

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

NICK GAUDIUSO AND ANTHONY GAUDIUSO, PARTNERS,  
D/B/A NICK & TONY'S HERO SHOP

DECISION

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 June 1, 1975  
through May 31, 1978.

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Petitioners, Nick Gaudio and Anthony Gaudio, Partners, d/b/a Nick & Tony's Hero Shop, 1223 McDonald Avenue, Brooklyn, New York 11230, 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 June 1, 1975 through May 31, 1978 (File No. 29097).

A hearing was commenced before Frank W. Barrie, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 30, 1982 at 1:45 P.M. and continued before Joseph W. Pinto, Jr., Hearing Officer, at the same offices on July 16, 1986 at 1:15 P.M., with all briefs submitted by September 16, 1986. Petitioners appeared by Murray Appleman, Esq. The Audit Division appeared by John P. Dugan, Esq. (Anne W. Murphy, Esq., of counsel).

#### ISSUES

I. Whether the State Tax Commission **is** barred from rendering a decision in this case due to laches.

11. Whether petitioners, Nick Gaudio and Anthony Gaudio, Partners, d/b/a Nick & Tony's Hero Shop, are liable for additional sales and use taxes which resulted from a field audit of petitioners' business.

FINDINGS OF FACT

1. On December 27, 1979, the Audit Division issued to petitioners, Nick Gaudio and Anthony Gaudio, Partners, d/b/a Nick & Tony's Hero Shop, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period June 1, 1975 through May 31, 1978 ("the audit period"). Said notice assessed tax due in the sum of \$36,551.83, plus interest of \$8,705.98, for a total amount due of \$45,257.81. Validated consents extending the period of limitation for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law were duly filed, extending the time for determining tax for the audit period to June 20, 1980.

2. Petitioners operate a retail hero or sandwich shop, selling such items as prepared foods, cigarettes, soda, beer and miscellaneous taxable items.

3. The assessment was the result of an audit by the Audit Division of the business operations of petitioners for the audit period. It revealed that petitioners kept various records such as a cash receipts journal, a check disbursements journal, purchase invoices, a general ledger and cancelled checks. However, petitioners did not maintain any cash register tapes, guest checks or sales receipts.

4. The Audit Division reviewed the books and records of the business but was unable to check actual sales since there were neither cash register tapes nor guest checks or sales receipts. Therefore, it was decided to perform an observation test. The first such test was conducted at the business premises on November 15, 1978 from 9:30 A.M. to 4:30 P.M. It was noted that the business was open from 7:00 A.M. to 7:00 P.M. The results of this observation test were deemed too high by the Audit Division, given the taxpayers' other available business records and returns.

5. The Audit Division chose to perform another observation test on February 16, 1979 from 9:30 A.M. to 4:30 P.M. and took an average of the two days, including an estimate used for the hours they were unable to observe:

	1st Observation Test <u>11/15/78</u>	2nd Observation Test <u>2/16/79</u>
Prepared food sales 9:30 - 4:30	<u>\$ 639.90</u>	<u>\$728.00</u>
Average food sales 9:30 - 4:30	<u>683.95</u>	
Estimated food sales 7 - 9:30 A.M. 4:30 - 7 P.M.	<u>205.19</u>	
Total	<u>\$ 889.14</u>	

The estimate for the hours 7:00 A.M. to 9:30 A.M. and 4:30 P.M. to 7:00 P.M. was calculated at 30 percent of the 9:30 A.M. to 4:30 P.M. figure. Saturdays were calculated at 50 percent of the total weekday figure.

6. The Audit Division decided to eliminate the estimates for the hours not observed and performed observation tests on Friday, September 14, 1979, Saturday, September 15, 1979 and Thursday, September 20, 1979. The results were as follows:

<u>Date</u>	<u>Time</u>	<u>Total Prepared Food Sales</u>
Friday 9/14/79	7:00 - 9:30 A.M.	\$ 71.55
Thursday 9/20/79	4:30 - 7:00 P.M.	<u>28.85</u>
Total		<u>\$100.40</u>
Saturday 9/15/79 <sup>1</sup>		

7. From these observation tests, the Audit Division determined total prepared food sales for a week by taking the total sales for a weekday, \$784.35, multiplying by 5 (days) and adding \$392.18 for Saturday sales to reach the weekly total of \$4,313.93. This figure was reduced by 25 percent to reflect

<sup>1</sup> Saturday was not observed in full because taxpayers ran out of bread and closed the store. Therefore, the 50 percent estimate for Saturday was retained.

inflation and then multiplied by 147 (weeks), the number of weeks in the audit period with allowances for holidays and vacations. Total prepared food sales were determined to be \$475,611.15.

8. The Audit Division also determined taxable sales of beer, soda, cigarettes and miscellaneous taxable items for the audit period. A percentage-of-purchase test was conducted using the taxpayers' own purchase records for the months of February 1977 and August 1976. The examination yielded the following percentages of total purchases:

Beer	7%
Soda	7%
Cigarettes	3%
Miscellaneous taxable items	2%

The Audit Division discovered that the examined purchase invoices reflected purchases which were 6.12 percent higher than the general ledger. The general ledger figures were increased by 6.12 percent. The adjusted purchases of \$178,020.32 were then reduced by 2 percent for spoilage and pilferage and \$4,500.00 for self use, as evidenced by the taxpayers' federal tax returns, to yield total adjusted purchases of \$169,959.91. The purchase percentages were applied to this figure to determine sales of each taxable item and then the following markups were applied to said purchase figures:

Beer	58.872
Soda	67.2966%
Cigarettes	28.23%
Miscellaneous items	97.96%

Total adjusted taxable sales were determined to be \$49,783.53.

9. Total adjusted taxable sales of \$49,783.53 were added to total prepared food sales of \$475,611.15 and reduced by the taxable sales reported of \$69,481.00. This yielded additional taxable sales of \$455,914.00, which yielded additional

tax of \$36,473.12. Added to this figure was additional tax on fixed assets of \$78.71, resulting in a total additional tax due of \$36,551.83.

10. The taxpayers contend that no factual foundation exists for the Audit Division's determination and that the records of the taxpayer were sufficient to accurately determine its tax liability for the audit period.

11. At hearing, petitioners submitted various documents with regard to matters involving 1976, 1977, and 1978 personal income taxes of each of the petitioners herein and 1976 - 1978 unincorporated business taxes of Nick & Tony's Hero Shop. Included were notices of deficiency, perfected petitions, correspondence with the Tax Appeals Bureau and withdrawals of petition. None of the documents were relevant to the instant matter.

#### CONCLUSIONS OF LAW

A. That the Audit Division was not barred by the doctrine of laches from assessing additional taxes due. Laches may not be imputed to the State in the absence of statutory authority. The rule is generally applied in connection with tax matters (Matter of Jamestown Lodge 1681 Loyal Order of Moose, Inc., 31 AD2d 981; Matter of Turner Construction Co. v. State Tax Commission, 57 AD2d 201). The record herein clearly shows that the Audit Division acted reasonably in light of the circumstances and without prejudice to petitioners.

B. 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" and authorizes, where necessary, an estimate of tax due "on the basis of external indices".

C. That section 1135(a) of the Tax Law provides that every person required to collect tax shall keep records of every sale and all amounts paid, charged

or due thereon and of the tax payable thereon. Such records shall include a true copy of each sales slip, invoice, receipt or statement.

D. That petitioners did not have cash register tapes or any other record that would serve as a verifiable record of taxable sales and, therefore, there were virtually no internal audit controls in this cash business. Because of petitioners' inadequate record keeping, the Audit Division's use of an observation test and markup percentage audit as a basis for determining petitioners' liability was proper in accordance with section 1138(a) of the Tax Law (Matter of Urban Liquors, Inc. v. State Tax Commission, 90 AD2d 576).

E. That the Audit Division reasonably calculated petitioners' tax liability by using observation tests and markup percentages. Petitioners, therefore, had the burden of showing that the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. Tully, 84 AD2d 858). Since petitioners offered no evidence other than documentation of an unrelated subsequent income tax audit, they failed to show that the assessment was erroneous.

F. That the petition of Nick Gaudiuso and Anthony Gaudiuso, Partners, d/b/a Nick & Tony's Hero Shop is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 27, 1979 is sustained, together with such additional interest as may be lawfully owing.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 09 1987

  
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PRESIDENT

  
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COMMISSIONER

  
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COMMISSIONER