

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
WILLIAM J. AVRUTIS	:	DECISION
d/b/a AVRUTIS FINE WINES & LIQUORS	:	
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, 1977	:	
through May 31, 1980.	:	

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Petitioner, William J. Avrutis doing business as Avrutis Fine Wines & Liquors, 87-02 Fifth Avenue, Brooklyn, New York 11209, 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, 1977 through May 31, 1980 (File No. 34308).

A 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 February 5, 1985 at 3:00 P.M., with additional documentary evidence and briefs to be submitted by April 5, 1985. Petitioner appeared by Michael D. Tucker, CPA. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined petitioner's sales tax liability for the period under consideration by the use of mark-up procedures.

FINDINGS OF FACT

1. On April 20, 1981, the Audit Division issued to Avrutis Fine Wines & Liquors a Notice of Determination and Demand for Payment of Sales and Use Tax Due, assessing sales and use taxes under Articles 28 and 29 of the Tax Law for

the period June 1, 1977 through May 31, 1980 in the amount of \$51,174.40, plus penalty and interest. On June 27, 1980 and December 4, 1980, William J.

Avrutis executed two consecutive consent agreements, which served to extend the period of limitations for assessment of tax for the period June 1, 1977 through May 31, 1980 to June 20, 1981, inclusive.

2. In view of the absence of cash register tapes and other source documents, the sales tax examiner considered petitioner's records inadequate to verify reported taxable sales, and consequently, decided to employ mark-up procedures. (Petitioner apparently does not dispute that the Audit Division's resort to mark-up testing was warranted but does object to the findings resulting therefrom.) The examiner's methodology is briefly summarized below.

The examiner analyzed petitioner's purchases during the months of August, 1979, February, 1980 and March, 1980 and determined that wine purchases represented 29.21 percent of total purchases, and liquor purchases, 70.79 percent of total purchases.

By reference to petitioner's purchases during October, 1980 and to selling prices as displayed in the store, the examiner calculated mark-up percentages for wine and for liquor of 16.74 percent and 12.947 percent, respectively.

The examiner accumulated petitioner's purchases from the general ledger and the federal income tax returns filed by Mr. Avrutis.

<u>PERIOD</u>	<u>SOURCE</u>	<u>PURCHASES</u>
6/77 - 12/77	general ledger	\$ 388,425
1978	federal income tax return	671,174
1979	federal income tax return	709,898
1/80 - 5/80	general ledger	239,433
		<u>\$2,008,930</u>

He segregated purchases during the audit period into wine purchases and liquor purchases by application of the appropriate percentages (wine: \$2,008,930

x 29.21% = \$586,808.45; liquor: \$2,008,930 x 70.79% = \$1,422,121.50) and marked wine purchases up by 16.74 percent (\$586,808.45 x 116.74%) and liquor purchases by 12.947 percent (\$1,422,121.50 x 112.947%), yielding taxable sales of \$2,291,284.00

The narrative portion of the examiner's report indicates that where certain liquors were sold at less than a 12 percent mark-up, he increased the mark-up to 12 percent and correspondingly increased taxable sales by \$46,260.00 to \$2,337,544.00. This adjustment apparently ensued from an earlier calculation of a liquor mark-up of approximately 6.3 percent but was eliminated subsequent to the conduct of a pre-hearing conference (Finding of Fact "3", infra).

The examiner disallowed all petitioner's claimed nontaxable sales as unsubstantiated.

A pilferage allowance of 1.5 percent was granted.

In sum, the examiner arrived at additional taxable sales of \$2,302,481.00 and sales tax due of \$51,174.40.

3. At a pre-hearing conference, petitioner presented documents: (a) demonstrating that purchases for the audit period encompassed purchases of lottery tickets (which when sold are not subject to sales tax) and interest charges for petitioner's delinquent payment of purchase invoices; (b) substantiating sales claimed as nontaxable; and (c) supporting an increase of the pilferage allowance to 2 percent. The Audit Division thus agreed to recalculate the assessment as shown below.

Corrected wine and liquor purchases	
Purchases per general ledger and returns	\$2,008,930
Less: purchases of lottery tickets and interest charges	<u>(173,666)</u>
	\$1,835,264
Less: pilferage at 2%	<u>(36,705)</u>
Wine and liquor purchases available for retail sale	\$1,798,559

Adjusted wine sales

Wine purchases

\$1,798,559 x 29.21%

\$ 525,359

Markup 16.74%

87,945

Adjusted wine sales

\$ 613,304

Adjusted liquor sales

Liquor purchases

\$1,798,559 x 70.79%

\$1,273,200

Markup 12.947%

164,841

Adjusted liquor sales

\$1,438,041

Taxable sales and sales tax due

Adjusted wine and liquor sales

\$2,051,345

Less: nontaxable sales

(160,004)

Audited taxable sales

\$1,891,341

Less: reported taxable sales

(1,662,803)

Additional taxable sales

\$ 228,538

Sales tax at 8%

\$18,283.04

4. Throughout the period under consideration, the liquor store suffered from financial difficulties. Summaries of the business checking account covering the period December 18, 1979 through May 15, 1980 reflect that the account was frequently overdrawn. Petitioner's suppliers insisted they be paid upon delivery of goods, which demand effectively limited the quantities petitioner was capable of purchasing. Petitioner therefore purchased "an inordinate amount of bottles" (in the words of its manager), as opposed to cases, of wine and liquor.

5. Petitioner maintains that the original liquor mark-up calculated by the examiner (6.3 percent) more closely approximated the actual mark-up. Liquors were sold for the minimum prices set forth in "Beverage Media" (a beverage industry monthly publication which compiles prices for innumerable brands of liquor and wine), but because petitioner was compelled to pay premiums when purchasing by the bottle rather than the case, the mark-up over cost was at times less than 12 percent.

By order of the Supreme Court, New York County, filed on October 28, 1969, William J. Avrutis and Francis (sic) Avrutis, administrators of the estate of Hilly Avrutis doing business as Avrutis Fine Wine and Liquor Shop, were adjudged guilty of six separate contempts of the Court "in having wilfully and deliberately sold, on six separate occasions, products manufactured or distributed by plaintiff [The House of Seagram, Inc.] at retail in the State of New York at prices below the minimum retail resale prices duly established therefor by plaintiff" in violation of the judgment of the Court entered on April 9, 1969; on September 11, 1973, the New York State Liquor Authority suspended the license of William J. and Frances (sic) Avrutis, doing business as Avrutis Fine Wine & Liquor Shop, for the period October 15, 1973 through October 26, 1973 for violation of section 101-bb of the Alcoholic Beverage Control Law by selling liquor at a price less than the minimum consumer resale price then in effect; and by letter dated May 5, 1975, the Division of Alcoholic Beverage Control issued a warning to William J. and Frances (sic) Avrutis, as follows:

"A recent investigation indicated that you violated section 101-bbb, subdivision 5 of the Alcoholic Beverage Control Law in that you offered to sell a wine at a price less than the minimum consumer resale price then in effect... You are hereby warned that a repetition of this violation or any other violation of the Alcoholic Beverage Control Law or Rules of the State Liquor Authority may subject your license to disciplinary action."

Petitioner was afforded the opportunity to submit additional documents after the hearing in support of the position that the original mark-up of 6.3 percent was the more accurate of the two percentages computed, but no documents were ever received.

6. Petitioner claims that the 2 percent reduction to purchases as an allowance for breakage and pilferage was insufficient. Petitioner's suppliers do not grant credit or refund for broken bottles unless petitioner inspects the

goods upon delivery and discovers the breakage; thus, in general, petitioner must absorb the cost of bottles broken. Further, a considerable number of bottles are pilfered from the shelves; petitioner could provide no estimate thereof, but the store manager testified, "...I know we lose quite a few bottles every week. You can just see they're missing; they're just not on the shelf."

CONCLUSIONS OF LAW

A. That the mark-up procedures employed by the Audit Division, as subsequently adjusted at a pre-hearing conference, were reasonably calculated to reflect the taxes due, and no further reduction of the assessment is warranted. Petitioner offered no persuasive evidence that its liquor mark-up during the period June 1, 1977 through May 31, 1981 was less than the percentage arrived at by the examiner (12.947 percent). Petitioner provided no proof to establish that purchases should be reduced by more than 2 percent to account for breakage and pilferage. Finally, all sales petitioner claimed to be nontaxable were accepted as such by the Audit Division.


B. That the petition of William J. Avrutis, doing business as Avrutis Fine Wines & Liquors, is granted to the extent indicated in Finding of Fact "3"; the assessment issued on April 20, 1981 is to be modified accordingly; and except as so granted, the petition is in all other respect denied.


DATED: Albany, New York

STATE TAX COMMISSION

OCT 30 1985

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER