

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
MAGGIE'S PLACE, 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 June 1, 1978	:	
through August 31, 1981.	:	

Petitioner, Maggie's Place, Inc., 21 East 47th Street, New York, New York 10017, 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 June 1, 1978 through August 31, 1981 (File No. 38571).

A small claims 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 July 26, 1984 at 2:45 P.M. Petitioner appeared by Jack M. Portney, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Thomas Sacca, Esq., of counsel).

ISSUE

Whether the Audit Division's use of the markup method of audit as a basis for determining petitioner's sales of food, beer, liquor and wine was proper.

FINDINGS OF FACT

1. Petitioner, Maggie's Place, Inc., operated a bar and restaurant located at 21 East 47th Street, New York, New York.
2. On June 25, 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 covering the period June 1, 1978 through August 31, 1981 for taxes due of \$25,524.38, plus interest of \$6,043.28, for a total of \$31,567.66.

3. Petitioner executed a consent extending the period of limitation for assessment of sales and use taxes for the period June 1, 1978 through February 28, 1981 to September 20, 1982.

4. Petitioner did not have guest checks or cash register tapes available for audit. Therefore, in order to verify the accuracy of taxable sales reported, the Audit Division reconstructed such sales by marking up purchases of food, beer, liquor and wine. A combined liquor and wine markup of 391.64 percent was computed using purchases for May, 1981, selling prices in effect at that time, a 15 percent allowance for spillage and 1-1/4 and 1-7/8 ounce servings of liquor and 5 ounce servings of wine. A beer markup of 341.85 percent was computed in the same manner as liquor and wine using an 8 ounce glass. The food markup was estimated to be 150 percent on the basis of statistics published by the National Restaurant Association. Total purchases for the period June 1, 1978 through February 28, 1981 were \$417,399.00, of which \$262,711.00 (62.94%) was food and \$154,688.00 (37.06%) was for liquor, wine and beer. Food purchases were adjusted to \$243,406.00 to allow for employee meals (\$15,730.00) and complimentary hors d'oeuvres (\$3,575.00). Beverage purchases were adjusted to \$146,823.00 to allow for drinks consumed by employees (11 employees @ \$1.00 each per day). The markup percentages were applied to the applicable purchases to arrive at taxable sales of \$1,312,021.00 for the period June 1, 1978 through February 28, 1981. Petitioner reported taxable sales of \$1,059,330.00 for the same period, leaving additional taxable sales of \$252,691.00, or an increase of 23.85 percent. This error factor was applied to taxable sales reported for the period March 1, 1981 through August 31, 1981 to determine additional taxable sales of \$48,782.00 for said period. The total tax due for the combined periods amounted to \$24,114.56.

The Audit Division requested petitioner to retain current guest checks. An analysis of two days' guest checks (July 17th and 25th) disclosed an overcollection error factor of .367 percent. This test was used to estimate additional taxes due of \$459.57 for the audit period.

The Audit Division determined use tax due of \$750.22 on the cost of employee beverages. There was also a use tax of \$200.00 assessed on fixed assets.

5. The Audit Division compared gross sales from the books and records with the sales tax returns filed and found that the sales per books exceeded the returns by \$37,814.04.

Petitioner submitted the results of a federal income tax audit for the years 1978, 1979, 1980 and 1981 which disclosed additional receipts of \$39,279.00. Petitioner conceded that sales tax is due on that amount.

6. During the period in issue, petitioner's cash register did not produce a tape. Petitioner argued that since the cash register tapes never existed, the absence of such tapes does not constitute inadequate books and records. Petitioner argued further that there is no statute or regulation that requires a business to maintain cash register tapes.

7. Petitioner submitted its own markup test on liquor and wine which showed a markup of 155.5 percent. The test differed from the Audit Division's in that the size of the drinks used was 2½ and 3 ounces of liquor and the allowance for spillage was increased to 25 percent. Petitioner had a 1 ounce shot glass on the premises; however, petitioner, at the time of the audit, indicated that liquor was "free poured" rather than using the shot glass. The Audit Division took this into account in allowing the quantity of liquor used in drinks to be 1-1/4 and 1-7/8 ounces.

Additionally, petitioner maintained that the food markup of 150 percent was not applicable to its operation and the allowances given for employee meals, drinks and complimentary food were insufficient.

CONCLUSIONS OF LAW

A. That section 1135(a) of the Tax Law provides that every person required to collect tax shall keep records of every sale and of all amounts paid, charged or due thereon and of the tax payable thereon. Such records shall include a true copy of each sales slip, invoice, receipt or statement.

Petitioner did not have cash register tapes, guest checks or any other record that would serve as a verifiable record of taxable sales. Under such circumstances, the Audit Division's use of a test period and a markup percentage audit was proper in accordance with section 1138(a) of the Tax Law (Matter of Urban Liquors, Inc. v. State Tax Commission, 90 A.D.2d 576; Matter of Hanratty's/732 Amsterdam Tavern, Inc. v. State Tax Commission, 88 A.D.2d 1028).

B. 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).

C. That the petition of Maggie's Place, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 25, 1982 is sustained.

DATED: Albany, New York

FEB 20 1985

STATE TAX COMMISSION

Richard A. Clev
PRESIDENT

James Q. K. O'Leary
COMMISSIONER

Mark J. [Signature]
COMMISSIONER