

STATE OF NEW YORK

STATE TAX COMMISSION

In The Matter of The Petition

of

PECONIC RESTAURANT & MARINA, 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 Period September 1,
1979 through May 31, 1982.

Petitioner, Peconic Restaurant & Marina, Inc., Noyac Road, Southampton,
New York 11968, 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. 41978).

A formal 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 October 11, 1985 at 9:00 A.M. Petitioner appeared by Katherine G.
Trakas, CPA. The Audit Division appeared by John P. Dugan, Esq. (Mark F. Volk,
Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined additional sales tax
due from Peconic Restaurant & Marina, Inc. for the period September 1, 1979
through May 31, 1982.

II. If so, whether the penalty and interest in excess of the statutory
minimum should be waived.

FINDINGS OF FACT

1. On December 20, 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, Peconic Restaurant & Marina, Inc. ("Peconic"),

for taxes due of \$6,528.00, plus penalty of \$1,342.08 and interest of \$1,443.67, for a total amount due of \$9,313.75 for the period September 1, 1979 through May 31, 1982.

2. On January 30, 1983, Peconic timely filed a petition for a hearing to review the Notice of Determination. Petitioner contends that in computing taxable sales, the examiner failed to consider inventory on hand. Petitioner claims that the hourly rate for repair labor was less during 1979 and 1980 than it was during 1982. Lastly, the petitioner argued that the examiner's estimate of winter storage charges and bottom painting was erroneous.

3. During the period at issue, the petitioner operated a small marina in the town of Southampton, New York. Petitioner's sales consisted of gasoline, marine parts, fishing tackle, boat repairs, bottom painting, summer dockage and winter storage. The petitioner provided its regular customers with a book containing approximately 50 incomplete sales invoices. Each time a customer made a purchase, the petitioner would complete a sales invoice and place it in a folder bearing the customer's name at petitioner's business premise. Every month the petitioner would bill the customer for sales made based on the invoices in the folder. The invoices were unnumbered and apparently constituted petitioner's sales records. Petitioner also prepared a sales invoice for transient customers, however, said invoices were not retained by petitioner. Taxable sales reported on sales and use tax returns were estimated by petitioner.

4. After concluding that petitioner's method of recording sales was inadequate, the examiner determined gross sales and taxable sales by the use of a test period audit method and other information that was available. Audited gross sales were calculated as follows:

- a) Gasoline purchases for the audit period were determined by analyzing check stubs for the fiscal year ended February 28, 1981. For this test year gasoline purchases amounted to 37.1% of total purchases (\$15,387 divided by \$41,434 = 37.1%). Application of this percentage to total merchandise purchases for the audit period resulted in total gasoline purchases of \$37,776. These purchases were marked up 13.47% (per analysis of July 20, 1982 selling price) to compute audited gross gasoline sales of \$42,864.
- b) "Other merchandise" purchases, i.e. marine parts and fishing tackle, of \$64,098 were marked up 33% to compute audited gross sales of other merchandise of \$85,250. The markup percentage was arrived at through discussion with vendor and random sampling of available merchandise. Petitioner agreed to this percentage since an extended and possibly more accurate markup test could not be conducted due to the unavailability of sales and/or purchase invoices.
- c) Bottom painting labor charges were determined through discussions with petitioner and amounted to \$11,250. This amount was arrived at by multiplying the average number of boats in winter storage (75) by the average boat length (20') by the rate per foot (\$2.50). $75 \times 20 \times 2.50 \times 3$ year audit period = \$11,250.
- d) Labor sales for repairs were determined by analyzing all available sales invoices for the year 1981. All charges applicable to labor were extracted and amounted to \$6,594. Projected to the three-year audit period, labor sales amounted to \$19,782.
- e) Winter storage charges amounted to \$34,020 and were determined by discussions with petitioner taking into consideration the number of boats stored and the average boat length.
- f) Dockage charges amounted to \$87,900 and were determined in the same manner as winter storage charges.

5. As a result of the above, total audited gross sales for the audit period were determined to be \$287,246. The examiner next computed nontaxable sales of \$96,950, i.e., state excise tax on gasoline in the amount of \$2,435 plus dockage charges for the audit period of \$87,900 plus merchandise sales for which the petitioner received an exemption certificate of \$6,615. The examiner then computed additional taxable sales and sales tax due by reducing audited

gross sales by nontaxable sales plus taxable sales reported and multiplying the result by the applicable sales tax rate (\$287,246 gross sales, less \$96,950 nontaxable sales, less \$98,007 taxable sales reported, times sales tax rate equals \$6,528 additional sales tax due). It should be noted that the examiner apparently made a computing error. Audit gross sales as determined by adding items 4(a) through (f) equals \$281,066 or \$6,180 less than that computed by the examiner.

6. At the hearing, the petitioner offered into evidence sheets listing its merchandise inventory at the time of the audit. The petitioner intended to prove that not all merchandise purchased had been sold, however, the petitioner failed to show what its merchandise inventory was at the beginning of the audit period. The petitioner also offered into evidence a list of boats from which it purportedly received its winter storage charges and bottom painting labor charges. However, by itself, the list is insufficient to overcome the storage charges and bottom painting labor charges as determined by the examiner. Petitioner also failed to show that the hourly rate for repair labor was less during 1979 and 1980 than it was during 1982, as it had contended (Finding of Fact "2").

7. The petitioner was the subject of an audit covering the period June 1, 1974 through February 28, 1977. During this period of time, the petitioner recorded sales in the same manner as during the period at issue. The Audit Division found no additional taxes due in the prior audit. As a result, petitioner's management believed that this method of recording sales was adequate.

CONCLUSIONS OF LAW

A. That the books and records of Peconic Restaurant & Marina, Inc. were incomplete and inadequate and therefore the Audit Division properly determined additional taxes due from such information as was available and external indices in accordance with section 1138(a)(1) of the Tax Law (Matter of George Korba v. State Tax Commission, 84 A.D. 2d 655).

B. That, under the circumstances herein, the Audit Division reasonably calculated the tax liability of petitioner and petitioner has failed to demonstrate by clear and convincing evidence that the method used to arrive at the assessment and the assessment itself are erroneous (Matter of Ristorante Puglia, Ltd. v. Chu 102 A.D. 2d 348, 351; Matter of Surface Line Operators Fraternal Organization Inc. v. Tully 85 A.D. 2d 858, 859). The evidence presented at the hearing was insufficient to overcome petitioner's burden of proof.

C. That additional taxable sales are hereby reduced by \$6,180 pursuant to Finding of Fact "5".

D. That section 1145(a)(1)(ii) of the Tax Law provides, in part, that where this Commission determines that the failure or delay in paying tax is due to reasonable cause and not due to willful neglect, it is authorized to cancel the penalty and that portion of interest in excess of the interest computed at the rate established pursuant to section 1142. Reasonable cause has been defined so as to include "any cause for delinquency which appears to a person of ordinary prudence and intelligence as a reasonable cause for delay in filing a return and which clearly indicates an absence of gross negligence or willful intent to disobey the taxing statutes. Past performance will be taken into account." 20 NYCRR 536.1(b)(6).

E. That petitioner's management believed that the method of recording sales was adequate in view of the results of the prior audit (Finding of Fact "7"); thus, petitioner has demonstrated that reasonable cause existed for its failure to pay the tax. Accordingly, the penalty is cancelled and interest is reduced to the minimum statutory rate.

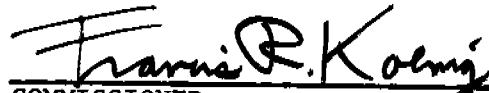
F. That the petition of Peconic Restaurant & Marina, Inc. is granted to the extent indicated in Conclusions of Law "C" and "E"; the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 20, 1982; and that except as so granted, the petition is denied.

DATED: Albany, New York

STATE TAX COMMISSION

FEB 18 1986


PRESIDENT


COMMISSIONER


COMMISSIONER