

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
JAMES TADROS	:	
D/B/A TADROS MODERN GROCETERIA	:	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, 1978	:	
through May 31, 1981.	:	

Petitioner, James Tadros d/b/a Tadros Modern Groceteria, 1425 South Avenue, Syracuse, New York 13207, 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, 1978 through May 31, 1981 (File No. 35845).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on October 16, 1984 at 1:15 P.M. Petitioner appeared by Louis Pascarella. The Audit Division appeared by John P. Dugan, Esq. (Anne Murphy, 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, James Tadros d/b/a Tadros Modern Groceteria, operated a small grocery store located at 1425 South Avenue, Syracuse, New York.
2. On September 14, 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 June 1, 1978 through May 31, 1981 for taxes due of \$5,763.88, plus interest of \$777.03, for a total of \$6,540.91.

3. On audit, the Audit Division found that petitioner estimated that 28 percent of gross sales were taxable. Petitioner's cash register did not produce a tape nor did petitioner maintain any other verifiable record of individual sales receipts. Total sales were recorded in a notebook on a daily basis.

In order to verify the accuracy of the taxable sales reported, the Audit Division analyzed purchase invoices for the period March 1, 1980 through May 31, 1980 to determine those purchases that would result in taxable sales when resold. Petitioner's purchase invoices were incomplete and therefore it was necessary for the Audit Division to obtain the missing purchases from the suppliers. Purchases of taxable items for the test period amounted to \$10,750.83. Based upon audits of similar businesses, the Audit Division determined that the average markup for taxable items was 22 percent. This percentage was applied to the taxable purchases to arrive at taxable sales of \$13,116.00 for the test period. Petitioner reported sales of \$6,721.00 for the same period, leaving additional taxable sales of \$6,395.00, or an error factor of 95.15 percent. The error factor was applied to the reported taxable sales for the audit period to determine total additional taxable sales of \$82,341.09 and tax due thereon of \$5,763.88.

4. James Tadros executed an agreement, dated May 28, 1981, whereby he agreed that the period March 1, 1980 through May 31, 1980 was to be used as a test period and the results of the test period would be the basis for determining any liability for the entire audit period.

5. Petitioner's representative, Louis Pascarella, analyzed purchases and sales for the audit period. Based on this analysis, Mr. Pascarella estimated that 42 percent of petitioner's gross sales were taxable sales which resulted in a deficiency of \$3,263.88. Mr. Pascarella attributed this deficiency to employee theft of merchandise.

6. Petitioner offered no evidence to establish that the tax assessed by the Audit Division was erroneous.

CONCLUSIONS OF LAW

A. That section 1135(a) of the Tax Law provides that every person required to collect tax shall keep records of every sale and of 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.

Petitioner did not have cash register tapes or any other record that would serve as a verifiable record of taxable sales. Under such circumstances, the Audit Division's use of a test period and markup percentage audit was proper in accordance with section 1138(a) of the Tax Law (Matter of Urban Liquors, Inc. v. State Tax Commission, 90 A.D.2d 576; Matter of Hanratty's/732 Amsterdam Tavern, Inc. v. State Tax Commission, 88 A.D.2d 1028).

B. That the Audit Division reasonably calculated petitioner's tax liability and petitioner has failed to demonstrate by clear and convincing evidence that the audit method or the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. Tully, 84 A.D.2d 858).

C. That the petition of James Tadros d/b/a Tadros Modern Groceteria is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 14, 1981 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

APR 04 1985

Rodriguez
PRESIDENT

Francis Q. Koenig
COMMISSIONER

[Signature]
COMMISSIONER