

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
AHMED S. AHMED :
D/B/A A & A GROCERY STORE :
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, 1980 :
through August 31, 1983. :
DETERMINATION

In the Matter of the Petition :
of :
YAHYA S. AHMED :
D/B/A A & A GROCERY STORE :
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, 1980 :
through August 31, 1983. :

Petitioner Ahmed S. Ahmed d/b/a A & A Grocery Store, 1677 Nostrand Avenue, Brooklyn, New York 11226, 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, 1980 through August 31, 1983 (File No. 801095).

Petitioner Yahya S. Ahmed d/b/a A & A Grocery Store, 1677 Nostrand Avenue, Brooklyn, New York 11226, 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, 1980 through August 31, 1983 (File No. 801096).

A hearing was held before Robert F. Mulligan, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 28, 1987 at 1:15 P.M., with all briefs to be submitted by May 1, 1987. Petitioners appeared by Bertie L.

Graham, P.A. The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUE

Whether an audit properly determined sales and use taxes due from petitioners.

FINDINGS OF FACT

1. A & A Grocery Store was a partnership consisting of Ali S. Ahmed, Ahmed S. Ahmed and Yahya S. Ahmed. The partnership operated a grocery store at 1677 Nostrand Avenue, Brooklyn, New York.

2. The Brooklyn District Office conducted a field audit of the business for the period September 1, 1979 through May 31, 1982. Although a consent extending the period of limitation on assessment for the period September 1, 1979 through August 31, 1980 was obtained, it expired prior to assessment. Accordingly, the audit period was revised to September 1, 1980 through August 31, 1983.

3. The audit was conducted as follows:

(a) Gross sales as per the cash receipts journal agreed with gross sales reported on the United States partnership returns filed for 1980 and 1981.

(b) A comparison between sales per the cash receipts books and the sales tax returns filed could not be made because petitioners' cash receipts books were incomplete.

(c) The auditor analyzed purchases made for the months of April, May and June 1981. The analysis revealed that sundry taxable purchases were 9.85 percent of total purchases.

(d) Cash disbursements showed purchases of \$13,872.00 in beer, \$22,634.00 in soda and \$17,973.00 in cigarettes for the original audit period of September 1, 1979 through May 31, 1982.

(e) Markup tests were made for the categories of taxable sundry, beer, soda and taxable cigarettes using purchase and selling prices for 1982. The resulting markups were as follows:

Taxable Sundry	- 37.54%
Beer	- 21.72%
Soda	- 47.82%
Taxable Cigarettes	- 32.49%

(f) The above markups were applied to purchases for the original audit period after allowing 2 percent for pilferage, resulting in adjusted taxable sales of \$124,738.00.

(g) It is noted that for the original audit period, purchases as per records were \$384,562.00 while audited taxable sales were \$124,738.00, or 32.4 percent of purchases.

(h) As petitioners had reported taxable sales of \$51,750.00, the figure of \$124,738.00 in audited taxable sales represented an increase of \$72,988.00 and resulted in an error percentage of 141.04 percent for the original audit period. This percentage was applied to taxable sales reported, resulting in additional taxable sales of \$87,635.00 and tax due of \$7,160.39 for the extended audit period September 1, 1980 through August 31, 1983.

4. On December 13, 1983, the Audit Division issued notices of determination and demands for payment of sales and use taxes due to petitioners Ahmed S. Ahmed d/b/a A & A Grocery Store and Yahya S. Ahmed d/b/a A & A Grocery Store, each in the amount of \$7,160.21 in tax, \$1,395.87 in penalty and \$1,285.89 in interest. Each notice was for the period September 1, 1980 through August 31, 1983 and totalled \$9,841.97.¹

5. At the hearing, the parties agreed that assessment for the quarters ending prior to June 1, 1982 was not in issue and, in fact, it was stipulated that payments had been made thereon by petitioners.

6. Average monthly purchases for the period September 1, 1979 through May 31, 1981 were \$12,279.00 and average quarterly purchases for the same period were \$36,837.00. Average taxable sales shown on the sales tax returns for this period were \$4,531.43.

7. After the hearing, petitioners' representative submitted additional documentation showing that the average purchases for the months of December 1982 through February 1983 and

¹A similar assessment was issued to Ali S. Ahmed on the same date but is not at issue herein.

the months of June 1983 through August 1983, were \$10,895.00 per month, or \$32,685.00 per quarter. It is noted that average quarterly taxable sales reported for the period June 1, 1982 through August 31, 1983 were \$5,479.00.

8. Petitioners' representative also submitted calculations purporting to show that taxable purchases constituted 11.7 percent of total purchases for one three-month period; however, said calculations were not substantiated.

CONCLUSIONS OF LAW

A. That Tax Law § 1138(a)(1) provides, in pertinent part, as follows:

"If a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors."

B. That where a taxpayer's records are incomplete or insufficient, the Audit Division may select a method reasonably calculated to reflect the sales and use taxes due and the burden then rests upon the taxpayer to demonstrate by clear and convincing evidence that the method of audit or amount of tax assessed was erroneous (Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858).

C. That in this case, petitioners' records were incomplete and insufficient. Accordingly, it was proper for the Audit Division to perform a test period markup audit.

D. That although it was proper for the Audit Division to estimate taxes by means of a markup test, under the circumstances herein the error rate of 141.04 percent should have been adjusted before application to the period June 1, 1982 through August 31, 1983. While said rate may have been valid for the earlier periods, it is clear that petitioners paid more tax per quarter and expended less on purchases per quarter during the later periods. Applying the factor of 32.4 percent (Finding of Fact "3[g]") to the average purchases for the quarters ending February 28, 1983 and August 31, 1983, or \$32,685.00 (Finding of Fact "7"), results in an average of \$10,590.00 in taxable sales per quarter. Such taxable sales result in an error percentage of 93.3 percent when compared to the \$5,479.00 in taxable sales reported for the

period June 1, 1982 through August 31, 1983. Accordingly, the percentage of error is to be reduced to 93.3 percent for the period June 1, 1982 through August 31, 1983.

E. That the petitions of Ahmed S. Ahmed d/b/a A & A Grocery Store and Yahya S. Ahmed d/b/a A & A Grocery Store are granted to the extent set forth in Conclusion of Law "D"; and, except as so granted, the petitions are denied and the notices of determination and demands for payment of sales and use taxes due issued December 13, 1983 are otherwise sustained.²

DATED: Albany, New York
January 28, 1988

ADMINISTRATIVE LAW JUDGE

²The recomputation by the Audit Division should reflect any payments made by petitioners subsequent to the issuance of the assessments (see ___ Finding of Fact "5").