

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
LA PINETA, 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 Periods Ended	:	
November 30, 1980 through January 11, 1982.	:	

Petitioner, La Pineta, Inc., c/o Joseph Geraci, 735 Ocean Parkway, Brooklyn, New York 11230, 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 ended November 30, 1980 through January 11, 1982 (File No. 39674).

A hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 14, 1985 at 1:15 P.M., with all briefs to be submitted by May 30, 1985. Petitioner appeared by Alfred F. Morace, P.A. The Audit Division appeared by John P. Dugan, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined additional sales taxes due from La Pineta, Inc. for the periods ended November 30, 1980 through January 11, 1982.

FINDINGS OF FACT

1. On June 22, 1982, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due under Articles 28 and 29 of the Tax Law against the petitioner, La Pineta, Inc., for taxes due of \$3,945.52, plus penalty of \$491.58 and interest of \$333.14, for a total amount due of

\$4,770.24 for the periods ended November 30, 1980 through January 11, 1982.

The notice contained the following explanation:

"As a result of a review of returns filed and you (sic) not sending information requested, your reported taxable sales have been increased by 35%. The following taxes are determined to be due in accordance with Section 1138 of the Sales Tax Law."

2. On September 15, 1982, the petitioner timely filed a petition for a hearing to review the above notice of determination. The petitioner claims that the notice is not consistent with the books and records which were made available to the Audit Division. The Audit Division claims that its audit method was proper and correct.

3. La Pineta, Inc. owned and operated a restaurant which was located at 306 West 48th Street in New York City. The restaurant sold food, beer, liquor and soft drinks. During the period at issue, the restaurant experienced declining sales and petitioner's president, Joseph Geraci, had to loan money to petitioner to pay its bills. As a result of the drop in sales, the restaurant was sold on January 11, 1982 to Mount Blanc Restaurant Corp. for \$3,000.00, which was the fair market value of the fixtures and equipment.

4. On April 9, 1982, the Audit Division sent petitioner a Bulk Sale Questionnaire requesting information about the sale of the restaurant and data regarding petitioner's purchases for the quarters ended February 29, 1980 through November 30, 1980. Since the questionnaire was not completed and returned to the Audit Division within the required ten days, the aforementioned notice was issued against the petitioner (see Finding of Fact "1"). The questionnaire was subsequently completed and returned to the Audit Division on May 4, 1983.

5. As the result of a pre-hearing conference, the Audit Division sent an auditor to Mr. Geraci's residence to review the petitioner's books and records

and determine if the assessment should be reduced or eliminated. The auditor found that the petitioner's books and records were inadequate. The petitioner maintained no cash register tapes, guest checks, sales or purchases journal or purchase invoices. Pursuant to the records which were maintained, the petitioner's purchases of food, liquor, beer and soda were lumped together in a single amount. Additionally, according to petitioner's U.S. Corporation Income Tax Returns for the years 1981 and 1982, petitioner's markup was only 31 percent, which was considered excessively low for a restaurant. The auditor concluded that there were, in fact, grounds for increasing the assessment; however, no actual audit of petitioner's books and records was performed.

6. At the hearing held herein, petitioner's representative introduced into evidence (Petitioner's Exhibit "1") worksheets which purported to be a summary of petitioner's sales by category, i.e. food, beverages, taxes and tips, taken from food tickets for the entire audit period. The worksheets, however, do not support petitioner's claim that the assessment is erroneous.

CONCLUSIONS OF LAW

A. That section 1138(a)(1) of the Tax Law provides, in part, that if a return required to be filed is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined from such information as may be available. If necessary, the tax may be estimated on the basis of external indices such as stock on hand, purchases, rental paid, number of employees or other factors.

B. That in determining the amount of a sales tax assessment, it is the duty of the Audit Division to select a method "reasonably calculated to reflect the taxes due" (Matter of Grant Co. v. Joseph, 2 N.Y.2d 196, 206). When the Audit Division employs such a method, it becomes incumbent upon the

petitioner to establish error (Matter of Meyer v. State Tax Commssion, 61 A.D. 2d 223 lv. to app. den. 44 N.Y.2d 645).

C. That, notwithstanding the inadequacy of petitioner's books and records, the Audit Division's increasing of petitioner's taxable sales by 35 percent was not proper auditing methodology and the assessment must be cancelled. The auditor visited Mr. Geraci's residence and was afforded the opportunity to conduct an audit of petitioner's books and records, but neglected to do so (see Finding of Fact "5") (see Matter of Chartair, Inc. v. State Tax Comm. 65 A.D.2d 44). The assessment at issue herein was therefore not based on any "external indices" as provided by section 1138(a)(1) of the Tax Law.

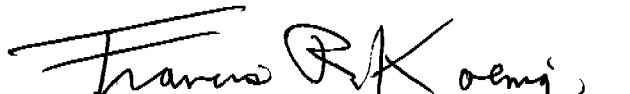
D. That the petition of La Pineta, Inc. is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 22, 1982 is hereby cancelled.

DATED: Albany, New York

FEB 18 1986

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER