

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
JACK VENGROFSKY : 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 June 1, 1978 :  
through May 31, 1981.

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Petitioner, Jack Vengrofsky, 90-07 31st Avenue, Jackson Heights, New York 11372, 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 June 1, 1978 through May 31, 1981 (File No. 41161).

A hearing was held before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 23, 1985 at 9:25 A.M. with all briefs to be submitted by September 23, 1985. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Mark F. Volk, Esq., of counsel).

ISSUE

Whether based upon tests of books and records, the Audit Division properly determined additional sales tax due from petitioner for the period June 1, 1978 through May 31, 1981.

FINDINGS OF FACT

1. On March 1, 1982, the Audit Division, as the result of a field audit, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against the petitioner, Jack Vengrofsky, assessing sales tax of \$6,780.64,

plus interest of \$1,429.13, for a total due of \$8,209.77 for the period June 1, 1978 through May 31, 1981. Mr. Vengrofsky executed consents extending the statute of limitations for issuing an assessment for sales and use taxes for the period June 1, 1978 through May 31, 1981 to March 20, 1982.

2. On May 24, 1982, the petitioner timely filed a petition for a hearing to review the notice of determination. Petitioner contends that his sales, as determined by the Audit Division, were incorrect and, further, that the liquor and wine markups which were utilized were excessive.

3. During the period at issue and at the present time, the petitioner operated a liquor store at 90-07 31st Avenue, Jackson Heights, New York. In or about June, 1981, the Audit Division initiated an audit of petitioner's books and records. Records requested and made available to the auditor included a sales journal, purchase invoices and cancelled checks. The auditor also requested a disbursements journal, however, none was made available. In order to verify purchases, the auditor analyzed cancelled checks and found that for the audit period purchases totalled \$225,485.00 whereas sales reported by the petitioner totalled \$184,586.00 a difference of \$40,826.00 which could not be explained by petitioner.

4. On July 30, 1981 the petitioner executed a consent agreeing to the use of a test period in performing the sales tax audit. The auditor first determined that liquor and wine represented 79% and 21% respectively of petitioner's purchases based on an analysis of purchase invoices for the months of September 1980 and May 1981. Said months were average and indicative of the petitioner's overall purchases. The auditor next computed markups on liquor and wine of 16.22% and 31.79% respectively based upon current costs and selling prices

obtained from the shelves and supplied by petitioner. The auditor then applied the above percentages to purchases for the audit period and determined adjusted taxable sales of \$269,344.00 which when reduced by reported taxable sales of \$184,586.00 resulted in additional taxable sales of \$84,758.00, a margin of error of 45.92%. Lastly, the auditor computed additional sales taxes of \$6,780.64.

5. At the hearing the petitioner claimed that his books and records were sent to his accountant to prepare for the hearing and that they were apparently lost in the mail. Petitioner was given additional time after the close of the hearing to submit whatever evidence he desired to support his contentions, however, no such evidence has been received.

#### CONCLUSIONS OF LAW

A. That the failure of petitioner to produce a disbursements journal does not per se mean that his books and records were incomplete or inadequate; the Audit Division was able to determine his purchases from cancelled checks. However, since the petitioner executed a consent agreeing to the use of a test period, the Audit Division's use of test periods was proper.

B. That once it is established that the audit method is proper, the burden then rests upon the taxpayer to demonstrate by clear and convincing evidence that the method of audit or the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization v. Tully, 85 AD2d 858). Petitioner has failed to overcome this burden of showing error.

C. That the petition of Jack Vengrofsky is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 1, 1982 is sustained.

DATED: Albany, New York

DEC 13 1985

STATE TAX COMMISSION

*Raduich A. Clem*  
PRESIDENT

*Francis R. Koenig*  
COMMISSIONER

*Mark J. [Signature]*  
COMMISSIONER