

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
WILLIAM G. MILEY, JR.	:	DECISION
D/B/A HONEST BILL'S	:	
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 August 31,	:	
1980 through August 27, 1982.	:	

Petitioner, William G. Miley, Jr., d/b/a Honest Bill's, 116 Sampson Street, Jamestown, New York 14701, 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 ended August 31, 1980 through August 27, 1982 (File No. 40969).

A formal hearing was held before James J. Morris, Jr., Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York on March 13, 1985 at 10:45 A.M. Petitioner appeared by Lodesto & Bailey, Esqs. (John L. LaMancuso, Esq. of counsel). The Audit Division appeared by John P. Dugan Esq. (Deborah J. Dwyer, Esq. of counsel).

ISSUE

Whether the Audit Division properly determined additional taxes due from petitioner.

FINDINGS OF FACT

1. During the periods at issue, William G. Miley, Jr. d/b/a Honest Bill's operated a take-out pizza and submarine sandwich shop. He sold pizzas, submarine sandwiches, chicken wings and soda for off-premises consumption. The only

table in the shop was for the convenience of patrons waiting for their orders. Food was not sold for on-premises consumption.

2. On September 8, 1982 the Department of Taxation and Finance received a "Notification of Sale, Transfer or Assignment in Bulk" (Form ST-274) from the prospective purchasers of the business.

3. On September 24, 1982 the Audit Division sent a letter to petitioner requesting copies of petitioner's federal returns for the years 1980 and 1981, a copy of the sales contract and the completion of a Bulk Sale Questionnaire (Form AU-196.8). Neither a completed Bulk Sale Questionnaire nor a copy of the contract of sale was received by the Audit Division in response to that request.

4. On December 3, 1982, the Audit Division issued to petitioner, William G. Miley, Jr. d/b/a Honest Bill's a Notice of Determination and Demand for Payment of Sales and Use Taxes Due in the amount of \$1,764.62 plus penalty and interest for the periods ended August 31, 1980 through August 27, 1982. Said notice explained:

"As a result of a review of returns filed and you not sending information requested, your reported taxable sales have been increased by 25%. The following taxes are determined to be due in accordance with section 1138 of the Sales Tax Law."

CONCLUSIONS OF LAW

A. Section 1138(a)(1) 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. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors."

B. That although a vendor is obligated to maintain records of his sales for audit purposes (Tax Law, §1135), the State, when conducting an audit, must

determine the amount of tax due from such information as may be available and, if necessary, the tax may be estimated on the basis of external indicies (Tax Law, §1138, subd. [a]; Matter of George Korba v. New York State Tax Comm., et al., 84 A.D.2d 655). However, the audit method adopted must be reasonably calculated to relect the taxes due (W. T. Grant Co. v. Lazarus, 2 N.Y.2d 196).

C. That the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued to petitioner herein was not "determined from such information as may be available," nor was it "estimated on the basis of external indices such as stock on hand, purchases, rents or charges, comparable rents or charges, types of accomdations and services, number of employees or other factors."

D. That in accordance with Conclusion of Law "C", the petition of William G. Miley, Jr., d/b/a Honest Bill's is granted and Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated December 3, 1982 is cancelled.

DATED: Albany, NY

OCT 30 1985

STATE TAX COMMISSION

Rodrick W. Cline
PRESIDENT

Francis R. Koony
COMMISSIONER

Mark Smith
COMMISSIONER