division asked to examine petitioner's sales tax returns, Federal income tax returns, general ledgers, bank statements, purchase invoices, daily cash books, guest checks and cashregister tapes. In response, petitioner was unable to provide guest checks, cash register tapes, bank statements for 1977 and 1980 through 1982, general ledgers for 1981 and 1982 and Federal tax returns for 1981.
3. The Audit Division also found that, although petitioner began business in January 1977,

sales and use tax returns were not filed until August 1981.

4. The Audit Division examined petitioner's general ledger and requested petitioner's purchase invoices to ascertain whether tax had been paid on the acquisition of fixed assets. Tax was assessed on those purchases where petitioner was unable to produce a purchase invoice. The foregoing resulted in a finding of fixed asset acquisitions in the amount of \$96,485.75 on which sales and use tax was due.

5. In order to conduct its audit, the Audit Division divided petitioner's sales into three categories: wine and liquor, beer and food. With respect to the categories of wine and liquor and of beer, the Audit Division utilized purchase invoices to determine cost and conversations with one of petitioner's officers to determine selling price. These amounts were used to calculate a markup on wine and liquor of 398.559% and a markup on beer of 178.737%. The Audit Division estimated that petitioner's markup on food sales was 150%. These markups were then multiplied by petitioner's respective purchases during the period January 1, 1977 through November 30, 1980. The foregoing computations resulted in additional taxable sales of \$259,508.88 and represented an increase in taxable sales of 37.7922%. The margin of error was then multiplied by the amount of taxable sales reported on petitioner's sales and use tax returns for the period December 1, 1980 through August 31, 1981, resulting in additional taxable sales of \$44,523.37. The sum of the additional taxable sales, \$304,032.25, was added to the taxable sales reflected on petitioner's sales tax returns for the period December 1, 1976 through November 30, 1977 of \$210,533.00¹ plus fixed asset purchases of \$96,485.75 on which tax was due. The total of the foregoing calculations resulted in the Audit Division's conclusion that petitioner was liable for additional sales and use taxes of \$24,442.04.

6. Upon review of the Audit Division's workpapers, petitioner decided to conduct and submit its own markup test. As a result, the Audit Division revised its calculation to arrive at a markup on food of 144.257% and liquor and wine of 334.446%. The markup on beer of

¹Although sales and use tax returns were not filed until August 1981, copies of unfiled sales and use tax returns were given to the auditor without remittance.

178.737% remained the same.

7. The revised markups were multiplied by the respective purchases for the period January 1, 1977 through November 30, 1980 resulting in sales of liquor and wine of \$302,758.04, beer of \$46,553.26 and food of \$538,722.24. The total of the foregoing sales was reduced by reported taxable sales to determine additional taxable sales of \$201,361.54. The amount of additional taxable sales represented an increase in taxable sales of 29.3243%. This percentage was multiplied by the reported taxable sales on the sales and use tax returns for the period December 1, 1980 through May 31, 1982 resulting in additional taxable sales of \$56,599.42. In a manner similar to the original calculation, the amount of the additional taxable sales was added to the taxable sales shown on petitioner's sales and use tax returns for the period December 1, 1976 through November 30, 1977 of \$210,533.00 plus fixed asset purchases of \$128,590.44 on which tax was due. These calculations resulted in the Audit Division's conclusion that sales and use tax was due in the amount of \$18,794.91.

8. As a result of documentation submitted by petitioner, the Audit Division revised its calculation of the tax due on fixed asset acquisitions to \$5,143.62.

9. On the basis of the audit as described, the Audit Division, on November 19, 1982, issued two notices of determination and demands for payment of sales and use taxes due. The notices assessed a deficiency of sales and use taxes for the period December 1, 1976 through May 31, 1982 in the amount of \$23,938.53 plus penalty of \$5,813.44 and interest of \$13,066.49 for a total amount due of \$42,818.46.

10. After the assessment of sales and use tax was issued, petitioner submitted additional information which led the Audit Division to conclude that the markup on wine and liquor should be reduced to 309.585 percent. Consequently, the amount of tax which the Audit Division asserted to be due at the hearing was \$22,203.84.

SUMMARY OF PETITIONER'S POSITION

11. At the hearing, petitioner declined to challenge the markup applied to beer or to the wine and liquor. However, petitioner did submit its own markup test on food, utilizing fish, meat

and poultry purchases but ignoring condiments. This markup test resulted in a higher markup percentage but no tax due on food sales, because of the smaller amount of purchases upon which the food markup was applied than that used by the Audit Division. Petitioner asserted that this methodology was more accurate because the patrons' use of condiments was so variable.

12. Petitioner maintains that its suppliers knew that sales tax had to be remitted. Consequently, petitioner argues that the amount of tax assessed on fixed asset acquisitions was excessive because it may be presumed that sales tax was collected and remitted by its suppliers.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides, in part, that if a return required to be filed is incorrect or insufficient, the Tax Commission shall determine the amount of tax due on the basis of such information as may be available. This section further provides that, if necessary, the tax may be estimated on the basis of external indices.

B. That in view of the paucity of the records available for examination, such records were insufficient for the verification of taxable sales. Accordingly, the Audit Division's use of an indirect audit method to estimate the tax due from petitioner was reasonable under the circumstances (see Matter of Licata v. Chu, 64 NY2d 873).

C. That when the records provided are incomplete or insufficient, it is the duty of the Audit Division to select a method reasonably calculated to reflect taxes due (Matter of Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858). In this instance, the Audit Division employed such a method. It was entirely reasonable for the Audit Division to utilize all of petitioner's food purchases to ascertain the amount of tax due on food sales, rather than the purchases with respect to just three main dishes. Exactness is not required when it is petitioner's own failure to maintain proper records which prevents exactness in the determination of sales tax liability (Matter of Markowitz v. State Tax Commn., 54 AD2d 1023, affd 44 NY2d 684).

D. That petitioner's argument that its suppliers knew that sales tax was required to be remitted and it should therefore be presumed that tax was collected is without merit. In the

absence of additional documentation, petitioner has not established that it is entitled to an adjustment of the tax imposed arising from the acquisition of fixed assets.

E. That the petition of Coliseum Palace, Inc. is denied and the notices of determination and demands for payment of sales and use taxes due, modified as indicated in Finding of Fact "10", are sustained.

DATED: Albany, New York
May 25, 1989

ADMINISTRATIVE LAW JUDGE