

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :

of :

CORAL DELICATESSEN & RESTAURANT, 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 May 31, 1981.

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Petitioner, Coral Delicatessen & Restaurant, Inc., 1473 Second Avenue, New York, New York 10021, 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 May 31, 1981 (File No. 38192).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 15, 1983 at 10:45 A.M. with all briefs to be submitted by October 12, 1983. Petitioner appeared by M. J. Schutz, Esq. and David Alster, CPA. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

#### ISSUE

Whether the Audit Division properly determined petitioner's taxable sales for the audit period based on a two-day observation test of petitioner's sales.

#### FINDINGS OF FACT

1. On May 12, 1982, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Coral Delicatessen & Restaurant, Inc. covering the period September 1, 1978 through May 31, 1981.

The Notice was issued as a result of a field audit and asserted additional tax due of \$14,773.51 plus interest of \$3,195.85 for a total due of \$17,969.36.

2. Petitioner, by signature of its president, Arnold Weisenfeld, executed two consents to extend the period of limitation for the issuance of an assessment for the period September 1, 1978 through February 28, 1979 to June 20, 1982.

3. On audit, an auditor for the Audit Division found that petitioner's records were insufficient for the determination of an exact amount of taxable sales for the audit period in that cash register tapes and guest checks were available only after July, 1981. Further, petitioner's cash register tapes did not differentiate between taxable sales and nontaxable sales and did not separately show the sales tax collected.

4. Petitioner estimated the taxable sales which it reported on sales and use tax returns filed by taking 75 percent of its total sales recorded and dividing the result by 108 percent to extract the sales tax included therein.

5. The auditor conducted an observation test on December 3 and December 7, 1981 from 9:30 a.m. to 4:15 p.m. each day. The result of the observations disclosed total sales for the two days observed of \$2,466.00. Of that total, \$918.00 constituted bulk sales of meat sold by the pound and \$481.00 were other nontaxable sales. This resulted in a taxable sales percentage of 43.25 percent. The auditor rationalized, however, that the volume of sandwich meat sold by the pound increased during the holiday season; therefore, it requested an additional observation test day during January, 1982. This request was refused by petitioner's accountant for health reasons.

The auditor, therefore, deleted from the observation test of December 3 and 7, 1981 the sandwich meat sold by the pound (Gross sales of \$2,466.00 were

reduced by \$918.00) and determined a taxable sales percentage of 68.9 percent (taxable sales of \$1,066.51 divided by \$1,548.00 gross sales).

In order to determine sales made for the hours not observed from 4:15 p.m. to 8:00 p.m., the auditor averaged the two days observed and divided the result by the number of hours observed to determine average hourly sales. This was multiplied by the number of hours open for business each day and average gross sales per day were determined of \$1,920.00. This was multiplied by the 30 days open for business in December, 1981 which resulted in gross sales of \$57,600.00.

The auditor then determined gross sales for December, 1980 using a consumer price index of 10.7 percent. This was done in order to make a comparison to gross sales reported. The auditor determined gross sales at the December, 1980 price level to be \$52,033.00. Petitioner reported gross sales during the same period of \$36,660.00 based on its recorded gross sales. The auditor determined a margin of error in reporting gross sales of 41.9 percent. Petitioner reported gross sales of \$859,073.00 during the audit period to which the auditor applied the 41.9 percent margin of error. Adjusted gross sales were thereby determined of \$1,219,025.00 during the audit period and taxable sales including sales tax were determined of \$839,980.00 at the 68.9 percent rate of taxable sales. This was divided by 108 percent to determine taxable sales of \$777,693.00 for the audit period. The auditor deducted \$601,823.00 in taxable sales reported by petitioner during the same period and determined additional taxable sales of \$175,870.00 and tax due thereon of \$14,069.60.

The audit results also included use tax due of \$469.04 on expense purchases and over and undercollections of sales tax of \$234.87. These items, however, are not at issue.

6. The auditor, in deducting taxable sales reported by petitioner, understated those sales by \$20,000.00. He conceded therefore that petitioner's sales tax liability should be reduced by \$1,600.00.

7. Petitioner argued that if the same method of calculation was made using taxable sales instead of gross sales, no additional sales tax liability would be due. These calculations are as follows:

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| Taxable sales both days (6 3/4 hrs. ea. day)       | \$ 1,064.11            |
| Taxable sales average for one day (6 3/4 hrs.)     | 532.06                 |
| Taxable sales average for one hour                 | 78.82                  |
| Taxable sales average for a full day (10 1/2 hrs.) | 827.61                 |
| Taxable sales for Dec. 1981 (30 days)              | 24,828.30              |
| Dec. 1981 Price Level                              |                        |
| (\$24,828.30 divided by 1.107)                     | 22,428.26 <sup>1</sup> |
| Taxable sales reported for Dec. 1980               | 26,428.26              |

8. Petitioner further argued that the auditor's observation of a high volume of meat sold by the pound applied to December 1980 as well as December 1981. If a comparison was to be made to sales reported, the result of the actual observations should be applied; namely the original taxable sales percentage of 43.25 percent.

It was reasoned by petitioner that even though gross sales increased by the method of audit, this increase had no bearing on taxable sales.

#### CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides for the use of external indices to determine taxable sales receipts when an exact amount of tax due cannot be determined from information available.

B. That petitioner did not maintain records sufficient for the determination of an exact amount of its taxable sales receipts. The audit method employed by

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<sup>1</sup> This calculation includes sales tax.

the Audit Division of observing the actual sales being made by petitioner was therefore proper. (Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44, 411 N.Y.S.2d 41.)

That the auditor for the Audit Division, however, in his extrapolation of its observations failed to consider that December, 1980 sales had the same characteristically higher volume of meat sold by the pound as did December, 1981. Further, if any increase to gross sales is warranted, that increase is due to nontaxable meat sold by the pound. The audit results therefore should have reflected the taxable sales percentage of 43.25 percent as observed on the increased gross sales determined.


C. That the application of the taxable sales percentage as concluded in "B" above results in no additional taxable sales. The additional sales tax of \$14,069.60 determined by the auditor is hereby cancelled. The additional sales tax of \$234.87 based on collection errors and use tax of \$469.04 on expense purchases is sustained.

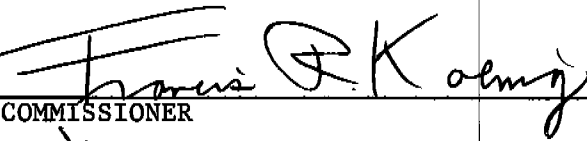
D. That the petition of Coral Delicatessen & Restaurant, Inc. is granted to the extent indicated in Conclusion "C" above; that the Audit Division is directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 12, 1982; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

JUL 31 1984

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER