

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
:
of :
:
ROTISO SERVICES, INC. :
D/B/A G.I. JOE :
:
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 March 1, 1979 :
through February 28, 1982. :
:

In the Matter of the Petition :
:
of :
:
MARY ANN ISOLA : 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 March 1, 1979 :
through February 28, 1982. :
:

In the Matter of the Petition :
:
of :
:
HIRAM ISOLA :
:
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 March 1, 1979 :
through February 28, 1982. :
:

Petitioners, Rotiso Services, Inc. d/b/a G.I. Joe, Mary Ann Isola and
Hiram Isola, 37 Carmine Street, New York, New York 10014, 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 March 1, 1979 through February 28, 1982
(File No. 38579).

A combined small claims hearing was held before Richard L. Wickham, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 30, 1984 at 1:15 P.M. Petitioners appeared by Michael Amarosa, Esq. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether the additional tax due assessed against petitioners was properly and correctly determined.

FINDINGS OF FACT

1. On June 20, 1982, the Audit Division issued notices of determination and demand for payment of sales and use taxes due to "G.I. Joe d/b/a Rotiso Service, Inc." (sic), Mary Ann Isola and Hiram Isola. Each notice assessed additional tax due of \$25,878.48 plus penalty and interest in accordance with the following schedule:

<u>Period Ended</u>	<u>Tax Due</u>	<u>Penalty</u>	<u>Interest</u>
5/31/79	\$1,853.52		\$721.07
8/31/79	1,194.08		420.38
11/30/79	1,951.76		628.72
2/28/80	2,088.40		610.94
5/31/80	2,046.16		536.69
8/31/80	2,220.40		500.28
11/30/80	2,374.16		463.88
2/28/81	2,400.00	\$456.00	397.92
5/31/81	2,400.00	384.00	325.32
8/31/81	2,400.00	312.00	259.68
11/30/81	2,475.00	247.50	181.42
2/28/82	2,475.00	173.25	96.67

2. The assessment against the corporate petitioner was based on a sales tax audit. Although requested, the corporation's books and records were not produced for audit. Lacking the records, the auditor reviewed the information available to him. An examination of the New York City corporation tax returns of Rotiso Services, Inc. filed for the years 1977 and 1978 revealed that the

business was a one man operation selling prepared foods, e.g. hot dogs, with an address of 370 West 11th Street. Based on the auditor's experience of auditing similar businesses operating in mid-town and lower Manhattan, it was estimated that corporate sales subject to sales tax were \$120,000.00 per year. The projection of the audit finding over the audit period, after an allowance for the taxable sales reported, resulted in a determination of additional tax due in the amount of \$25,878.48.

3. Petitioners maintain that the auditor's estimate of sales is excessive, but are unable to produce books and records, same having allegedly been destroyed by petitioners' landlord after evicting petitioners from the business premises or by the accounting firm in possession of corporate books. At the hearing, petitioners introduced their file copy of the U.S. Corporation Income Tax Return for the fiscal year November 1, 1979 through October 31, 1980, which shows that corporate sales for the fiscal year were \$18,497.00. Petitioners also introduced photocopies of checks, presumably written in payment of the sales tax reported on returns filed for the quarterly periods ended February 28, 1976; May 31, 1976; August 31, 1976 and November 30, 1976, which indicate sales for the yearly period December, 1975 through November, 1976 of \$21,290.75.¹

4. Petitioners further maintain that Rotiso Services, Inc. ceased operations sometime in March, 1980. It is noted that the assessments issued to petitioners reflect the filing of sales and use tax returns for quarterly periods through

1 The checks of Rotiso Services, Inc. total \$1,703.26 which when divided by the 8 percent combined State and local rate results in taxable sales of \$21,290.75.

November 30, 1980. In fact, taxable sales reported for the time period after March, 1980 were \$6,991.00.²

CONCLUSIONS OF LAW

A. That petitioner failed to maintain books and records as required under section 1135 of the Tax Law. Without books and records, the Audit Division was unable to verify the taxable sales reported or to determine such sales accurately. It was, therefore, proper and correct for the Audit Division to determine the taxable sales of Rotiso Services, Inc. d/b/a G.I. Joe from available information as provided in section 1138(a) of the Tax Law. (See Matter of Chartair, Inc. v. State Tax Commission, 64 A.D.2d 44.)

B. That once established that the Audit Division selected a method of calculation reasonably designed to reflect the tax due, it was incumbent upon petitioners to show by clear and convincing evidence that the method of audit or amount of tax assessed was erroneous. It cannot be said from the testimony or evidence presented at the hearing that petitioners have sustained their burden. (See Matter of Carmine Rest. v. State Tax Commission, 99 A.D.2d 581.)

C. That the petitions of Rotiso Services, Inc. d/b/a G.I. Joe, Mary Ann Isola and Hiram Isola are denied and the notices of determination and demand

2 The auditor estimated quarterly taxable sales of \$30,000.00 and tax due of \$2,400.00 based on a combined 8 percent State and local rate. Therefore, the estimated tax due for the three quarterly periods within the time span of April, 1980 through November, 1980 would be \$7,200.00. Only \$6,640.72 tax due was assessed. Subtraction of the \$6,640.72 from the \$7,200.00 results in a tax reported of \$559.28. The division thereof by the applicable 8 percent rate indicates taxable sales of \$6,991.00 were reported.

for payment of sales and use taxes due, numbered S820620030M, S820620031M and S820620032M, respectively, are sustained.

DATED: Albany, New York

STATE TAX COMMISSION


MAR 06 1985



PRESIDENT



COMMISSIONER



COMMISSIONER