

STATE OF NEW YORK

STATE TAX COMMISSION

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| In the Matter of the Petition | : | |
| | : | |
| of | : | |
| | : | |
| RAYMOND BARTOLOMEO | : | DECISION |
| D/B/A RAY'S PIZZERIA | : | |
| 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. | : | |

Petitioner, Raymond Bartolomeo d/b/a Ray's Pizzeria, 866 McDonald Avenue, Brooklyn, New York 11218, 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. 38236).

A hearing was commenced before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 23, 1984 at 10:45 A.M. and was continued to conclusion on May 7, 1985 at 9:15 A.M., with all briefs to be submitted by June 21, 1985. Petitioner appeared by Joseph Victor, Esq. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether the Audit Division's use of a one-day observation test to determine petitioner's taxable sales was proper.

II. Whether the penalty and that portion of interest exceeding the minimum statutory rate should be cancelled.

FINDINGS OF FACT

1. Petitioner, Raymond Bartolomeo d/b/a Ray's Pizzeria, sold pizza, sandwiches, cold cuts and cheese.

2. On May 12, 1982, 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 for taxes due of \$3,128.54, plus penalty and interest of \$1,441.16, for a total of \$4,569.70. Said notice covered the period December 1, 1978 through August 31, 1981.

3. Petitioner executed a consent extending the period of limitation for assessment of sales and use taxes for the period December 1, 1978 through February 28, 1979 to June 20, 1982.

4. On audit, the Audit Division found that bank deposits agreed with gross sales reported on sales tax returns filed. However, petitioner did not have cash register tapes, guest checks or any other records that could be used to make an independent verification of taxable sales receipts. Moreover, petitioner did not have purchase records that would have enabled the Audit Division to reconstruct sales. Because of the incomplete books and records, the auditor performed an observation test on December 17, 1981. The auditor observed and prepared a list of all sales for that day (11:00 A.M. to 6:00 P.M.). Gross sales were \$110.75, of which \$105.55 were taxable sales. Sales tax was deducted from the taxable sales amount to arrive at net taxable sales of \$97.73. Taxable sales for the audit period were then estimated as follows:

| | <u>Dec. 1978-Nov. 1979</u> | <u>Dec. 1979-Nov. 1980</u> | <u>Dec. 1980-Aug. 1981</u> |
|-------------------------------|----------------------------|----------------------------|----------------------------|
| Daily taxable sales | \$ 97.73 | \$ 97.73 | \$ 97.73 |
| Less: allowance for inflation | 25.40 (26%) | 12.70 (13%) | -- |
| | <u>\$ 72.33</u> | <u>\$ 85.03</u> | <u>\$ 97.73</u> |
| Weekdays | 5 | 5 | 5 |
| Weekday sales | <u>\$ 361.65</u> | <u>\$ 425.15</u> | <u>\$ 488.65</u> |
| Saturday sales (25%) | 54.25 | 63.77 | 73.30 |
| Total weekly sales | <u>\$ 415.90</u> | <u>\$ 488.92</u> | <u>\$ 561.95</u> |
| Number of weeks | 48 | 48 | 36 |
| Total sales | <u>\$19,963.20</u> | <u>\$23,468.15</u> | <u>\$20,230.20</u> |

The above taxable sales amounted to \$63,661.55 as compared to reported taxable sales of \$24,552.00, leaving additional taxable sales of \$39,109.55 and tax due thereon of \$3,128.76.

5. Petitioner's average daily sales based on returns filed were \$30.00. Petitioner testified at the hearing that his sales averaged approximately \$70.00 per day.

6. Petitioner argued that his sales tax returns were properly filed and reflect the actual sales of the business. Petitioner argued further that there was no basis for the Audit Division's use of the observation test.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides that "if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available" and authorizes, where necessary, an estimate of tax due "on the basis of external indices".

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).

B. That petitioner maintained inadequate and incomplete books and records for purposes of verifying taxable sales. Accordingly, the Audit Division's use of an observation test as a basis for determining petitioner's liability was proper pursuant to section 1138(a) of the Tax Law (Matter of Sakran v. State Tax Commission, 73 A.D.2d 989).

C. 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).

D. That the penalty and interest imposed by the Audit Division under section 1145(a) of the Tax Law is sustained, as petitioner has not established that reasonable cause for abatement exists.

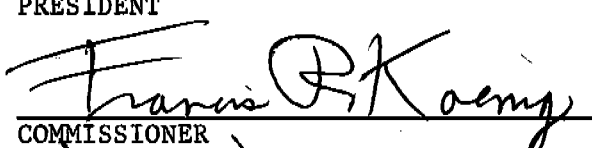
E. That the petition of Raymond Bartolomeo d/b/a Ray's Pizzeria is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 12, 1982 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

DEC 13 1985


PRESIDENT


COMMISSIONER


COMMISSIONER