

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
BURT AND BLANCHE SMITH	:	
D/B/A SMITH'S GROCERY	:	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 November 30, 1981.	:	

Petitioners, Burt and Blanche Smith, Smithboro, New York 13840, 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 November 30, 1981 (File No. 39449).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 164 Hawley Street, Binghamton, New York, on December 20, 1984 at 1:15 P.M. Petitioners appeared by Walter R. Mandeville, P.A. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined additional sales taxes due from petitioners based on an examination of available books and records.

FINDINGS OF FACT

1. Petitioners, Burt and Blanche Smith d/b/a Smith's Grocery, operated a grocery store located in Smithboro, New York. Petitioners also sold gasoline and a substantial variety of dry goods.

2. On June 20, 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 petitioners covering the period March 1, 1979 through November 30, 1981 for taxes due of \$4,819.70, plus interest of \$888.30, for a total of \$5,708.00.

3. On audit, the Audit Division found that petitioners did not maintain books of original entry. The only sales records available were cash register tapes which showed total sales and sales tax collected. Purchase records consisted of invoices and a check register. The check register showed disbursements and bank deposits.

In order to verify the accuracy of the taxable sales reported, the Audit Division analyzed purchase invoices for the year 1980 to determine those purchases that would result in taxable sales when resold (excluding gasoline and kerosene). The taxable purchases amounted to \$126,666.07 which represented 38.22 percent of total purchases (excluding gasoline and kerosene purchases). This percentage was applied to purchases of \$373,006.67 for the period March 1, 1979 through November 30, 1980 after allowing for pilferage and self-consumed items to determine taxable purchases of \$142,563.15. The purchases were placed in thirteen different categories and a markup percentage was computed for each category based on costs and selling prices in effect at the time of the audit (approximately February, 1982). The weighted average markup of all categories was 34.59 percent. The weighted average markup was applied to the taxable purchases determined above to arrive at taxable sales of \$191,875.04.

A weighted average markup for gasoline and kerosene of 8.15 percent was computed based on purchases and sales in 1980. This markup was applied to gasoline and kerosene purchases for the period March 1, 1979 through November 30, 1980 to determine sales of \$61,505.30. The combined audited taxable sales were \$253,381.04. Petitioners reported taxable sales of \$205,932.00 for the same period, leaving additional taxable sales of \$47,449.04 or an error factor of

23.04 percent. The error factor was used to determine additional taxable sales for the entire audit period of \$79,603.87 and tax due thereon of \$4,776.23.

Use tax of \$43.47 was assessed on the self-consumed taxable purchases.

4. Petitioners submitted federal income tax returns for the years 1979, 1980 and 1981. Total gross sales and total purchases shown on said returns were \$899,338.11 and \$757,809.63, respectively, for a total gross profit of \$141,528.48. Petitioners performed an analysis of these figures with the following results:

	<u>Gross</u>	<u>Taxable</u>	<u>Exempt</u>
Sales	\$899,338.11	\$431,412.49	\$467,925.62
Purchases	<u>757,809.63</u>	<u>282,186.91</u>	<u>475,622.72</u>
Gross Profit	\$141,528.48	\$149,225.58	(\$ 7,697.10)

Petitioners concluded from the analysis that the audit results were erroneous since the gross profit on taxable items exceeded the overall gross profit.

In addition, petitioners argued that the audit did not give consideration to nontaxable sales made to exempt organizations and sales by the case. They further argued that it was improper to apply a markup percentage computed in 1982 to purchases made in prior years.

Petitioners did not substantiate any nontaxable sales. They also failed to establish what effect case sales had on the weighted markup or that their markup was lower in 1979, 1980 and 1981 than in 1982.

CONCLUSIONS OF LAW

A. That petitioners maintained incomplete and inadequate books and records. Moreover, the cash register tapes were useless for verifying taxable sales reported in that it could not be determined if sales tax was charged on

all taxable items (Matter of Carl J. Licata, et al. v. Roderick Chu, et al, 64 N.Y.2d 873).

Accordingly, the Audit Division properly determined taxable sales from available information and on the basis of external indices as provided in section 1138(a) of the Tax Law (Matter of Sakran v. State Tax Commission, 73 A.D.2d 989).

B. That that Audit Division reasonably calculated petitioners' tax liability and petitioners have 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 Burt and Blanche Smith d/b/a Smith's Grocery is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 20, 1982 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JUL 10 1985

Roderick A. Clem
PRESIDENT

Francis R. Koehn
COMMISSIONER

Mark J. Smith
COMMISSIONER