

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ANTONIO RIZZO AND		
GIUSEPINA MAUCERI		:DETERMINATION
PARTNERS OF TONY		
AND ORAZIO PIZZERIA		DTA NO. 807398
	:	
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, 1984.	:	

Petitioners, Antonio Rizzo and Giusepina Mauceri, partners of Tony and Orazio Pizzeria, c/o James H. Tully, Jr., Esq., 90 State Street, Albany, New York 12207-1780, 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, 1984.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on May 10, 1991 at 9:15 A.M., with all briefs to be submitted by September 3, 1991. Petitioners appeared by DeGraff, Foy, Holt-Harris & Mealey, Esqs. (James H. Tully, Jr., Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Arnold M. Glass, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly determined additional sales and use taxes due from Tony and Orazio Pizzeria.

II. Whether the Division of Taxation requested books and records from petitioners for the period September 1, 1983 through August 31, 1984.

III. Whether penalties assessed against petitioners should be abated.

FINDINGS OF FACT

Pursuant to a field audit of Tony and Orazio Pizzeria (the "Pizzeria") which commenced

in August 1983, the Division of Taxation, on December 10, 1984, issued to Antonio Rizzo and Giusepina Mauceri, as partners of the Pizzeria, two notices of determination and demands for payment of sales and use taxes due as follows:

<u>Period</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total Due</u>	
9/1/80-8/31/83		\$59,816.63	\$14,515.98	\$22,111.09	\$96,443.70
9/1/83-8/31/84		\$19,106.02	\$ 2,172.70	\$ 1,475.66	\$22,754.38

Previously, petitioner Antonio Rizzo, on behalf of the Pizzeria, executed consents extending the period of limitation for assessment of sales and use taxes as follows:

<u>Date Executed</u>	<u>Period Extended</u>	<u>Date for Assessment</u>
11/11/83	9/1/80-2/28/81	6/20/84
6/12/84	9/1/80-8/31/81	12/20/84

On August 17, 1983, the auditor visited the business premises at 336 Knickerbocker Avenue, Brooklyn, New York. She transcribed the prices of the various items sold and left her business card for the accountant to call.

On September 19, 1983, she sent an appointment letter to the Pizzeria's accountant, Irving Grossman, C.P.A., to whom she was referred by the proprietor. This letter requested books and records of the Pizzeria for the period September 1, 1980 through August 31, 1983 and scheduled an appointment to examine the books and records at Mr. Grossman's office on October 7, 1983.

The only records presented to the auditor by the accountant were copies of the Federal partnership returns for 1980, 1981 and 1982 and some purchase invoices from suppliers of the Pizzeria, C & F Dairy Co., Inc. ("C & F") and Boardwalk Root Beer Co., Inc. ("Boardwalk"). There were no cash register tapes, guest checks or day book presented. The auditor was informed by Mr. Grossman that daily sales records were destroyed, but that weekly figures were recorded.

The purchases from C & F for 1981 totaled \$13,964.18 and the purchases from Boardwalk for approximately six months in 1981 amounted to \$1,247.00, for a total of \$15,111.18. The auditor compared this total with purchases on the Federal return for 1981

(\$7,180.00).¹

Based upon a lack of complete books and records from which taxable sales could be verified, together with a comparison of purchases per invoices and returns and her determination that income from the Pizzeria was far too low (\$5,330.00 for 1980, \$3,771.00 for 1981 and \$5,844.00 for 1982), the auditor determined that external indices would have to be utilized to determine taxable sales for the audit period. The Federal partnership returns also revealed that the cost of rent and utilities exceeded income thereby further causing the auditor to doubt the accuracy of sales reported on the sales tax returns.

Based upon the foregoing, it was decided by the auditor and her supervisor that an observation test would be the best method of determining taxable sales. A "short" observation test was performed on November 17, 1983 from 11:00 A.M. until 2:30 P.M. During the observation (there were two auditors present), the Pizzeria made sales in the amount of \$183.55, or approximately \$53.00 per hour. The auditor observed two men behind the

counter as well as a woman who, apparently, was the wife of the owner. At the time, the soda machine was out of order.

The auditor stated that, on June 12, 1984, she telephoned Antonio Rizzo and Irving Grossman and asked them to come into her office for a conference prior to scheduling another observation of the Pizzeria's business, but they failed to appear. She testified that, while no additional written request was made for books and records (the original audit period ended August 31, 1983), she continued to orally request production of the books and records through the date of this telephone call.

It was thereafter decided to enlarge the scope of the observation test so an additional test was scheduled for October 24, 1988. The auditor described the day as "drizzly". She arrived at

¹From an examination of the Federal partnership returns, it appears that the auditor compared the purchases to the figure set forth on the 1982 return rather than the 1981 return. Purchases per the 1981 return were reported as \$9,882.00.

the Pizzeria at 10:00 A.M. and another auditor arrived at 3:20 P.M. At 6:08 P.M., the owner became angry and asked the auditors to leave. He stated that he was closing for the day and did, in fact, close the doors. At approximately 7:30 P.M., the auditor's supervisor drove by the premises and noted that it had reopened. During the six hours observed, the Pizzeria made sales of \$407.06, or \$50.88 per hour. Wall menu prices were utilized in this computation.

The auditor decided to disregard the hourly figure from the November 17, 1983 observation (\$53.00) and, instead, utilized only the hourly sales figure from the October 24, 1984 test (\$50.88).

The auditor testified that, on December 7, 1984, the head of her unit, Steve Kohilakis, telephoned the Pizzeria at about 4:00 P.M. and spoke to Tony who identified himself as the pizza man. Tony said that he was open until midnight on weekdays and until 1:30 A.M. on Fridays and Saturdays.

The auditor assumed that the Pizzeria was open seven days per week. Total working hours per week were determined to be 101 based upon 14 hours per day Sunday through Thursday (10:00 A.M. until midnight) for a total of 70 hours plus 31 hours (10:00 A.M. until 1:30 A.M.) on Fridays and Saturdays. Based upon that assumption and the hourly sales figure of \$50.88 determined during the October 24, 1984 observation test, she determined taxable sales of \$66,794.00 per quarter ($101 \text{ hours} \times \$50.88 = \$5,138.00 \text{ per week} \times 13 \text{ weeks} = \$66,794.00$). A total of 16 sales tax quarters were assessed, so taxable sales were determined to be \$1,068,704.00 for the audit period. Taxable sales of \$104,698.00 had previously been reported. Additional taxable sales of \$964,006.00 taxed at the applicable rate (8 or $8\frac{1}{4}\%$) resulted in additional tax due of \$78,922.65 (the total assessed in both notices of determination).

On June 17, 1985, a conference was held by the former Tax Appeals Bureau. Total tax due was reduced to \$66,812.99 (the assessment in the amount of \$59,816.63 [Notice No. S841210243K] was reduced to \$50,759.16 and the assessment in the amount of \$19,106.02 [Notice No. S841210244K] was reduced to \$16,053.83). This revision was made as a result of the auditor's having included Sundays in her calculation despite the fact that the wall menu, at

the premises, indicated that the Pizzeria was closed on Sunday. Total working hours per week were, therefore, reduced from 101 to 87 with resulting taxable sales per week also being reduced from \$5,138.00 to \$4,426.56 (or \$57,545.28 per quarter).

Petitioner Antonio Rizzo corroborated the auditor's testimony that she was referred to his then-accountant, Irving Grossman, for purposes of conducting the audit. The auditor admitted that Mr. Grossman failed to provide her with a power of attorney but, nevertheless, she went to his office to obtain the Pizzeria's records after having previously sent him an appointment letter (see, Finding of Fact "2").

Petitioner Antonio Rizzo stated that he and his wife were the owners of the business and that they owned the building at 336 Knickerbocker Avenue in Brooklyn.²

He stated that he arrives at the Pizzeria at 11:00 A.M., but he does not open for business until 11:45 A.M. and that he closes at 8:00 P.M.³ He further testified that he is open six days per week (closed Sunday) and is closed on all major holidays (New Year's Day, Christmas, Thanksgiving, Memorial Day, Independence Day and Labor Day).

Petitioner Antonio Rizzo testified that, because of health code violations, the business declined. As a result thereof, he closed the Pizzeria for approximately five to six months beginning in January 1982 for renovations. Antonio Gicalone testified at the hearing that he helped Mr. Rizzo with the renovations. Sylvester LaRoussa and Victorio Ferrara, both of whom lived in the neighborhood, testified that the Pizzeria was closed for approximately five months in 1982. Sales reported for the quarters ended February 28, 1982 and May 31, 1982 were considerably lower than sales reported for all other quarters in the audit period.

²The 1980 and 1981 Federal partnership returns indicate payments for rent in 1980 and 1981, but no rental payments were claimed as deductions for 1982.

³The wall menu observed by the auditor indicated that the business closed at 9:00 P.M. However, the head of the auditor's unit, per a telephone conversation, determined that the business was open until midnight on weekdays and until 1:30 A.M. on Fridays and Saturdays (see, Finding of Fact "5").

SUMMARY OF THE PARTIES' POSITIONS

Petitioners' position is as follows:

(a) A request for books and records beyond the original audit period (September 1, 1980 through August 31, 1983) was never made and the assessment for the period September 1, 1983 through August 31, 1984 should, therefore be cancelled.

(b) While, admittedly, complete books and records were not furnished by petitioners' then-accountant, Irving Grossman, the auditor never actually made a request therefor to petitioners. Moreover, since Mr. Grossman did not possess and/or provide a properly executed power of attorney, the auditor's request for records and all subsequent dealings with Mr. Grossman were a violation of the secrecy provisions of the Tax Law and were, therefore, invalid. Not having made a proper request for books and records, the auditor could not resort to external indices, i.e., an observation test. Petitioners also contend that Mr. Grossman has now disappeared with all of the books and records of the Pizzeria.

(c) The auditor ignored price increases during the period of the audit, ignored the fact that the business was closed for approximately five months in 1982 and failed to take proper notice of both the hours of operation and the days (Sundays and holidays) on which the Pizzeria was closed. Stewart Buxbaum, C.P.A., prepared an analysis which indicated that, if it is deemed that a proper request for books and records was made and resort to external indices was proper, total additional tax due for the audit period should be \$19,140.00 (see, Petitioners' Exhibit No. "2").

(d) Penalties should be abated since petitioner Antonio Rizzo is a man of limited education and very limited knowledge of the English language. He, therefore, depended upon an accountant who, petitioners contend, disappeared with petitioners' records in the middle of the audit.

The position of the Division of Taxation may be summarized as follows:

(a) Based upon the fact that complete books and records were not made available to

the auditor, her resort to external indices, i.e., an observation test, was reasonable.

(b) Petitioners, while attacking the across-the-board application of the wall menu prices, have failed to introduce credible evidence as to what the actual prices were during the various portions of the audit period. The analysis of Stewart Buxbaum (alleging that the correct amount of the assessment should be \$19,140.00) was admittedly made without a review of books and records.

(c) The applicable secrecy provisions (Tax Law § 1146[a]) were not violated herein. The auditor disclosed no information to Mr. Grossman, but merely reviewed records presented. Moreover, since Mr. Rizzo directed the auditor to this accountant and since he prepared petitioners' returns, Mr. Grossman already had knowledge of all relevant information contained therein.

(d) Limited education and/or limited knowledge of the English language does not constitute reasonable cause and, therefore, penalty should not be abated.

CONCLUSIONS OF LAW

A. Tax Law § 1138(a)(1) 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 section further provides that, if necessary, the tax may be estimated on the basis of external indices. The resort to external indices is predicated upon a finding of insufficiency in the taxpayer's recordkeeping such that verification of sales is a virtual impossibility (Matter of Chartair, Inc. v. State Tax Commn., 65 AD2d 44, 411 NYS2d 41, 43). In such circumstances, the Division of Taxation must select a method of audit reasonably calculated to reflect tax due (Matter of Grecian Square v. State Tax Commn., 119 AD2d 948, 501 NYS2d 219, 221), and the burden is on petitioner to establish by clear and convincing evidence that both the method used to arrive at the tax assessment and the assessment itself are erroneous (Matter of Sol Wahba, Inc. v. State Tax Commn., 127 AD2d 943, 512 NYS2d 542, 543).

To determine the adequacy of a taxpayer's records, the Division of Taxation must first

request and thoroughly examine the taxpayer's books and records for the entire period of the proposed assessment (Matter of Adamides v. Chu, 134 AD2d 776, 521 NYS2d 826, lv denied 71 NY2d 806, 530 NYS2d 109; Matter of King Crab Restaurant v. State Tax Commn., 134 AD2d 51, 522 NYS2d 978). The purpose of this examination is to determine whether the records are so insufficient as to make it virtually impossible for the Division to verify taxable sales receipts and conduct a complete audit (Matter of Chartair, Inc. v. State Tax Commn., supra; Matter of Ronnie's Suburban Inn, Inc., Tax Appeals Tribunal, May 11, 1989).

B. The auditor stated that oral requests for records continued to be made up to and through her telephone call of June 12, 1984 (see, Finding of Fact "4"). There is no evidence that such requests were made thereafter.

Judicial notice is hereby taken that June 12, 1984 was a Tuesday. During the period June 1 through June 12, 1984, there existed (exclusive of Sundays) 10 business days. Utilizing the weekly sales figure of \$4,426.56 (see, Finding of Fact "6"), daily sales would be \$737.76 (\$4,426.56 divided by 6). For the period June 1 through June 12, 1984, taxable sales would be \$7,377.60. Petitioners reported taxable sales of \$3,876.00 for the quarter ended August 31, 1984. Additional taxable sales were \$3,501.60 (\$7,377.60 - \$3,876.00) which, at the applicable rate (8 $\frac{1}{4}$ %), results in additional tax due of \$288.88. According to the revised computation made at the conference, additional tax due for the quarter ended August 31, 1984 was determined to be \$4,427.69. Since no request for books and records was made after June 12, 1984, the assessment for the balance of this quarter (from June 13 through August 31, 1984) must be cancelled (Matter of Adamides v. Chu, supra). Additional tax due for this quarter is, therefore, reduced from \$4,427.69 to \$288.88, a reduction of \$4,138.81.

C. Petitioners' contention that the auditor failed to properly request books and records (since no power of attorney had been obtained from the accountant, Irving Grossman) is rejected. The auditor visited the business premises and was referred to this accountant. There is no evidence that the auditor, in requesting and examining the Pizzeria's books and records at the accountant's office, violated the secrecy provisions of Tax Law § 1146(a). Even assuming,

arguendo, that such violation did occur, it is clear that petitioners were aware that the business was under audit. Moreover, in contacting and meeting with the accountant, the auditor was merely following petitioners' instructions. Had she failed to contact Mr. Grossman to obtain the books and records, it is likely that petitioners would now be arguing that the auditor failed to examine the books and records before resorting to external indices.

D. Petitioners' books and records were clearly inadequate. There were no guest checks, cash register tapes or any other source documents from which reported taxable sales could have been verified. Resort to external indices herein was proper and petitioners have failed to prove, by clear and convincing evidence, that the audit method selected (observation test) was erroneous.

Petitioners have proven, however, that the results derived therefrom warrant certain modifications. First, the testimony of petitioner Antonio Rizzo and certain other individuals (see, Finding of Fact "9") has established that the Pizzeria was closed for approximately five months. Since such testimony indicates that the business closed in January 1982, it will be inferred that operation ceased from January 1 through May 31, 1982 (since the exact dates cannot be ascertained). The assessment for the entire quarter ended May 31, 1982 (in the revised amount of \$4,649.28) must be cancelled. For the previous quarter, i.e., the quarter ended February 28, 1982, two months or two-thirds of the revised assessment of \$4,667.43 must be cancelled. Such assessment for this quarter is, therefore, reduced from \$4,667.43 to \$1,555.81.

In addition, the testimony of Antonio Rizzo is hereby deemed credible with respect to his contention that the Pizzeria was closed on six holidays per year. For the audit period, tax assessed on sales for the following holidays must be cancelled:

<u>Period Ended</u>	<u>Holiday</u>
11-30-80	Labor Day, Thanksgiving
2-28-81	Christmas, New Years
5-31-81	Memorial Day
8-31-81	Independence Day
11-30-81	Labor Day, Thanksgiving
2-28-82	*Christmas

5-31-82	*None
8-31-82	Independence Day
11-30-82	Labor Day, Thanksgiving
2-28-83	Christmas, New Years
5-31-83	Memorial Day
8-31-83	Independence Day

11-30-83	Labor Day, Thanksgiving
2-29-84	Christmas, New Years
5-31-84	Memorial Day
8-31-84	**None

* New Years Day and Memorial Day of 1982 are not credited since the assessment for this period was, hereinabove, cancelled.

** Independence Day of 1984 is not credited since the assessment for the period June 13 through August 31, 1984 was cancelled (see, Conclusion of Law "B").

Based on the foregoing, tax assessed on sales for 21 holidays must be cancelled. Utilizing the daily sales figure of \$737.76 (see, Conclusion of Law "B"), taxable sales must be reduced by \$15,492.96 (\$737.76 x 21). For the period September 1, 1980 through August 31, 1981, the tax rate was 8%; for periods thereafter, the rate increased to 8¼%. For the first six holidays credited, taxable sales of \$4,426.56 (6 x \$737.76), or tax of \$354.12, must be cancelled. For the remaining 15 holidays credited, taxable sales of \$11,066.40 (15 x \$737.76), or tax of \$912.98, must be cancelled for a total reduction of the assessment, for holidays credited, of \$1,267.10.

Total reductions in the assessments are, therefore, as follows:

Cancel June 13 through August 31, 1984	\$ 4,138.81
Cancel January 1 through May 31, 1982	7,760.90
Holidays closed	1,267.10
	<u>\$13,166.81</u>

Based upon the reductions at conference (see, Finding of Fact "6"), the assessments were reduced to a total additional tax due of \$66,812.99. Accounting for the above additional allowances, total additional tax due is further reduced by \$13,166.81, from \$66,812.99 to \$53,646.18.

E. As indicated in Paragraph "10(c)", Stewart Buxbaum, C.P.A., prepared an analysis wherein he contends that total additional tax due should be \$19,140.00. This analysis contains several flaws. First, as the Division of Taxation correctly points out, it, like the Division's estimate, is not based upon an examination of books and records. Second, the analysis consists only of pizza sales (Mr. Buxbaum stated that he did not consider other foods or beverages sold because pizza was the most popular item sold) and it assumes, without any documentary

substantiation, that the selling price for a slice of pizza was 40¢ in 1980, 50¢ in 1981, 60¢ in 1982, 70¢ in 1983 and 75¢ in 1984. By virtue of the aforesaid prices, the analysis reduced the \$50.88 per hour figure determined by the auditor (see, Finding of Fact "4") to \$47.00 for 1983, \$40.00 for 1982, \$34.00 for 1981 and \$27.00 for 1980.

Petitioner Antonio Rizzo's uncorroborated testimony, in light of evidence to the contrary (see, Finding of Fact "5"), cannot be found to be credible with respect to hours of operation of the Pizzeria nor can it be found to be credible as to prices charged during the earlier portions of the audit period. While it is quite possible that prices varied during the period, it is incumbent upon petitioners to maintain books and records to substantiate that fact. Although there may be some inaccuracies in the audit method, the Division is not required to pick the most accurate method, but merely a rationally based one which it has done (Matter of Grecian Square v. State Tax Commn., supra). In addition, exactitude is not required when it is due to the taxpayer's own failure to keep adequate records that the Division must resort to external indices to perform the audit (see, Matter of W. T. Grant v. Joseph, 2 NY2d 196, 159 NYS2d 150, cert denied 355 US 869). Therefore, other than the adjustments previously set forth, it cannot be found that the audit method or the results thereof were erroneous.

F. Petitioners contend that penalties should be abated in light of their limited education and knowledge of the English language. In the first place, it is obvious from the fact that sales tax returns were filed and tax was remitted for each of the quarters at issue, that petitioners were aware of their responsibility to collect sales tax and to both file returns and pay the taxes collected. Simply because they are foreign-born does not lead to a conclusion that these petitioners were ignorant. But even assuming, arguendo, that they were ignorant of their duties and responsibilities under the Tax Law, ignorance of the law cannot, in and of itself, constitute a basis for reasonable cause for failure to comply (see, Matter of Auerbach v. State Tax Commn., 142 AD2d 390, 536 NYS2d 557; Matter of LT & B Realty Corp. v. New York State Tax Commn., 141 AD2d 185, 535 NYS2d 121; 20 NYCRR 536.5[c][5]). Penalties assessed are, therefore, sustained.

G. The petition of Antonio Rizzo and Giusepina Mauceri, partners of Tony and Orazio Pizzeria, is granted to the extent indicated in Conclusion of Law "D"; the Division of Taxation is directed to modify the notices of determination and demands for payment of sales and use taxes due issued to petitioners on December 10, 1984 accordingly; and, except as so granted, the petition is in all other respects denied.

DATED: Troy, New York
July 23, 1992

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE