

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
PIOMEER SUPERETTE, INC.	:	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 September 1, 1978	:	
through July 31, 1981.	:	

Petitioner, Piomeer Superette, Inc., c/o Bab Food Market & Deli, Inc., 1879 Broadway, New York, New York, 10023, 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, 1978 through July 31, 1981 (File No. 37943).

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 20, 1984 at 9:15 A.M., with all briefs to be filed by January 18, 1985. Petitioner appeared by Damashek & Bezoza, Esqs. (Ira S. Bezoza, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUES

I. Whether the Audit Division's issuance of an estimated assessment to petitioner was proper and, if so, whether the petitioner is liable for additional sales and use taxes for the above-captioned period.

II. Whether, if additional tax is due, petitioner has established reasonable cause for underreporting and underpayment of tax, thus warranting cancellation or reduction of penalties and interest assessed.

FINDINGS OF FACT

1. Petitioner, Piomeer Superette, Inc. ("Piomeer"), was engaged in business at 890 Ninth Avenue, New York City, operating a superette-grocery store. Four individuals operated Piomeer's business on a six days per week, fifteen hours per day basis. On August 4, 1981, a Notification of Sale, Transfer or Assignment in Bulk was received by the Audit Division, providing notice of the sale of Piomeer's business assets to L.D.R. Deli Corp. ("L.D.R.").

2. On September 4, 1981, a sales tax auditor from the Audit Division's New York District Office was assigned to determine the sales tax liability, if any, of Piomeer.

3. On September 8, 1981, the auditor called the escrow agent for the bulk sale transaction, and was advised that Piomeer's accountant was one Vasilios Apostolatos¹. The auditor called Mr. Apostolatos and was given an appointment for October 2, 1981. The auditor also made arrangements with Mr. Apostolatos to make an observation of sales at the business premises (as being operated by L.D.R.).

4. On September 15, 1981, the auditor made an observation of the business premises, to "...get a sense of the business". He spoke with the personnel at the premises, who informed him that the purchaser's (L.D.R.'s) accountant was also Mr. Apostolatos. The auditor saw various equipment used to prepare food and beverages in the store, including a hot table, rotisserie, and coffee pot. The auditor told the store personnel that a Certificate of Authority must be

¹ Mr. Apostolatos had succeeded one Harry Samios as Piomeer's accountant in or about November, 1980 (see Finding of Fact "12", infra). Mr. Samios was later rehired as accountant by Piomeer's principals in or about March, 1982, apparently to replace one Terrance Christou (see Finding of Fact "7", infra).

prominently displayed on the premises, and informed them of protest rights and procedures.

5. An extended observation of prepared food sales at the premises operated by L.D.R. was made on September 24, 1981. Mr. Apostolatos was present during this observation. The auditor observed sales of prepared foods, noting the posted prices for all prepared foods and counting the numbers of items sold.

6. On October 2, 1981, the auditor went to Mr. Apostolatos' office and reviewed some of Piomeer's records. He was advised that purchase records were available only for June and July of 1981. Piomeer did not keep daily cash register tapes or other original entry sales documents. The auditor and Mr. Apostolatos discussed methods for the audit, and Mr. Apostolatos signed an agreement allowing the use of test period audit techniques. The auditor prepared partial transcripts of Piomeer's daily cash receipts and purchases from Piomeer's day book and made an analysis of Federal income tax returns. The Federal returns reflected a 24 percent gross profit, but a 32 percent markup. Mr. Apostolatos advised the auditor that there had been no significant change in the business after the sale from Piomeer to L.D.R.

7. A second observation of L.D.R.'s sales of prepared foods was made on October 20, 1981. The next day, Mr. Apostolatos cancelled an audit appointment, and informed the auditor that Piomeer had retained a new accountant, one Terrance Christou. The auditor, in turn, mailed power of attorney forms to Mr. Christou.

8. As of October 21, 1981, when the auditor was informed that Piomeer had hired a new accountant, the previous accountant, Mr. Apostolatos, had provided only partial and incomplete records for review. Since Piomeer's accountant had not provided sufficient information upon which to determine the taxes due, the

auditor estimated tax due based on disallowance of all claimed non-taxable sales per Piomeer's sales tax returns.

9. On October 23, 1981, the Audit Division issued to Piomeer a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period September 1, 1978 through July 31, 1981 in the amount of \$75,796.62, plus penalty and interest. As noted, this Notice was based on disallowance of all claimed non-taxable sales reflected per Piomeer's returns, and was not calculated on the basis of either of the observations previously noted nor on any other direct or indirect audit tests.

10. Between November 5, 1981 and January 11, 1982, the auditor made repeated attempts to contact the new accountant for Piomeer (Mr. Christou), and Angelo Vergatos, president of Piomeer. On January 11, 1982, Mr. Christou provided some additional (though incomplete) records and, at a subsequent appointment on January 19, 1982, submitted a power of attorney dated October 30, 1981. Mr. Christou also signed an agreement authorizing the use of test period audit methods. Like the previous accountant, Mr. Christou informed the auditor that there was no significant difference between the business of Piomeer and of L.D.R.

11. Vaselas Loukatos was the secretary-treasurer of Piomeer and kept the books. A day book was used to record Piomeer's daily cash receipts and cash purchases. The daily cash receipts figure was taken from cash register total sales. The cash register did not identify items sold and did not have a tax key. Payroll amounts were also shown in the day book. Sandwich and beverage sales were not recorded in the day book. Mr. Loukatos identified a markup chart used to determine Piomeer's selling prices. Sometime after March, 1982, Mr. Loukatos prepared a list of 1980 prices by looking at 1980 invoices and

referring to this markup chart. According to Mr. Loukatos, items were sold at different markups varying from 15 percent for milk to 30 or 40 percent for soda.

12. Harry Samios was the accountant for Piomeer from 1976 until November, 1980. Mr. Samios received records from Piomeer consisting of the aforementioned day book (showing cash receipts, payroll, and cash purchases), a checkbook and bank statements, and a paper bag containing each month's purchase invoices. Mr. Samios reconciled Piomeer's bank statements, and prepared receipts and disbursements journals. The disbursements records prepared by Mr. Samios listed taxable and non-taxable purchases. Mr. Samios did not review the actual purchase invoices.

13. Mr. Samios prepared Piomeer's sales tax returns for most of the audit period. Taxable sales were computed by adding a 35 percent markup to the disbursement records amounts for taxable purchases and then adding sales of coffee and sandwiches. Piomeer did not keep records of coffee and sandwich sales, and Mr. Samios obtained this figure from one of the officers of Piomeer. Prior to and until 1976, Mr. Samios had been adding a 30 percent markup to taxable purchases. However, after a State sales tax audit for the period spanning 1973 to 1976 had determined a markup of 40 percent, Mr. Samios changed his computation method by using the 35 percent markup, which he thought was fair. The 35 percent markup was not based on a review of actual costs or selling prices of Piomeer.

14. Vaselas Loukatos testified that there was equipment in the basement at 890 Ninth Avenue included in the sale to L.D.R. There was no hot table included in this equipment. Upon further questioning by his counsel, Mr. Loukatos stated that the equipment was only a rotisserie. During cross-examination,

Mr. Loukatos reviewed some purchases by Piomeer of meats, including corned beef, pastrami, chicken, spare ribs, top round, and turkey. On re-direct he stated that the top round and turkey were cooked in an oven on the premises. The oven was located in the basement.

15. During his testimony, Mr. Loukatos reviewed some of the purchase invoices for Piomeer for the month of July, 1981. Among its supplies, Piomeer had purchased cases of chickens, top round, roast beef, and turkeys and spare ribs. Piomeer also purchased barbecue sauce in gallon containers. Mr. Loukatos stated that Piomeer did not use the barbecue sauce, but purchased it for sale to restaurants and other institutions in the neighborhood.

16. On June 8, 1982, the Audit Division issued a Notice of Assessment Review to Piomeer reducing the aforementioned amount of tax assessed (see Finding of Fact "9") to \$62,095.47, plus penalty and interest. The deficiency set forth in the Notice of Assessment Review was based upon the auditor's observed sales of prepared food and beverages by L.D.R., and upon a purchase markup test of taxable purchases made by Piomeer based upon July, 1981 purchase invoices and a markup performed using current purchase invoices and shelf prices of L.D.R.

17. Based upon Piomeer's July, 1981 purchase invoices, the auditor calculated taxable purchases of 46.2 percent and based upon L.D.R.'s prices and invoices, the auditor calculated markups for beer at 42.6 percent, soda at 44.8 percent, tobacco at 52.8 percent, candy at 32.1 percent and miscellaneous taxable items at 50 percent.

18. The auditor calculated adjusted taxable sales of \$319,667.04 per the observations of L.D.R., and adjusted taxable sales of \$790,859.59 per the taxable ratio markup test. The combined total of adjusted taxable sales per

audit was then reduced by taxable sales reported per Piomeer's returns in the amount of \$387,886.00, resulting in unreported taxable sales of \$722,640.61, or a margin of error of 186.3 percent, producing a total sales tax deficiency of \$57,810.52.

19. In addition to the foregoing, a use tax deficiency of \$4,142.00 on fixtures, equipment and leasehold improvements was added to the assessment to arrive at the total additional sales and use tax amount of \$62,095.67, as shown on the Notice of Assessment Review.²

20. As a result of a pre-hearing conference, at which additional information was provided to the auditor by Piomeer (including purchase invoices from February, 1981), a recomputation was made whereby the ratio of taxable purchases to total purchases was revised to 27.61 percent, thereby reducing taxable sales per the taxable ratio test to \$472,350.11 and the margin of error to 104.19 percent. The sales tax deficiency was thereby reduced to \$32,331.09. The use tax deficiency was also reduced to \$220.00, based upon additional information provided to the auditor, thus resulting in total sales and use taxes due in the amount of \$32,694.24.³

21. Petitioner challenges the assessment under review, asserting that the Audit Division exceeded statutory authority by issuing the assessment solely in

2 Included therein was tax in the amount of \$143.15, based on expense purchases, which is not challenged by petitioners.

3 By its brief, the Audit Division indicates a lesser amount remaining at issue; specifically, \$32,474.24, based on two invoices submitted at the hearing in substantiation of the \$220.00 use tax amount set forth in Finding of Fact "20".

view of time constraints and without an adequate basis therefor, that the audit conducted of the purchaser's premises was not reasonably calculated to assess any taxes due from Piomeer as the seller, that the amount of tax assessed was unreasonable in light of the seller's business activities and, alternatively, that statutory penalties and interest should be abated based upon reasonable cause.

CONCLUSIONS OF LAW

A. That receipts from sales such as those at issue herein are presumed to be subject to tax until the contrary is established, and the burden of proving that any receipts are not subject to tax rests with the person required to collect tax or the customer [Tax Law section 1132(c)]. Furthermore, every person required to collect tax is under a duty to keep adequate records pertaining thereto and to make such records available for examination by the Audit Division [Tax Law section 1135].

B. That petitioner did not maintain complete or adequate books and records such that upon audit, taxable and nontaxable sales could be verified and tax liability determined therefrom with any degree of exactness. Moreover, petitioner made available in the early audit stages only a small amount of those limited records maintained. The observation tests revealed greater taxable sales taking place than were reported on petitioner's returns. In view of such circumstances, there was a factual basis for issuance of an assessment based on disallowance of claimed nontaxable sales (in effect increasing taxable sales but not increasing petitioner's reported total sales), and thus the October 23, 1981 notice was not invalid.

C. That where, as here, adequate records are not maintained or made available, it is well settled that the Audit Division may estimate the amount of tax due from such information as is available and may resort to the use of external indices reasonably calculated to arrive at a determination of tax liability [Tax Law section 1138(a)]. In fact, petitioner, by its authorized representatives, had agreed in writing to the propriety of using test period auditing techniques.

D. That in view of the total lack of records maintained by Piomeer concerning prepared food sales, the observations of such sales by petitioners' successor, L.D.R., as described, were properly utilized in calculating the instant assessment. It is noted that petitioner's accountants, one of whom also served as L.D.R.'s accountant, indicated that there was no significant difference between the businesses conducted by Piomeer or L.D.R., and had agreed to such observation tests. Finally, the Audit Division has recalculated and reduced the assessment based on each instance where petitioner has produced additional records (see Findings of Fact "10" and "20", and footnote "2"). Petitioner would seek further reduction of the assessment (to \$5,761.99), based on estimates of its sales and selling prices. Given the lack of records in support thereof, further reduction of the assessment as sought by petitioner is not warranted.

E. That the petitioner has not presented such facts or circumstances as would warrant cancellation of the penalty assessed, nor is there a basis for waiver or reduction of interest due.

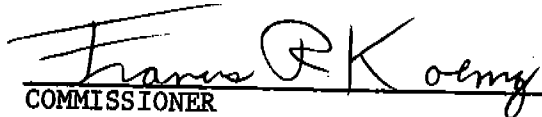
F. That the petition of Piomeer Superette, Inc. is hereby denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on October 23, 1981, as reduced in accordance with the Finding of Fact "20", is sustained.

DATED: Albany, New York

JUN 28 1985

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER