

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
FRIENDLY COFFEE SHOP, INC. AND STYLIANOS LOPARNOS, AS OFFICER	:	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 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 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 March 1, 1983 through November 30, 1985 (File No. 804862).

A hearing was held before Robert F. Mulligan, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York on February 7, 1989 at 10:00 A.M., with all briefs to be submitted by May 12, 1989. Petitioner appeared by Ernest Rahman, Public Accountant. The Division of Taxation appeared by William F. Collins, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUE

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

FINDINGS OF FACT

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

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.

The Audit

The audit of the business was conducted as follows:

(a) 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.

(b) 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.

(c) 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 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.

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

(e) 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.

(f) 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.

(g) 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.

(h) 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.

(i) 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.

SUMMARY OF PETITIONERS' POSITION

Petitioners contend that the assessments are incorrect in the following respects:

(a) During the audit period, the City of Yonkers was in a period of economic depression and the office buildings in the area of the coffee shop had a vacancy rate of 35 to 40%, but that occupancy increased by the time of the observation test.

(b) The observation test of only two days was inadequate.

(c) The day of March 3rd was inappropriate because it was the first business day of the month, when many persons cashed welfare and social security checks in the neighborhood.

(d) The auditor's attribution to Mr. Loparnos of the statement that sales were \$790.00 on March 20th was in error. Petitioners' accountant claims that Mr. Loparnos actually stated that the figure was \$600.00 to \$650.00.

(e) There was no adjustment for inflation.

(f) Business increased due to the renovations made to the premises after the fire.

(g) There was no allowance made for slump periods, i.e. snowstorms, etc., or for the fact that the business was open for only one-half day on Saturdays.²

It is noted that the only evidence offered by petitioners was the vague testimony of Stylianos Loparnos. It is also noted that Mr. Loparnos offered no specific testimony as to the accuracy of the \$790.00 figure used for March 20th or anything with respect to the one-half day on Saturdays, as well as other material facts.

CONCLUSIONS OF LAW

²During the audit, petitioners' accountant claimed that the business was not open on Saturdays, but apparently retracted this when he learned that petitioner's day book showed that the business was open six days per week.

A. That during the period at issue Tax Law § 1138(a)(former [1]) provided, 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 Division of Taxation may select a method reasonably calculated to reflect the sales and use taxes due. 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 the records of Friendly Coffee Shop, Inc. were clearly incomplete and insufficient (Finding of Fact "2[b]"). Accordingly, it was proper for the Division of Taxation to estimate taxes based on observations of the business. However, allowance should have been made to reflect lower prices which generally prevailed in the years prior to the time when the audit was actually conducted, i.e., March 1986. Accordingly, audited taxable sales for the period March 1, 1983 through February 29, 1984 are to be reduced by 10.1%; such sales for the period March 1, 1984 through February 28, 1985 are to be reduced by 6.2%; and such sales for the period March 1, 1985 through November 30, 1985 are to be reduced by 2.1%.³

D. That except as set forth in Conclusion of Law "C", petitioners have failed to sustain their burden of proof to show that the method of audit or the amount of tax assessed was erroneous. As noted in Finding of Fact "5", the only evidence offered by petitioners at the hearing was the vague testimony of Mr. Loparnos, which ignored several of the claims made by petitioners' representative. Also, no explanation was offered why the corporation's day book showed no significantly larger volume of sales for the first day of the month compared with the other days. Finally, it is clear that the corporation had two to four employees working "off the books" and this substantiates the fact that a significant amount of sales were unreported.

E. That the petition of Friendly Coffee Shop, Inc. and Stylianos Loparnos, as officer, is granted to the extent of the inflation adjustment set forth in Conclusion of Law "C", but is otherwise denied and the notices of determination and demands for payment of sales and use taxes due issued to petitioners on May 30, 1986, as so modified, are sustained.

DATED: Troy, New York
November 22, 1989

/s/ Robert F. Mulligan
ADMINISTRATIVE LAW JUDGE

³Official notice has been taken of the United States Bureau of Labor Statistics Consumer Price Index for "Lunch away from home", Table No. 760, Statistical Abstract of the United States, 1989 Edition, which provides the following indices for the years in issue: 100.0 for 1983, 103.8 for 1984, 107.8 for 1985 and 112.0 for 1986.

