

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

GARY M. AND MARIE E. SWEET

DECISION

for Redetermination of a Deficiency or **for**
Refund of Personal Income Tax and Unincorporated :
Business Tax under Articles 22 and 23 of the
Tax Law for the Years 1978, 1979 and 1980.

Petitioners, Gary M. Sweet, 522 Monroe Avenue, Rochester, New York 14607 and Marie E. Sweet, 86 Vayo Street, Rochester, New York 14609, filed a petition for redetermination of a deficiency or for refund of personal income tax and unincorporated business tax under Articles 22 and 23 of the Tax Law for the years 1978, 1979 and 1980 (File No. 37054).

A hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, 259 Monroe Avenue, Rochester, New York, on January 28, 1986 at 9:15 A.M. Petitioner Gary M. Sweet appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel) .

ISSUE

Whether, for New York State personal income tax purposes and for unincorporated business tax purposes, petitioners realized additional, unreported income in 1978, 1979 and 1980 as disclosed by a sales tax audit of the Avenue Pub.

FINDINGS OF FACT

1. At all times during the years 1978, 1979 and 1980, petitioner Gary M. Sweet owned and operated as a sole proprietorship the Avenue Pub, a bar located at 522 Monroe Avenue, Rochester, New York.

2. On January 22, 1982, as a result of an audit, the Audit Division issued a Notice of Deficiency to petitioners, Gary M. and Marie E. Sweet, asserting additional income tax due together with penalty and interest for the years 1978, 1979 and 1980 in amounts as follows:

<u>Additional Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total Amount Due</u>
\$30,049.82	\$4,162.83	\$5,071.75	\$39,284.40

3. As indicated in a Statement of Audit Changes dated October 15, 1981 and issued to petitioners, the additional tax asserted due by the Audit Division was premised upon the results of a sales tax audit of the Avenue Pub covering the years at issue herein. Specifically, the additional taxable sales found due on the sales tax audit were deemed by the Audit Division to be additional gross sales for personal income tax and unincorporated business tax purposes and were used as such to determine petitioners' personal income tax and unincorporated business tax liability for the years at issue herein. Although only one Notice of Deficiency was issued to petitioners, the Statement of Audit Changes indicated that of the additional tax asserted due in said notice, \$21,589.81 was asserted as additional personal income tax due and \$8,460.01 was asserted as additional unincorporated business tax due.

4. On audit of the Avenue Pub for sales tax purposes, the auditor attempted to verify the bar's gross sales. In reviewing the bar's cash register tapes, the auditor found two sets of register tapes covering a 14-day period in November, 1980, only one of which was recorded in the bar's **books**. The accountan

for the bar had no explanation for the two sets of tapes. The auditor then attempted to verify the bar's beer and liquor purchases with local distributors. This check revealed that the bar's books had understated by approximately \$35,000.00 its actual beer and liquor purchases over the three year audit period.

5. The auditor then decided to determine additional taxable sales by three methods. The first was a markup test for the period January through March, 1981. The auditor used the drink size provided by petitioner Gary M. Sweet and the regular drink prices charged by the bar. No adjustment was made in the markup for special drink prices or happy hours. This markup resulted in additional taxable sales for the entire audit period of \$323,092.00.

6. The auditor then computed additional taxable sales by analyzing the 14-day period in November, 1980 for which two sets of cash register tapes were available. As noted previously, only one set of the register tapes was recorded in petitioner's books. The auditor totalled the sales figures for both sets of tapes and compared that figure with petitioner's reported sales for the same period. The auditor then computed an error ratio of 71.089 percent between the two sets of figures. This error ratio was then applied to petitioner's reported sales for the entire audit period. This calculation resulted in additional taxable sales of \$238,584.00 for the audit period.

7. Next the auditor performed a second markup test for the period January through March, 1981. As in the first markup test, the auditor used the drink size provided by petitioner Gary M. Sweet and the bar's regular drink prices. In addition, the auditor made adjustments in the markup for special drink prices and happy hours in accordance with petitioner's representations as to the frequency of such special periods and the prices charged during such

periods. This markup, resulted in additional taxable sales for the entire audit period of \$200,473.00.

8. Upon review of the three audit methods, the auditor determined that the method described in Finding of Fact "6" most reasonably reflected the bar's additional taxable sales for the audit period. Accordingly, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued to "The Avenue Pub - Sweet, Gary" on September 20, 1981 based upon this method. Gary Sweet did not protest said notice.

9. Subsequent to the issuance of the aforementioned notice of determination and demand, the Audit Division advised petitioner Gary Sweet that a personal income tax audit would be computed based upon the results of the sales tax audit and allowed said petitioner an opportunity to submit any additional business expenses he may have had during the relevant period. Receiving no response from petitioner, the Audit Division recomputed petitioner's personal income tax and unincorporated business tax liability based on the results of the sales tax audit. In its computations, the Audit Division allowed as a business expense the additional \$35,000.00 in purchases found on audit.

10. For each of the years at issue, petitioners, Gary M. and Marie E. Sweet, filed joint New York State personal income tax returns. Petitioners' 1978 and 1979 returns were filed on August 18, 1980. Petitioners' 1980 return was timely filed. In addition, petitioner Gary M. Sweet filed New York State unincorporated business tax returns for each of the years at issue. Said petitioner's unincorporated business tax returns for 1978 and 1979 were filed on August 18, 1980, and the 1980 return was timely filed.

11. At no time during the years at issue did petitioner Marie E. Sweet own or operate the Avenue Pub, nor was she in any way involved in the running of the Avenue Pub.

12. At hearing, petitioner Gary M. Sweet contended that the results of the sales tax audit were inaccurate. Regarding the existence of two sets of cash register tapes, he stated that one of the tapes represented a reading of the cash register at a particular point in the day, and that the other tape was a summary of an entire day's sales. The results of the audit, which were premised upon the total of the two sets of tapes, were therefore improper. Petitioner also contended that he failed to protest the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued to him on September 20, 1981 because of a failure on the part of his representative to advise him of the potential consequences resulting therefrom.

CONCLUSIONS OF LAW

A. That where a taxpayer's records are inadequate, incomplete and unreliable the Audit Division is authorized to determine income by whatever method will reflect the taxpayer's income. In determining a taxpayer's income, the Audit Division is not restricted to the use of any particular method, since circumstances will vary in individual cases (see DiLando v. Commissioner, 34 T.C.M. 1046, 1050; Matter of William T. Kelly, State Tax Commission, December 31, 1984). In view of Finding of Fact "4", the books and records maintained by petitioner Gary M. Sweet as sole proprietor of the Avenue Pub were inadequate and unreliable. The Audit Division was therefore authorized to use the results of the audit method described in Finding of Fact "6" to determine additional personal income tax and unincorporated business tax due. The audit method utilized herein was acceptable under the circumstances because the Audit Division used petitioner

Gary M. Sweet's own records in determining petitioners' tax liability. Moreover, the results of the two markup audits performed by the Audit Division strongly support the results of the audit methodology ultimately used in determining petitioners' liability herein.

B. That petitioners have failed to submit any evidence which would tend to show the results of the audit were in error. Accordingly, they have failed to sustain their burden of proof pursuant to section 689(e) of the Tax Law.


C. That inasmuch as petitioner Marie E. Sweet neither owned nor operated the Avenue Pub at any time during the years at issue, the Audit Division improperly asserted additional unincorporated business tax due from said petitioner. With respect to said petitioner's personal income tax liability, notwithstanding her lack of involvement in the running of the Avenue Pub, she did sign joint New York State personal income tax returns for each of the years at issue. Accordingly, petitioner Marie E. Sweet's liability herein is hereby limited to the additional personal income tax asserted due by the Audit Division, together with penalties and interest arising therefrom as included in the Notice of Deficiency issued January 22, 1982.

D. That the petition of Gary M. and Marie E. Sweet is granted to the extent indicated in Conclusion of Law "C"; that the Audit Division is directed to modify the Notice of Deficiency issued January 22, 1982 in accordance therewith; and except as so granted, the petition of Gary M. and Marie E. Sweet is denied.

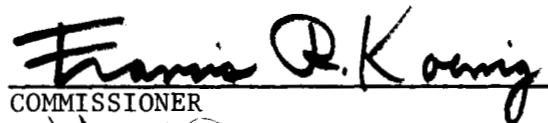
DATED: Albany, New York

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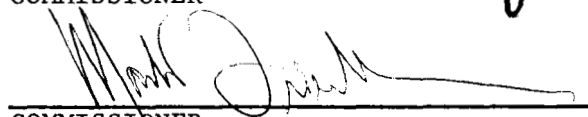
JUN 17 1986



PRESIDENT



COMMISSIONER



COMMISSIONER