

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
ROMAR DELI, 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 March 1, 1979	:	
through February 19, 1982.	:	

Petitioner, Romar Deli, Inc., c/o Murray Katz, 67-07 Myrtle Avenue, Glendale, New York 11385, 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 19, 1982 (File No. 39151).

A formal hearing was held before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 29, 1984 at 10:30 A.M. Petitioner appeared by Murray Katz, Esq. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined additional sales taxes due from petitioner for the period March 1, 1979 through February 19, 1982.

FINDINGS OF FACT

1. Petitioner, Romar Deli, Inc., was a kosher delicatessen-restaurant in Cedarhurst, New York. The business was purchased in April, 1978 and was sold on February 19, 1982. No valuation of fixed assets was stated in the sales contract or closing statement for the February 19, 1982 sale. The purchaser had paid a tax on a valuation of \$5,000.00 for the bulk sale of fixed assets.

2. The auditor reviewed petitioner's available books and records. Sales per books agreed substantially with sales per federal income tax and sales tax returns filed. Purchases per books agreed substantially with purchases per federal income tax returns. However, petitioner's guest checks, cash register tapes, menus and purchase invoices were not available for audit. After reviewing the available records, the auditor determined that petitioner's markup on food of 54.95 percent was too low. Therefore, based on his audit experience, purchases for the audit period were marked up 125 percent to determine petitioner's gross sales. Although petitioner kept a record of its taxable sales, it computed taxable sales for sales tax purposes by estimating that 40 percent of the gross sales were taxable sales. Based on his audit experience, this percentage was deemed too low and the auditor determined that 85 percent of the audited gross sales were taxable sales. These adjustments resulted in additional taxable sales of \$681,964.68. Petitioner's books at the time of the sale indicated that the depreciated valuation of the fixed assets was in the amount of \$75,000.00. Since the purchaser paid tax on a valuation of \$5,000.00, fixed assets per bulk sale were assessed at an additional \$70,000.00.

3. On May 25, 1982, the Audit Division issued to petitioner, Romar Deli, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for tax due of \$53,060.33, plus penalty of \$10,098.99 and interest of \$10,273.43, for a total due of \$73,432.75 for the period March 1, 1979 through February 19, 1982.

4. Since the purchaser had continued the business in the same manner as petitioner, the Audit Division performed an observation test on June 25, 1982 from 8:45 A.M. to 8:30 P.M. Said test indicated that 79.3 percent of the gross

sales were taxable sales. However, the auditor did not adjust the taxable sales previously determined.

5. At the hearing, the ledger of Romar Deli, Inc. was submitted as evidence. The ledger contained the daily postings of sales, purchases and cash and check disbursements for the business from May, 1978 through February, 1982. However, no purchase invoices, guest checks or cash register tapes were submitted to substantiate the postings.

6. An analysis of the food sold by petitioner indicating the cost, sales price and the gross profit percentage for each food item for the months of May, 1980, July, 1981 and February, 1982 was submitted into evidence. The selling prices were allegedly taken from old menus and the costs were allegedly verified through the distributors. However, no menus or purchase invoices were submitted to substantiate the amounts shown in the analysis.

7. A portion of the document that related to the purchase of the business by petitioner in April, 1978 was also submitted as evidence. Said document indicated that fixtures were valued at \$5,000.00. However, the U.S. Corporation Income Tax Return, Form 1120, with an attached depreciation schedule, Form 4562, filed by petitioner for fiscal year ending March 31, 1980, indicated that the total cost of furniture, fixtures and equipment was \$121,014.29.

8. Petitioner did not raise the issue of penalty and interest at the hearing.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law authorizes the use of external indices to estimate tax due. Since petitioner did not have cash register tapes, guest checks or purchase invoices, the Audit Division could not verify

taxable sales or ascertain the exact amount of tax due. Therefore, the Audit Division's determination of tax due based on audit experience was proper.

B. That it is incumbent upon petitioner to show that the additional taxes due as determined by the Audit Division were incorrect. Petitioner has not shown or substantiated errors in the methodology or result of the audit and thus no reduction of the tax found to be due is warranted (Matter of Manny Convissar v. State Tax Commission, 69 A.D.2d 929).

C. That since the observation test performed by the Audit Division indicated that 79.3 percent of the gross sales were taxable sales, the Audit Division is directed to recompute the taxable sales using said percentage.

D. That the petition of Romar Deli, Inc. is granted to the extent indicated in Conclusion of Law "C", supra, and in all other respects denied; and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 25, 1982, as modified by the Audit Division, is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 18 1985

Roderick W. Chen
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark J. [Signature]
COMMISSIONER