

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions
of
BITONI RESTAURANT, INC.
and WILLIAM DURANDO, AS OFFICER
for Revision of Determinations or for Refunds
of Sales and Use Taxes under Articles 28 and 29
of the Tax Law for the Period October 6, 1975
through May 31, 1981.

DECISION

Petitioners, Bitoni Restaurant, Inc. and William Durando, as officer, 62 West 48th Street, New York, New York 10020, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period October 6, 1975 through May 31, 1981 (File Nos. 42034 and 42035).

A hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 14, 1985 at 9:15 A.M., with all briefs to be submitted by July 17, 1985. Petitioners appeared by Murray Appleman, Esq. The Audit Division appeared by John P. Dugan, Esq. (Kevin A. Cahill, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined petitioners' additional sales tax due.

FINDINGS OF FACT

1. On March 19, 1982, as the result of a field audit, the Audit Division issued four notices of determination and demands for payment of sales and use taxes due against petitioners, Bitoni Restaurant, Inc. ("Bitoni") and William Durando, as officer of Bitoni, as follows:

<u>Notice No.</u>	<u>Petitioner</u>	<u>Period</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
S820319297M	Bitoni	10/6/75-2/28/79	\$108,649.52	\$21,968.14	\$60,809.00	\$191,426.66
S820319298M	Bitoni	3/1/79-5/31/81	\$ 56,164.34	-0-	\$ 8,627.00	\$ 64,791.34
S820319299M	Durando	10/6/75-2/28/79	\$106,649.52	\$21,648.14	\$59,284.41	\$187,582.07
S820319300M	Durando	3/1/79-5/31/81	\$ 55,686.88	-0-	\$ 8,563.09	\$ 64,249.97

On June 22, 1982, notice numbers S820319298M and S820319300M were cancelled

having been superseded by two additional notices issued May 20, 1982 as follows:

<u>Notice No.</u>	<u>Petitioner</u>	<u>Period</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
S820520428M	Bitoni	3/1/79-5/31/81	\$56,164.34	\$12,408.98	\$11,489.39	\$80,062.71 ¹
S820520429M	Durando	3/1/79-5/31/81	\$55,686.88	\$12,298.77	\$11,399.84	\$79,385.49 ¹

2. Petitioner William Durando, as president of Bitoni, executed consents extending the period of limitation for assessment of sales and use taxes due for the period March 1, 1978 through February 28, 1981 to March 20, 1982.

3. Bitoni operates a fast food restaurant which sells pizza, sandwiches, rolls, coffee, tea, soda, beer and wine. Bitoni did not retain any original source sales documents such as guest checks or cash register tapes so that in computing its sales tax returns, Bitoni's accountant would add Bitoni's bank deposits to its cash payroll and divide by 108 percent to determine sales and sales tax collected.

4. On audit, the auditor, after checking records of the Department of Health, the State Liquor Authority and the Division of Corporations of the Department of State, determined that Bitoni had originally been incorporated on October 6, 1975. Pama Food, Inc. ("Pama") had been operating on the premises prior to Bitoni and the lease was transferred from Pama to Bitoni on October 16,

1 The discrepancy between the amount assessed against Bitoni and the amount assessed against William Durando results from a use tax assessment which was assessed against Bitoni but not Mr. Durando. The use tax is not in issue.

1975. Mr. Durando had been the manager of Pama for three years prior to the transfer and then became president of Bitoni. Bitoni purchased the business from Pama for \$20,000.00 plus the assumption of two existing chattel mortgages with a combined balance of \$118,000.00. Bitoni applied for a liquor license on June 30, 1976 and for a permit from the Department of Health on August 3, 1976. The latter permit was issued on September 30, 1976. Bitoni did not register as a sales tax vendor nor begin filing sales tax returns until the period ended May 31, 1978.

5. The auditor requested that petitioners' accountant supply him with all the available books and records. The only records available were some sales tax returns, bank statements and cancelled checks. The auditor analyzed purchases by check for the period February 1, 1979 through December 31, 1980. Based on this analysis, he determined that average monthly food purchases by check were \$1,204.53, excluding purchases of pizza ingredients. The average monthly figure was multiplied by 39, the number of months in the period March 1, 1978 through May 31, 1981, to arrive at non-pizza food purchases by check for said period of \$46,976.67. The auditor requested petitioners to keep an account of cash purchases of food for the month of May, 1981. Cash purchases for May were \$4,091.22, exclusive of pizza ingredients. This figure was also multiplied by 39 to determine non-pizza food purchases by cash for the period March 1, 1978 through May 31, 1981 of \$159,557.98. The combined check and cash purchases of non-pizza food items were marked up by 181 percent based on a Dun and Bradstreet retail business table for restaurant businesses with an annual sales volume of \$250,000.00 to \$500,000.00. This resulted in adjusted taxable food sales of \$580,361.20 for the period March 1, 1978 through May 31, 1981.

6. To determine pizza sales, the auditor analyzed flour purchases for May, 1981 and determined that petitioners purchased 3,500 pounds of flour per month. Petitioners informed the auditor that one pound of flour was used per pizza and each pizza had eight slices which sold for \$.85 per slice. At the rate of 3,500 pizzas per month, monthly sales were estimated to be \$23,800.00 resulting in \$928,200.00 in pizza sales for the period March 1, 1978 through May 31, 1981. The combined pizza sales and other food sales totalled \$1,508,561.24 for the period March 1, 1978 through May 31, 1981. This amount was compared to taxable sales reported of \$552,772.00, resulting in additional taxable sales of \$955,789.00.

7. For the period October 6, 1975 through February 28, 1978, when Bitoni was not registered, and did not file sales tax returns or maintain books and records, the auditor determined gross sales by using the average adjusted taxable sales for the period March 1, 1978 through May 31, 1981. This resulted in average gross sales per quarter of \$116,044.00 and total gross sales unreported for the period October 6, 1975 through February 28, 1978 of \$1,073,407.00. This amount was combined with gross sales for the later period resulting in \$2,029,205.00 in additional taxable sales for the period October 6, 1975 through May 31, 1981. This resulted in sales tax due of \$162,336.40.

8. Petitioners made allegations to the effect that Bitoni may not have been in business during the period prior to March 1, 1978; however, petitioners offered no evidence in any form to refute the findings made by the auditor. Petitioners also argued that Bitoni's records were sufficient to conduct a complete audit and that to require more would be arbitrary and capricious.

9. Along with their brief, petitioners submitted proposed findings of fact, all of which have been incorporated herein except for number 1 which was

irrelevant, number 11 which was irrelevant with respect to Pama's sales tax identification number and filing record, and number 13 which was not supported by the evidence.

CONCLUSIONS OF LAW

A. That a "...vendor is obligated to maintain records of his sales for audit purposes (Tax Law, §1135), and the State, when conducting an audit, must determine the amount of tax due 'from such information as may be available' but '[i]f necessary, the tax may be estimated on the basis of external indices' (Tax Law, §1138, subd. [a], par[1])." Korba v. New York State Tax Commission, 84 A.D.2d 655, 656. Exactness in determining the amount of sales tax liability is not required where it is the petitioner's own failure to maintain proper records which necessitates the use of external indices. Markowitz v. State Tax Commission, 54 A.D.2d 1023 aff'd 44 N.Y.2d 684.

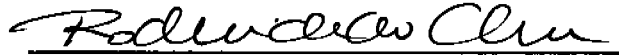
B. That petitioners had no guest checks, cash register tapes, purchase invoices or any other source documents from which the Audit Division could determine petitioners' sales tax liability. Therefore, resort to a test period and markup based on external indices was warranted. Cancelled checks and bank statements alone do not constitute adequate records with which to conduct a complete audit. Additionally, petitioners produced no evidence, either in the form of testimony or documentation, to refute the audit findings or to show that Bitoni was not in business prior to March 1, 1978; thus, they have not met their burden of proving that the audit was erroneous.


C. That the petitions of Bitoni Restaurant, Inc. and William Durando, as officer, are denied and the notices of determination and demands for payment of sales and use taxes due issued March 19, 1982 and May 20, 1982 are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

NOV 07 1985


PRESIDENT


COMMISSIONER


COMMISSIONER