

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

FALIRO ENTERPRISES, 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 December 1, 1978
through November 30, 1981. :

Petitioner, Faliro Enterprises, Inc., c/o Anastasios Patelis, 480 Second Avenue, 25B, New York, New York, 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 November 30, 1981 (File No. 39318).

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 December 4, 1985 at 1:15 P.M. Petitioner appeared by Julius Mendalis, Esq. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly estimated petitioner's taxable sales on the basis of external indices.

II. Whether the Audit Division correctly determined the value of the furniture and fixtures acquired by petitioner during the audit period.

III. Whether the Audit Division correctly determined the value of furniture and fixtures transferred in the bulk sale of petitioner's business assets.

FINDINGS OF FACT

1. Petitioner, Faliro Enterprises, Inc., operated a coffee shop and restaurant located at 1014 Lexington Avenue, New York, New York. The business was sold on November 4, 1981.

2. On February 10, 1982, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period December 1, 1978 through November 30, 1981 for taxes due of \$31,513.33, plus penalty and interest of \$11,865.40, for a total of \$43,378.73. The Audit Division had scheduled an audit for January 19, 1982. At that time, the books and records made available were incomplete. The auditor advised petitioner of the additional records required to complete the audit. The additional records could not be provided prior to the expiration of the ninety day period for notifying the purchaser of the business of any liability due from petitioner. Therefore, the Audit Division estimated the taxes due on the foregoing notice on the basis of available information. The auditor obtained petitioner's rent and insurance expense of \$47,002.00 from the corporation income tax returns filed for the fiscal years ended September 30, 1979, 1980 and 1981. This amount was divided by 8.3 percent (the ratio of sales to rent, taxes and insurance costs per "Restaurant Industry Operations Report" for 1979 published by Laventhal & Horwath) to arrive at gross sales of \$566,288.64 and tax due thereon of \$45,421.09. Petitioner paid taxes of \$13,907.76 for the same period, leaving additional taxes due of \$31,513.33.

3. On August 25, 1982, the Audit Division issued a second notice asserting additional tax due of \$6,822.46, plus applicable penalty and interest for the periods ended November 30, 1980, May 31, 1981 and November 30, 1981. This notice was in addition to the notice issued February 10, 1982 and was based on

the subsequent examination of additional books and records. Petitioner's corporation income tax return for the fiscal year ended September 30, 1980 showed the acquisition of fixtures and equipment amounting to \$20,000.00 on September 1, 1980. The return for the following year indicated an alteration of \$2,030.00 on May 31, 1981. Petitioner did not produce any purchase invoices or other documentation to establish that sales tax was paid on the purchases of the fixtures and equipment and thus petitioner was held liable for use tax of \$1,762.40. The Audit Division also determined that the book value of petitioner's assets when the business was sold was \$63,334.00 (cost per tax return, September 30, 1981 - \$54,034.00 + additions - \$22,030.00 = \$76,064.00 less depreciation - \$12,730.00). The bulk sales tax computed thereon was \$5,225.06. The Audit Division had received a bulk sales tax of \$165.00 and therefore assessed the difference of \$5,060.06.

4. The Audit Division reconciled gross sales from the general ledger with federal corporation income tax returns and sales tax returns and found insignificant discrepancies. However, petitioner did not have cash register tapes, guest checks or any other record to make an independent verification of receipts. Purchases shown on the corporation tax returns also reconciled with the books and records. The purchase invoices were not available for verification. Petitioner's reported overall markup based on sales and purchases per the books and records was 178.9 percent.

5. The business was located in a residential neighborhood. Petitioner purchased the business in October, 1978 for \$67,000.00. At that time, the business was known as "Kasey's Kitchen". Petitioner operated the restaurant as a coffee shop until May, 1980. Sales consisted primarily of coffee, pastries, hamburgers, sandwiches and french fries. Thereafter, petitioner closed for

approximately three months for renovations. The business reopened as the "Byzantian Restaurant" which offered a variety of Greek foods and also sold beer and wine. The dimensions of the premises were 11 feet frontage by 45 feet in depth. Prior to May, 1980, there was seating for 24 persons (7 counter seats and booths for 17). Petitioner removed the counter as part of the renovations in May, 1980 which increased the seating capacity to 36.

6. The contract of sale between petitioner and Sirimson, Inc. in October, 1978 allocated the purchase price of \$67,000.00 as follows:

fixtures	-	\$ 3,000.00
leasehold	-	51,000.00
goodwill	-	13,000.00

The contract also provided for the assignment of a twelve year lease that expired in 1984. The depreciation schedule filed with petitioner's corporation income tax return for the fiscal year ended September 30, 1979 listed the cost of furniture, fixtures and lease as \$54,033.50. Petitioner computed its allowance for depreciation on the entire amount. On November 4, 1981, petitioner sold the business to NNC Enterprises, Inc. for \$85,000.00. The only allocation of the purchase price in the contract was \$2,000.00 to fixtures. Petitioner also assigned the existing lease to the purchaser.

7. Petitioner took the position that the statistical data contained in the publication used by the Audit Division to estimate sales was compiled from "restaurant" operations and was not applicable to its coffee shop or fast food type of business. Although petitioner objected to the use of said publication, it offered as an alternative an estimate of sales based on the ratio shown for sales to payroll costs (25 percent). Petitioner submitted its payroll records for the audit period, including the payroll ledger and employer's

quarterly federal tax returns. Total wages paid for the audit period amounted to \$47,450.00. Estimated sales based on the payroll records were \$189,800.00.

8. With respect to use taxes, petitioner argued that the value of the assets sold included a value for the existing lease on the premises rather than leasehold improvements as determined by the Audit Division. For income tax purposes, petitioner listed \$74,033.50 as the value for fixed depreciable assets. There was no value shown for intangible assets such as a lease or leasehold. Petitioner offered no evidence to establish that any part of the assets it sold were for the lease.

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."

B. That petitioner did not have cash register tapes, guest checks or any other record that would serve as a verifiable record of taxable sales. Moreover, it did not provide purchase invoices in order to verify the accuracy of the cost of goods sold. Because of the incomplete books and records, the Audit Division could not rely on the sales or purchases shown on the corporation tax returns or in the general ledger (Matter of Skiadas v. State Tax Commission, 95 A.D.2d 971) and properly estimated taxable sales in accordance with the provisions of section 1138(a) of the Tax Law (Matter of McClusky's Steak House, Inc. v. State Tax Commission, 80 A.D.2d 713).

C. That under the circumstances herein, the audit method selected was reasonable. When a taxpayer's recordkeeping is faulty, exactness is not

required of the examiner's audit (Matter of Meyer v. State Tax Commission, 61 A.D.2d 223). Petitioner failed to sustain its burden of showing that the method of audit or the amount of tax assessed was erroneous.

D. That petitioner is liable for tax on the fixtures and equipment acquired for \$22,030.00 pursuant to section 1133(b) of the Tax Law.

E. That the bulk sales tax was paid by the purchaser on the value of \$2,000.00 placed on the fixtures in the contract of sale. The book value of the assets of \$63,334.00, as set forth in Finding of Fact "3", was the proper basis for determining the bulk sales tax (Matter of WEBR, Inc. v. State Tax Commission, 58 A.D. 471). Accordingly, petitioner is liable for the additional bulk sales tax of \$5,060.06 which it failed to collect from the purchaser pursuant to section 1133(a) of the Tax Law.

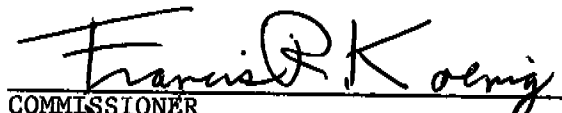
F. That the petition of Faliro Enterprises, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued February 10, 1982 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

JUN 19 1986


PRESIDENT


COMMISSIONER


COMMISSIONER