

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
739 FOOD CORP.
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 December 1, 1978
through August 31, 1981.

DECISION

Petitioner, 739 Food Corp., 739 Nostrand Avenue, Brooklyn, New York 11216, 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 December 1, 1978 through August 31, 1981 (File No. 37127).

A formal hearing was held before Frank W. Barrie, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 18, 1984 at 9:45 A.M. Petitioner appeared by Lawrence Scharfman, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined additional sales taxes due from petitioner for the period December 1, 1978 through August 31, 1981.

FINDINGS OF FACT

1. On March 26, 1982, the Audit Division issued to petitioner, 739 Food Corp., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due in the amount of \$49,873.89 plus interest for the period December 1, 1978 through August 31, 1981.

2. Petitioner operates a supermarket in Brooklyn, New York and is engaged in the retail sale of both taxable and non-taxable items.

3. The Audit Division commenced an audit of petitioner in September of 1981. Records available for review by the Audit Division were petitioner's actual sales tax returns, copies of petitioner's Federal and State income tax returns, a cash receipts journal, a check disbursements journal, a general ledger, a check register with cancelled checks, and monthly bank statements. During the course of the audit, upon the request of the Audit Division, purchase invoices were also made available for review.

4. Vendor had limited register tapes and those register tapes made available for review showed only a taxable key. The tapes did not itemize the items upon which tax was or was not charged.

5. The Audit Division chose the then current period of March 1, 1981 through May 31, 1981 to verify petitioner's sales of taxable items. Made available to the Audit Division were purchase invoices for that period and the cash disbursements journal. A review of the cash disbursements journal disclosed that the only disbursements recorded therein for that period were payments made by check. The journal did not reflect any purchases made by cash.

A review of the purchase invoices for the same period disclosed invoices paid in cash, which purchases were not reflected or recorded in the cash disbursements journal. Also noted was the lack of invoices reflecting purchases of items being sold by petitioner.

A review of petitioner's cash disbursements journal and petitioner's check disbursements journal for a prior period (quarter ended November 30, 1978) which reflected both cash and check disbursements showed that cash purchases were 5.98 percent of petitioner's purchases by check.

6. The Audit Division reviewed each of the invoices reflected in the cash disbursements journal which were paid by check and from said recorded invoices determined purchases of items having a taxable nature upon their sale in the amount of \$79,970.17. This amount was increased by 5.98 percent to reflect unrecorded cash purchases. These purchases were then marked up by 20 percent to reflect taxable sales. The use of a 20 percent markup was agreed to by petitioner.

Said purchases, as increased and marked up, indicated taxable sales for the test period of \$101,702.87 which, compared to petitioner's reported taxable sales of \$44,686.00 for the same period, reveal an error percentage of unreported taxable sales of 127.59448 percent.

Reported taxable sales for the entire audit period of December 1, 1978 through August 31, 1981 were then increased by the error percentage and multiplied by the applicable tax rate to determine audited sales tax due which, after giving credit for sales taxes actually paid, resulted in the additional sales taxes claimed due in the amount of \$49,873.89 for the entire audit period.

7. Petitioner's reported gross sales per its federal income tax returns were greater than its gross sales as reported on its sales tax returns.

8. In determining the amount of purchases to be marked up in arriving at the amount of taxable sales, no consideration was made by the Audit Division with respect to theft or pilferage of merchandise. Petitioner sustained losses attributable to pilferage at a rate of 2.25 percent of sales.

9. Petitioner also alleged having sustained robbery and burglary losses in excess of \$100,000.00 during the audit period. However, such cash and equipment losses have no effect upon the amount of petitioner's taxable sales.

10. The Audit Division determined \$4,275.13 in sales tax to be owing for the period ended February 28, 1979. At the hearing, the Audit Division conceded that it had not received any consents to extend the statute of limitations for assessment from petitioner and no evidence was presented that the return for such period was filed after the due date. In addition, the audit report states that "vendor filed all returns in a timely manner."

CONCLUSIONS OF LAW

A. That the quarterly return for the period ended February 28, 1979 was filed on or before March 20, 1979 and, in the absence of a written consent extending the period of limitation on assessment, any additional taxes with respect to such period were required to have been assessed on or before March 20, 1982. The Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated March 26, 1982 did not timely assess additional sales and use taxes for such period.

B. That although there is statutory authority for the use of a "test period" to determine the amount of tax due, resort to this method of computing tax liability must be founded upon an insufficiency of record keeping which makes it virtually impossible to verify taxable sales receipts and conduct a complete audit (Matter of Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44). From the limited cash register tapes and other records maintained by the petitioner, the Audit Division could not determine if sales tax was charged on all taxable items. Therefore, such documents were inadequate for verifying taxable sales or ascertaining the exact amount of tax due.

C. That the audit procedures utilized, as described, disclosed a significant variance from taxable sales reported, thus justifying the conclusion that sales tax was not properly charged on all items subject to tax. Such a discrepancy

established the inadequacy and unreliability of petitioner's books and records (Matter of George Korba v. State Tax Commission, 84 A.D.2d 655). Accordingly, the determination of additional taxes due was proper in accordance with the provisions of section 1138(a) of the Tax Law (Matter of Chartair, supra; Matter of Sakran v. State Tax Commission, 73 A.D.2d 989).

D. That in accordance with Conclusion of Law "A" above, the Audit Division is directed to cancel that portion of the assessment relating to the quarterly period ended February 28, 1979.

E. That in accordance with Finding of Fact "8", supra, the Audit Division is directed to recompute petitioner's taxable sales (and the additional sales tax due thereon) after taking into account losses of merchandise due to theft and pilferage.

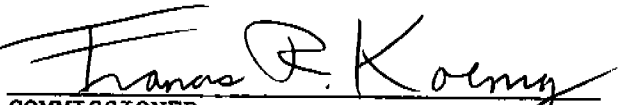
F. That except as noted in Conclusions of Law "D" and "E" above, the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 26, 1982 is sustained and the petition of 739 Food Corp. is hereby denied.

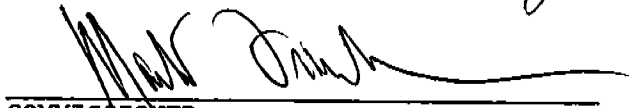
DATED: Albany, New York

STATE TAX COMMISSION

JUN 28 1985


PRESIDENT


COMMISSIONER


COMMISSIONER