

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	DECISION
JILL'S COFFEE SHOP II, INC. T/A	:	
MR. EDD'S COFFEE SHOP	:	
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, 1980.	:	

Petitioner, Jill's Coffee Shop II, Inc. t/a Mr. Edd's Coffee Shop, 890 Franklin Avenue, North Valley Stream, New York 11580, 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, 1980 (File No. 38525).

A hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 9, 1985 at 9:15 A.M., with additional information to be submitted by July 15, 1985. Petitioner appeared by Edward D'Argenio. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined petitioner's sales tax liability.

FINDINGS OF FACT

1. On December 7, 1981, as the result of a field audit, the Audit Division

issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Jill's Coffee Shop II, Inc. t/a Mr. Edd's Coffee Shop, in the amount of \$5,209.64 plus interest of \$1,006.10 for a total due of \$6,215.74 for the period September 1, 1978 through May 31, 1980.

2. Petitioner operated a coffee shop with a seating capacity of approximately 100. Petitioner's owners, Edward and Lynne D'Argenio, along with their son, worked at the coffee shop on a full-time basis. Petitioner also employed a part-time waitress. During the period in issue, the coffee shop was open five days a week from 7:00 A.M. to 4:00 P.M. serving breakfast and lunch items including eggs, rolls, coffee, hamburgers, french fries and sandwiches. On March 11, 1980 the stock of petitioner was transferred from Mr. and Mrs. D'Argenio to Vinod Patel for approximately \$34,000.00.

3. On audit, the auditor requested that petitioner produce any books and records available. The only records petitioner supplied were Federal income tax returns for 1978 and 1979 and some related workpapers. There were no guest checks, bank statements, cancelled checks, purchase invoices or any other type of business record. The auditor, therefore, took the taxable sales of \$14,500.00 reported by the new owner for the first quarter of his operation and projected those sales per quarter over the entire audit period. Such sales resulted in sales tax due of \$7,763.08 less tax already paid of \$3,913.44 for additional tax due of \$3,849.64. The auditor also initially determined that there was a bulk transfer of the assets of the business which was subject to tax of \$1,360.00. At a pre-hearing conference, it was determined that since there was merely a

transfer of the stock of petitioner, no bulk sale took place and the Audit Division agreed that the assessment should be reduced to \$3,849.64 plus interest.

4. At the hearing petitioner showed that Mr. Patel operated the coffee shop seven days a week compared to the five days a week that Mr. and Mrs. D'Argenio operated the business. Thus, absolute use of the sales figures of the new owner would not accurately reflect the sales figures of the prior owners. Taxable sales of \$14,500.00 per quarter equated to daily sales of \$160.57 when the shop was operated seven days per week. If the shop was operated five days per week, daily sales of \$160.57 resulted in taxable sales per quarter of \$10,357.14.

There were other variables, such as personalities of the owners, which petitioner argued would affect the sales of the business; however, no evidence was produced indicating how much such variables would change the audit results.

CONCLUSIONS OF LAW

A. That a "...vendor is obligated to maintain records of his sales for audit purposes (Tax Law, §1135), and the State, when conducting an audit, must determine the amount of tax due 'from such information as may be available,' but 'if necessary, the tax may be estimated on the basis of external indices' (Tax Law, §1138, subd. [a])." Korba v. New York State Tax Commission, 84 A.D.2d 655. Exactness in determining the amount of sales tax liability is not required where it is the petitioner's own failure to maintain proper records which necessitates the use of external indices. Markowitz v. State Tax Commission, 54 A.D.2d 1023 aff'd 44 N.Y.2d 684. It then becomes petitioner's burden to

show that the method of audit or the amount of tax assessed was erroneous.

B. That, other than two Federal income tax returns, petitioner maintained no business records from which the Audit Division could determine petitioner's sales tax liability and, therefore, resort to use of external indices, in this case sales tax returns of the new owner, was warranted. However, in utilizing the taxable sales of the new owner, account should have been taken of the difference in the number of days per week the business was operated. Thus, the proper taxable sales per quarter was \$10,357.14 as discussed in Finding of Fact "4". Additional sales tax due should thus be recomputed as follows:

Taxable sales per quarter	\$10,357.14
Tax rate	x.08
Tax per quarter	<u>828.57</u>
	x 6
Complete quarter	<u>4,971.42</u>
Plus partial quarter	
(\$828.57 divided by 13 weeks x 9 weeks)	+ 573.63
Tax due for audit period	<u>5,545.05</u>
Tax previously paid	- 3,913.44
Additional tax due	<u>\$ 1,631.61</u>

The tax due is, therefore, reduced to \$1,631.61 plus minimum interest. This amount takes into consideration the reduction in tax discussed in Finding of Fact "3". Petitioner has not proven that the audit was erroneous in any other respect.

C. That the petition of Jill's Coffee Shop II, Inc. t/a Mr. Edd's Coffee Shop is granted to the extent indicated in Conclusion of Law "B"; that the

Audit Division is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 7, 1981; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

NOV 07 1985

Roderick W. Allen
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark J. [Signature]
COMMISSIONER