

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
CHARLES AND JACQULYN AMATO	:	DECISION
D/B/A EAGLE HOTEL	:	
	:	
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, 1976	:	
through May 31, 1979.	:	

Petitioners, Charles and Jacquelyn Amato, d/b/a Eagle Hotel, Main Street, Downsville, New York 13755, 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, 1976 through May 31, 1979, (File No. 29687).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 164 Hawley Street, Binghamton, New York, on December 17, 1984, at 1:15 P.M. Petitioners appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq. of counsel).

ISSUE

Whether the Audit Division properly determined additional sales taxes due from petitioners based on an examination of available books and records.

FINDINGS OF FACT

1. Petitioners, Charles and Jacquelyn Amato, d/b/a Eagle Hotel, operated a bar located in Downsville, New York. The bar served food items such as hamburgers, soup, pizza and snacks. During the last six months of the audit period, petitioners also sold prepared sandwiches. Petitioners also operated a liquor store which was adjacent to the bar.

2. On December 20, 1979, 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 petitioners covering the period June 1, 1976 through May 31, 1979 for taxes due of \$2,635.21, plus interest of \$439.71, for a total of \$3,074.92.

3. On the audit of the liquor store, the Audit Division compared sales and purchases from the books and records and found a reported markup of 7 percent. Since the New York State Liquor Authority requires a minimum markup on liquor of 12 percent and wine is normally sold at a higher markup than liquor, the Audit Division determined that the sales per the books were insufficient. The Audit Division estimated that the markup for the liquor store was 25 percent. This estimate was based on office experience with audits of other liquor stores in rural areas. The estimated markup was applied to liquor and wine purchases recorded in the books and records to arrive at sales of \$70,817.17.

With respect to the bar operation, the Audit Division conducted a markup test for liquor, wine and beer using purchases for the months of March, April and May, 1979. Petitioners did not maintain the purchase invoices which showed the individual items purchased. Instead they retained only the monthly statements from their suppliers. The Audit Division obtained the detailed purchase information from the suppliers. The liquor purchases were categorized as low, medium and high price brands. Wine purchases were categorized separately. Using drink serving sizes and selling prices provided by petitioners, the Audit Division computed a weighted average markup for liquor and wine of 299 percent. The markup considered an allowance for spillage and for drinks that contained more than one ounce of liquor.

The beer markup was 125 percent and was computed in the same manner as liquor and wine. Food markups of 113 percent and 70 percent were determined using the cost and selling prices of the most frequently sold menu items. The 70 percent markup was computed for the period when petitioner sold prepared sandwiches.

The markups were applied to applicable purchases from the books and records to determine total sales of liquor, beer, wine and food which amounted to \$197,590.04. The audited sales from both operations totaled \$268,407.21. Petitioner reported taxable sales of \$202,527.00 for the same period, leaving additional taxable sales of \$65,880.21 and tax due thereon of \$2,635.21.

4. Petitioners argued that the markups computed by the Audit Division were excessive in that no consideration was given to "happy hour" (4:30 p.m. to 6:00 p.m.) when customers were given two drinks for the price of one and to the increase in inventory over the audit period. The Audit Division offered in evidence Schedule C filed with federal income tax returns for the years 1977, 1978 and 1979 which showed no significant increase in inventory. Petitioners failed to establish what effect "happy hour" had on the markups determined by the Audit Division.

5. Counsel for the Audit Division conceded that the notice issued December 20, 1979 (Finding of Fact "1") was not timely with respect to the period June 1, 1976 through August 31, 1976 and therefore, the additional taxes assessed for said period of \$405.65 are cancelled.

6. Petitioners' books and records for the bar and restaurant operation were incomplete and inadequate in that there were no guest checks for food sales to reconcile with the cash register tapes. Moreover, the available cash register tapes were useless for verifying taxable sales.

The analysis of purchases and sales for the liquor store which disclosed a reported markup below the legal minimum established the unreliability of the books and records.

CONCLUSIONS OF LAW

A. That when books and records are incomplete and unreliable, a "test period" audit using external indices is permissible (Matter of Korba v. New York State Tax Commission, 84 A.D.2d 655. Accordingly, the Audit Division properly determined petitioners' tax liability in accordance with the provisions of section 1138(a) of the Tax Law).

Petitioners failed to sustain their burden of showing that the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. Tully, 84 A.D.2d 858).

B. That in accordance with Finding of Fact "5", the taxes due are reduced to \$2,229.56.

C. That the petition of Charles and Jacquelyn Amato, d/b/a Eagle Hotel, is granted to the extent indicated in Conclusion of Law "B"; the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes due issued December 20, 1979; and that, except as so granted, the petition is in all other respects denied.

Dated: Albany, New York

JUN 28 1985

STATE TAX COMMISSION

Roderick W. Chen
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark J. [Signature]
COMMISSIONER