

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petitions	:	
of	:	
RONNIE'S SUBURBAN INN, INC. and RONALD BOARD, AS OFFICER	:	DETERMINATION
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.	:	

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Petitioners, Ronnie's Suburban Inn, Inc. and Ronald Board, as officer, 80 River Meadow Drive, Rochester, New York 14623, filed petitions 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).

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 259 Monroe Avenue, Rochester, New York, on September 16, 1987 at 9:15 A.M., with all briefs and additional documents to be submitted by November 16, 1987. Petitioners appeared by Ronald Board, president. The Audit Division appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether, as the result of a field audit, the Audit Division accurately determined the amount of sales and use taxes due arising from petitioners' sales of beer, liquor and food.

FINDINGS OF FACT

1. Petitioner Ronnie's Suburban Inn, Inc. ("Ronnie's") was a tavern located in Rochester, New York. 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.
2. On September 20, 1984 the Audit 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 Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner Ronald Board, as president of 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.

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

4. In response, the Audit Division received Ronnie's sales journal, purchase journal and some purchase invoices. No cash register tapes or guest checks were provided.

5. Upon review of Ronnie's sales and purchase journals for the period June 1, 1981 through August 31, 1982, the Audit Division found that petitioners' records reflected food purchases of \$39,711.20 and food sales during the same period of \$8,211.14. Petitioners' records also showed that the markup on beer and liquor was 95 percent. The Audit Division also found that petitioner's purchase journal did not distinguish beer purchases from liquor purchases.

6. The Audit 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 petitioners' purchase invoices.

7. In order to calculate the amount of sales and use taxes due, the Audit Division applied a markup of 250 percent to petitioners' purchases of beer and liquor. The markup of 250 percent was premised, in part, on Audit Division experience in conducting audits of other taverns. The Audit Division corroborated the markup of 250 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 petitioners' 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 Audit 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 markup would have been 276 percent. Therefore, the Audit Division concluded that its estimated markup of 250 percent was reasonable since it was less than its test markups.

8. On the basis of prior audit experience, the Audit Division estimated a markup of 100 percent on food purchases to calculate food sales.

9. The estimated markups were applied to petitioners' 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.

10. Due to a very competitive environment, Ronnie's had many promotions involving food and drink. It was Ronnie's practice to offer food and beer at discounted prices in order to induce people to patronize the bar. These promotions included, among others: "Dimey Day" wherein glasses of draft beer would be offered for 10 cents, offers of Schnapps for 50 cents a glass, offers of free pizza for a limited number of hours and special prices on its sales of chicken wings and submarine sandwiches.

11. During the period in issue, petitioners sponsored approximately five softball teams. It was Ronnie's practice to provide free beer to the members of a sponsored team after games. In addition, Ronnie's sponsored parties for its softball teams after tournaments. Thus, the corporation provided 8 or 9 parties a year.

12. The beer which spilled into the sink at Ronnie's drained into a five gallon bucket. This bucket was emptied at least once a day, except during the summer when it was emptied at least twice a day.

13. During October and November 1984 petitioners attempted to ascertain the amount of beer that was lost due to waste. This was accomplished by comparing the amount of beer in the bucket each day with the amount of beer sold. Petitioners maintain that on the basis of their

observation test, approximately 45 percent of the beer that was drawn was lost through waste.

14. 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.

#### SUMMARY OF PETITIONER'S POSITION

15. At the hearing, petitioner maintained that the assessment of sales and use taxes was excessive because it failed to take into account the promotional discounts, the beer which was given away arising from the sponsorship of the softball teams and the amount of beer wasted.

#### CONCLUSIONS OF LAW

A. That section 1138(a)(1) of the Tax Law provides, in part, that if a return required to be filed is incorrect or insufficient, the amount of tax due shall be determined on the basis of such information as may be available. This paragraph 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, petitioners' records were insufficient for the verification of taxable sales. An additional indicia of the inadequacy of petitioners' records is revealed by the discrepancy between petitioners' food purchases and sales. Accordingly, the Audit Division's use of an indirect audit method to estimate the tax due from petitioners was reasonable under the circumstances ( see e.g. Matter of Licata v. Chu, 64 NY2d 873; 592 Seventh Avenue Restaurant, State Tax Commn., August 21, 1985).

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 v. Tully, 85 AD2d 858). In this instance, the Audit Division employed such a method. Inasmuch as no original sales records were provided and the purchase records did not distinguish between liquor and beer, it was reasonable for the Audit Division to rely on its prior experience, with respect to beer and liquor, and a markup test of sales to determine petitioners' markup percentage. Moreover, petitioners have not presented sufficient evidence to ascertain the amount of any adjustment that may be

warranted for either promotional discounts or sponsorship of softball teams. With respect to beer, petitioners maintain, in effect, that almost one-half of their beer was lost through waste. This proposition is not found tenable in the absence of more complete documentation. It is recognized that petitioners may have had greater waste than the amount implicit in the Audit Division's markup percentages. However, exactness is not required when it is petitioners' 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 the petitions of Ronnie's Suburban Inn, Inc. and Ronald Board, as officer, are denied and the notices of determination and demands for payment of sales and use taxes due, issued, respectively, September 20, 1984 and December 20, 1984, are sustained.

DATED: Albany, New York  
April 7, 1988

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ADMINISTRATIVE LAW JUDGE