

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

JACK I. YATES

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 September 1, 1979
through May 31, 1982.

Petitioner, Jack I. Yates, 115 Club Street, Cape Vincent, New York 13618, 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 September 1, 1979 through May 31, 1982 (File No. 39982).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on October 17, 1984 at 1:15 P.M. Petitioner appeared by Victor Chini, Esq. The Audit Division appeared by John P. Dugan, Esq. (Anne Murphy, Esq., of counsel).

ISSUE

Whether the audit procedures used by the Audit Division in an examination of petitioner's books and records were proper and whether the additional taxable sales determined as a result thereof were correct.

FINDINGS OF FACT

1. Petitioner, Jack I. Yates, operated a bar located at 115 Club Street, Cape Vincent, New York.

2. On October 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 petitioner covering the period September 1, 1979 through May 31, 1982 for taxes due of \$2,115.75, plus interest of \$408.29, for a total of \$2,524.04.

3. On audit, the Audit Division determined that petitioner's reported markup per the books and records for 1981 was 132 percent. Based on the auditor's experience, this markup appeared low for the type of business. Additionally, the auditor found that the sales journal was incomplete in that there were no entries for several months and cash register tapes were not available for audit.

Because of petitioner's insufficient recordkeeping, the Audit Division performed a markup test in order to verify the accuracy of taxable sales reported on the sales tax returns. Petitioner furnished the Audit Division with selling prices and the serving sizes of liquor drinks and beer. The Audit Division computed a weighted average markup of 213 percent based on an analysis of purchase invoices for the period March through May, 1982. This markup was applied to liquor, beer and wine purchases for 1981 which resulted in taxable sales of \$39,035.00. Petitioner reported taxable sales of \$28,280.00 for the same period, leaving additional taxable sales of \$10,755.00 for an underreporting factor of 38.03 percent. This percentage was applied to taxable sales reported for the audit period to determine additional taxable sales of \$30,225.00 and tax due thereon of \$2,115.75.

4. Following a pre-hearing conference with the Tax Appeals Bureau, the Audit Division agreed to reduce the liability to \$1,263.50.

5. Petitioner's cash register did not produce a tape. Petitioner made daily entries for sales in the sales journal from a reading off the cash register.

6. Petitioner's accountant, Walter Ross, analyzed purchases of beer, liquor and wine for 1981. His analysis resulted in a markup of 105.7 percent (205.7 percent of cost to sales). The primary difference between this analysis and the Audit Division's was in the computation of the unit cost of a drink. Petitioner used purchases for the entire year of 1981 and computed sales of \$24,570.55. The books and records reflected sales of \$28,280.00 for 1981.

Based on the foregoing analysis, petitioner concluded that sales taxes were overpaid as opposed to underreported.

CONCLUSIONS OF LAW

A. That section 1135(a) of the Tax Law provides that every person required to collect tax shall keep records of every sale and of all amounts paid, charged or due thereon and of the tax payable thereon. Such records shall include a true copy of each sales slip, invoice, receipt or statement.

Petitioner did not have cash register tapes or any other record that would serve as a verifiable record of taxable sales. Hand-recorded entries in a ledger of gross sales figures for each day were not reliable records to satisfy the statutory requirements that records of individual sales be retained (Matter of Skiadas v. State Tax Commission, 95 A.D.2d 971). Under such circumstances, the Audit Division's use of a test period and markup percentage audit was proper in accordance with section 1138(a) of the Tax Law (Matter of Urban Liquors, Inc. v. State Tax Commission, 90 A.D.2d 576; Matter of Hanratty's/732 Amsterdam Tavern, Inc. v. State Tax Commission, 88 A.D.2d 1028).

B. That the Audit Division reasonably calculated petitioner's tax liability. 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 has the burden of demonstrating by clear and convincing evidence that the amount of tax assessed was erroneous (Matter of Urban Liquors, Inc., supra). The evidence offered by petitioner (Finding of Fact "6") did not meet this burden.

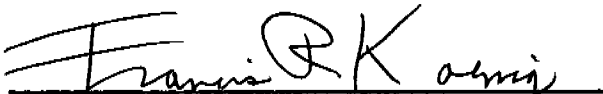
C. That the petition of Jack I. Yates is granted to the extent that the additional taxes due are reduced to \$1,263.50. The Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued October 20, 1982; and that, except as so granted, the petition is in all other respects denied.

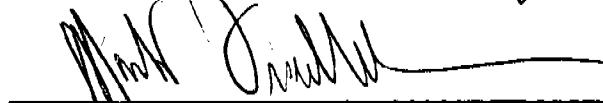
DATED: Albany, New York

STATE TAX COMMISSION

APR 15 1985


PRESIDENT


COMMISSIONER


COMMISSIONER