

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition

of

VESTAL INN, 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, 1974
through November 30, 1977.

Petitioner, Vestal Inn, Inc., 700 Front Street, Vestal, New York 13850,
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, 1974
through November 30, 1977 (File No. 22196).

A hearing was held at the offices of the State Tax Commission, 164 Hawley
Street, Binghamton, New York, on February 8, 1983 at 1:15 P.M. Petitioners
appeared by Daniel L. Gorman, Esq. The Audit Division appeared by Paul B.
Coburn, Esq. (James F. Morris, Esq., of counsel).

ISSUES

I. Whether the completeness of the records maintained by petitioner
prohibited the use of a test period in conducting an audit.

11. Whether the audit performed properly reflected petitioner's sales tax
liability and resulting additional tax due.

FINDINGS OF FACT

1. On March 13, 1978, as the result of an audit, the Audit Division
issued a Notice of Determination and Demand for Payment of Sales and Use Taxes
Due against petitioner, Vestal Inn, Inc., assessing additional sales taxes due

of \$2,129.90, plus penalty and interest of \$831.75, for the period December 1, 1974 through November 30, 1977.

2. Petitioner, for the period under review, operated a neighborhood bar and grill in Vestal, New York. It sold beer, wine and liquor, food and miscellaneous items such as cigarettes, candy, gum and cigars.

3. On audit, it was determined that petitioner maintained a sales journal, cash receipts journal, cash disbursements journal, daily sales summary sheets, cash register tapes and purchase invoices. These reflected a book markup on sales of 117.5 percent for beer, 170.6 percent for wine and liquor and 59 percent for food. Miscellaneous items sold at a loss.

4. Based on the auditor's experience, petitioner's book markups appeared low. By comparing purchase prices shown on purchase invoices for September 1975, November 1975, April 1976 and August 1977 to sales prices obtained from petitioner, the auditor arrived at markups of 141.5 percent for beer and 210.4 percent for wine and liquor. Similar analysis revealed markups of 40.9 percent on cigarettes, 300 percent on soft drinks and 35 percent on the other miscellaneous items. The analysis of food purchases indicated the book markup of 59 percent was correct.

5. The auditor applied his computed markups to purchases for the audit period to arrive at taxable sales. Since tax was included in the selling price, an adjustment was made resulting in audited taxable sales of \$277,555.15. The tax due thereon was \$19,428.87. Petitioner paid \$16,989.21 with the returns it filed, which left a balance due of \$2,439.66. This was reduced to \$2,129.90 at a pre-assessment conference to allow for the personal consumption of food.

6. Petitioner contends that its liquor drinks contained $1\frac{1}{4}$ ounces of liquor rather than 1 ounce as used by the Audit Division in its markup analysis, and that its spillage of draft beer was greater than the Audit Division's 15 percent spillage allowance. The one ounce serving of liquor was obtained by the auditor from a bar fact sheet prepared by petitioner prior to the commencement of the audit. No credible evidence was offered to substantiate a $1\frac{1}{4}$ ounce serving of liquor or a spillage allowance on draft beer greater than the 15 percent allowed.

7. Petitioner experienced a breakage of bottled beer and gave free bottled beer to customers. The record reveals that in the beer markup analysis, 67 percent of petitioner's bottled beer purchases were sold as six-packs at reduced prices.

8. The auditor testified that the books and records maintained by petitioner were among the best he has ever seen for petitioner's type of business.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides that:

"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."

Such external indices may not be used unless it is "virtually impossible to verify taxable sales receipts and conduct a complete audit" with available records. (Chartair, Inc. v. State Tax Commission, 65 AD2d 44, 46.)

B. That petitioner maintained all the register tapes for the period, along with other accounting papers with which a complete audit could have been performed. "[I]t is the lack of adequate records that authorizes the use of

the [markup] test." (Christ Cella v. State Tax Commission, 102 AD2d 352, 354; Matter of STW Sales, Inc., State Tax Commission, January 18, 1985.) Although cash register tapes may be considered inadequate records if they do not indicate clearly whether an item is taxable or nontaxable, (Licata v. Chu, 64 NY2d 873), in this case all of petitioner's sales were of taxable items. Therefore, resort to the use of external indices was not warranted and petitioner's sales are accepted as reported.

C. That the petition of Vestal Inn., Inc. is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 13, 1978 is cancelled.

DATED: Albany, New York

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ADMINISTRATIVE LAW JUDGE