

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
JOSEPH RAGUSA	:	DECISION
d/b/a JOE'S PIZZA	:	
	:	
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,	:	
1977 through August 31, 1980.	:	

Petitioner, Joseph Ragusa, d/b/a Joe's Pizza, 1438 Hollywood Avenue, Bronx, New York 10461, 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, 1977 through August 31, 1980 (File No. 33751).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 25, 1984, at 1:15 P.M. Petitioner appeared by Dominick N. D'Ambrozio, CPA. The Audit Division appeared by John P. Dugan, Esq. (Deborah Dwyer, Esq., of counsel).

ISSUE

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

FINDINGS OF FACT

1. Petitioner, Joseph Ragusa, d/b/a Joe's Pizza, operated a pizza and hero sandwich shop located at 290 East Kingsbridge Road, Bronx, New York. The store was divided into two sections. One side sold pizza and soda and the other sold cold cuts, hero sandwiches, soda and coffee. The store was destroyed by a fire on December 1, 1980.

2. On May 20, 1981, 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 covering the period September 1, 1977 through August 31, 1980 for taxes due of \$4,080.64, plus interest of \$687.80, for a total of \$4,768.44.

3. Petitioner executed a consent extending the period of limitation for assessment of sales and use taxes for the period at issue to December 20, 1981.

4. The Audit Division had begun an audit of petitioner's books and records on October 23, 1980. The books and records made available for audit at that time were a day book of sales and purchases, federal income tax returns and sales tax returns. Petitioner did not retain any cash register tapes.

The Audit Division analyzed purchases for the months of March, April and May, 1980 and categorized the purchases as follows: cold cuts - 51.57%, pizza ingredients - 38.45%, soda - 05.89% and coffee - 04.09%. These percentages were used to determine total purchases by category for the audit period. The Audit Division had intended to perform a markup test based on current costs and selling prices and an observation test, however, the store was destroyed by fire before the next scheduled appointment. Consequently, the Audit Division estimated markup percentages for petitioner's business based on office experience with audits of similar businesses. The estimated markups were sandwiches - 125%, pizza - 250%, soda - 200% and coffee 200%. The markup percentages were applied to the purchases determined above to arrive at taxable sales of \$193,874.00. Petitioner reported taxable sales of \$142,866.00, leaving additional taxable sales of \$51,008.00 and tax due thereon of \$4,080.64.

The auditor observed a price list on the premises showing cold cuts sold by the pound, however, no allowance for nontaxable sales was made on audit because petitioner did not have the records to substantiate the extent of such sales. The sales tax returns filed by petitioner show nontaxable sales of approximately 10 percent of gross sales. Petitioner offered no testimony or documentary evidence at the hearing to establish the amount of nontaxable sales of cold cuts.

5. At a pre-hearing conference, petitioner submitted a cost breakdown of the individual ingredients used to make pizza and certain sandwiches, along with the applicable selling prices. The Audit Division representative at the conference used petitioner's figures to compute the following markup percentages:

<u>Product</u>	<u>1979</u>	<u>1980</u>
pizza	254%	246%
ham and cheese sandwich	84%	88%
turkey sandwich	73%	--
salami and provolone sandwich	70%	64%
liverwurst sandwich	128%	--

Listed below are the markup's computed by petitioner.

<u>Product</u>	<u>1979</u>	<u>1980</u>
pizza	92%	93%
ham and cheese sandwich	13%	loss
turkey sandwich	13%	--
salami and provolone sandwich	loss	loss
liverwurst sandwich	32%	--

The differences between the markups computed by the Audit Division and by petitioner is in the quantities of the ingredients used to make the particular item, e.g., 4 slices of meat per sandwich as compared to 9; $\frac{1}{2}$ lb. of cheese per pizza as compared to 1 lb.

The Audit Division did not revise its audit as a result of the conference since there was no significant change in the markups from the original estimates.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides that the amount of tax due shall be determined from such information as may be available but "(i)f necessary, the tax may be estimated on the basis of external indices".

Petitioner did not have cash register tapes or any other verifiable record of receipts available for audit. The failure to retain such documents as required by section 1135 of the Tax Law necessitated the use of markup percentages by the Audit Division to determine taxable sales (Matter of Murray's Wines and Liquors v. State Tax Commission, 78 A.D. 2d 947).

B. That since petitioner's books and records were incomplete and inadequate, the estimates used by the Audit Division based on office experience with similar businesses were reasonable and petitioner failed to demonstrate by clear and convincing evidence that the amount of tax assessed was erroneous (Matter of Skiadas v. State Tax Commission, 95 A.D. 2d 971).

C. That the petition of Joseph Ragusa, d/b/a Joe's Pizza is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 20, 1981 is sustained.

DATED: Albany, New York

FEB 06 1985

STATE TAX COMMISSION

Rodrick A. Allen
PRESIDENT

Thomas P. Koenig
COMMISSIONER

Mark J. [Signature]
COMMISSIONER