

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
JOSEPH A. BONANNO	:	DECISION
D/B/A ELWOOD MARKET OF THORNWOOD	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Periods December 1, 1975	:	
through February 29, 1976 and September 1, 1977	:	
through August 31, 1981.	:	

Petitioner, Joseph A. Bonanno d/b/a Elwood Market of Thornwood, 810 Commerce Street, Thornwood, New York 10594, 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 periods December 1, 1975 through February 29, 1976 and September 1, 1977 through August 31, 1981 (File No. 39627).

A hearing was commenced before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 8, 1985 at 9:15 A.M. and continued to conclusion on November 22, 1985 at 9:40 A.M. Petitioner appeared by Joseph Grabowski. The Audit Division appeared by John P. Dugan, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined petitioner's additional sales and use tax due.

II. Whether the Audit Division properly credited petitioner for payments made toward his sales and use tax liability for the period in issue.

III. Whether petitioner's failure to timely remit sales tax was due to reasonable cause and not to willful neglect, thus warranting the cancellation of penalty and that portion of interest in excess of the minimum statutory rate.

FINDINGS OF FACT

1. On June 18, 1982, as the result of a field audit, the Audit Division issued two notices of determination and demands for payment of sales and use taxes due against petitioner, Joseph A. Bonanno d/b/a Elwood Market of Thornwood. The first notice was in the amount of \$17,259.54, plus penalty of \$4,280.78 and interest of \$6,880.29, for a total due of \$28,420.61 for the periods December 1, 1975 through February 29, 1976 and September 1, 1977 through November 30, 1980. The second notice was in the amount of \$6,798.33, plus penalty of \$1,067.85 and interest of \$890.79, for a total due of \$8,756.97 for the period December 1, 1980 through August 31, 1981.

2. Petitioner operated a grocery store and delicatessen which sold sandwiches and hot meals in addition to groceries. The only records petitioner had available for audit were bank statements and an incomplete set of purchase invoices.

3. In view of the lack of available records, the auditor performed a purchase markup test of the bank statements and purchase invoices for the months of September, October and November, 1980. A comparison of the statements and invoices revealed that purchases for the test period exceeded bank deposits by 132.9 percent. The auditor applied this percentage to total bank deposits for the audit period to determine total audited purchases. The auditor computed a taxable percentage of 50.35 percent based on the available purchase invoices for the test period. The auditor then compared purchases to selling prices supplied by petitioner or taken from the shelves. The result was a weighted

markup of 46.49 percent. The markup was then applied to audited taxable purchases to determine audited taxable sales.

4. Petitioner maintains that credit should have been allowed for a lower markup on beer and soda sales by the six pack. The Audit Division pointed out that, following completion of the audit, adjustments were made for six-pack sales which reduced the markup on beer and soda sales. Petitioner performed his own markup test on coffee purchases, including the costs of the cup, lid, sugar and milk in the calculation. Petitioner calculated a lower markup than the auditor, but failed to take into account that the lower markup would have to be applied to a higher purchase amount, which included the lid, cup, sugar and milk purchases. The resulting difference between petitioner's audited coffee sales and those computed by the auditor would be negligible.

5. Upon completion of the audit, petitioner began making payments. Some payments were made prior to the issuance of the notices of determination and were accounted for in the notices. The remainder of the payments occurred after the notices were issued and, as of the hearing date, petitioner had not yet been given credit for them. Following the hearing, the auditor examined petitioner's payment records and determined that the sales tax due, taking account of total payments received, was \$16,242.62, plus penalty of \$9,823.13 and interest of \$15,529.01, for a total due of \$41,594.76 as of December 20, 1985. Included in this adjustment was the elimination of the period December 1, 1975 through February 29, 1976 due to the expiration of the statute of limitations for assessment.

6. Petitioner presented no credible documentary or other evidence to establish that his failure to timely remit sales tax was due to reasonable

cause. Out of the sixteen quarters constituting the revised audit period, petitioner filed only one sales tax return and that return was filed over four months late.

CONCLUSIONS OF LAW

A. That a "...vendor is obligated to maintain records of his sales for audit purposes (Tax Law, §1135), and the State, when conducting an audit, must determine the amount of tax due 'from such information as may be available' but '[i]f necessary, the tax may be estimated on the basis of external indices' (Tax Law, §1138, subd. [a], par [1])." Korba v. New York State Tax Commission, 84 A.D.2d 655, 656. Exactness in determining the amount of sales tax liability is not required where it is the petitioner's own failure to maintain proper records which necessitates the use of external indices. Markowitz v. State Tax Commission, 54 A.D.2d 1023 aff'd 44 N.Y.2d 684.

B. That, in view of petitioner's complete lack of adequate records with which to conduct an audit, the auditor was justified in resorting to a test period and markup test method of audit. Credit was given for petitioner's sales of beer and soda by the six pack and petitioner offered no other evidence sufficient to prove the audit findings erroneous.

C. That petitioner has not established that his failure to timely remit sales tax was due to reasonable cause and not willful neglect. Accordingly, the assessment of penalty and interest pursuant to Tax Law § 1145(a) is sustained.

D. That as a result of the payments made by petitioner discussed in Finding of Fact "5", the sales and use tax due is reduced to \$16,242.62 plus penalty and interest.


E. That the petition of Joseph A. Bonanno d/b/a Elwood Market of Thornwood is granted to the extent indicated in Conclusion of Law "D"; that the Audit

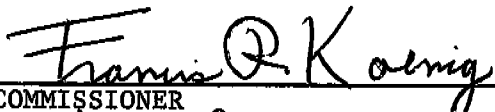
Division is directed to modify the notices of determination and demands for payment of sales and use taxes due issued June 18, 1982 accordingly; and that, except as so granted, the petition is in all other respects denied.

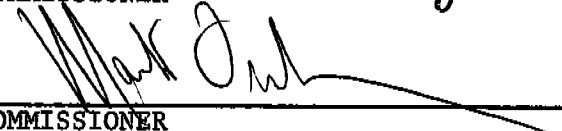
DATED: Albany, New York

STATE TAX COMMISSION

APR 21 1986


PRESIDENT


COMMISSIONER


COMMISSIONER