

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

IRIS RESTAURANT, 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 February 28, 1978
through May 31, 1980. :

Petitioner, Iris Restaurant, Inc., 82 Bank Street, New York, New York 10014, 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 February 28, 1978 through May 31, 1980 (File No. 42096).

A formal hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 4, 1985 at 2:20 P.M., with all briefs to be submitted by May 30, 1985. Petitioner appeared by Ullman, Weisberg & Co. (Jack Ullman, C.P.A.). The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined the sales and use tax liability of Iris Restaurant, Inc. for the periods in issue.

FINDINGS OF FACT

1. On September 20, 1982, the Audit Division, as a result of an audit, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Iris Restaurant, Inc. ("Iris") for the period February 28, 1978 through May 31, 1980. The notice assessed a tax due of \$20,608.88 plus penalty of \$5,152.22 and interest of \$8,365.07 for a total of \$34,126.17.

On the same date, a Notice for an identical amount was issued against William Gottlieb as officer of Iris Restaurant, Inc.

2. The petitioner filed sales and use tax returns for the period December 1, 1978 through February 28, 1979; and March 1, 1979, through May 31, 1979. No additional taxes were assessed for these periods. The petitioner also filed a sales tax return for the period June 1, 1979, through August 31, 1979. The Audit Division assessed an additional tax due of \$2,477.84 for this period. No other tax returns were filed by petitioner.

3. Iris had ceased doing business at the time of the audit. Books and records were requested from petitioner, but those made available were incomplete and could not be used as a basis for the audit. No purchase records, state or federal tax returns, guest checks, cash register tapes or cash disbursement journals were submitted. Subsequent to the audit, the petitioner submitted records of cash receipts for May, 1978 and January, February and October of 1979. But these were also incomplete.

4. Since the Audit Division was unable to obtain records upon which an audit of Iris could be performed, it was concluded that resort to external indices was necessary.

5. At the time of the audit, the Audit Division was conducting an audit of another restaurant, Inca Bar and Restaurant ("Inca"), owned by William Gottlieb, located in the same area of New York City and similar in operation to Iris. Since both restaurants were so similar, it was concluded that Iris's tax liability could be most accurately calculated by using figures taken from the second restaurant. Inca's gross purchases for the 1979 calendar year, as reported on its Federal Income Tax return were \$37,773.00. The Audit Division used this figure as a basis to estimate Iris's annual purchases and applied a

300 percent markup to arrive at a tax liability of \$3,021.84 per quarter for Iris. The 300 percent markup was based on the Audit Division's past experience with similar restaurants in the same area.

6. The petitioner argued that the taxes determined to be due were excessive because they were based on estimated figures and a markup higher than that employed by Iris. No testimony or documentary evidence was submitted in support of the petitioner's contentions.

CONCLUSIONS OF LAW

A. Section 1135(a) of the Tax Law states:

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, in such form as the Tax Commission may by regulation require. Such records shall include a true copy of each sales slip, invoice, receipt [or] statement.

Petitioner Iris failed to maintain books and records as required by the Tax Law. Consequently, the Audit Division properly estimated the taxes due on the basis of external indices pursuant to section 1138(a) of the Tax Law.

B. That the method of estimating taxes employed by the Audit Division was reasonable under the circumstances, and Iris failed to sustain its burden of demonstrating by clear and convincing evidence that the tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. State Tax Commission, 85 A.D.2d 858).

C. That the petition of Iris Restaurant, Inc. is in all respects denied.

DATED: Albany, New York

OCT 30 1985

STATE TAX COMMISSION

Rodolfo W. Chu
PRESIDENT

Francis P. Koehn
COMMISSIONER

Mark J. Smith
COMMISSIONER