

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
WILLIAM GOTTLIEB	:	DECISION
D/B/A INCA BAR AND RESTAURANT	:	
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, 1979	:	
through May 31, 1980.	:	

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Petitioner, William Gottlieb d/b/a Inca Bar and Restaurant, 343 Bleecker 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 June 1, 1979 through May 31, 1980 (File No. 42097).

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 3:15 P.M., with all briefs to be submitted by June 15, 1985. Petitioner appeared by Ullman, Weisberg & Co., C.P.A.'s (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 William Gottlieb d/b/a Inca Bar and Restaurant during the periods in issue.

FINDINGS OF FACT

1. Petitioner, William Gottlieb, was the sole owner and proprietor of Inca Bar and Restaurant ("Inca") during the tax periods at issue.

2. 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 William Gottlieb d/b/a Inca Bar and Restaurant for the period June 1, 1979 through May 31, 1980. The Notice assessed a tax due of \$12,087.36, plus penalty of \$3,021.84 and interest of \$4,043.73, for a total of \$19,152.93.

3. Petitioner filed no New York State and local sales and use tax returns for the periods in issue.

4. At the time the audit occurred, Inca had ceased doing business and no books and records were made available to the Audit Division. Therefore, it was concluded that a determination of sales and use taxes due could be arrived at only through external indices.

5. Based on its experience with similar restaurants operating in the same geographical area, the Audit Division applied a 300 percent markup to Inca's total purchases for 1979, which were \$37,773.00; the latter figure was taken from Inca's 1979 Federal income tax return. This method produced a total gross sales figure of \$151,092.00 for the 1979 calendar year in contrast to the gross sales figure of \$66,649.00 reported on Inca's 1979 federal return.

6. Subsequent to the audit, the petitioner provided the Audit Division with bank deposits and workpapers for the calendar year 1979. Deposits were missing for the months of January, August and September, 1979. The petitioner also submitted a lease showing the premises once occupied by Inca were leased to another party as of March 1, 1980.

7. Inca was not doing business during the last quarter for which taxes were assessed (March 1, 1980 through May 31, 1980) as evidenced by the aforementioned lease.

8. Although the petitioner contended that the 300 percent markup utilized by the Audit Division was too high for a restaurant such as Inca which caters to a working class clientele, he offered no evidence in support of his contentions.

CONCLUSIONS OF LAW

A. That section 1135(a) of the Tax Law provides that:

"[e]very 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."

Petitioner William Gottlieb failed to maintain books and records as required by law. Moreover, the records submitted by petitioner were so insufficient as to make it virtually impossible to conduct a complete audit.

B. That in light of petitioner's failure to provide complete and adequate records, the Audit Division selected an audit method reasonably calculated to reflect the taxes due (Matter of Carmine Restaurant, Inc. v. State Tax Comm., 99 A.D.2d 581), and petitioner failed to sustain its burden of proof by clear and convincing evidence that the method of audit was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. State Tax Comm., 85 A.D.2d 858). However, the Audit Division failed to give consideration to the fact that petitioner ceased doing business as of March 1, 1980. Petitioner's liability for sales and use tax due shall be reduced by \$3,021.84 in accordance with Finding of Fact "7".


C. That the petition of William Gottlieb d/b/a Inca Bar and Restaurant is granted to the extent indicated in Conclusion of Law "B"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand


for Payment of Sales and Use Taxes Due issued September 20, 1982; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

OCT 30 1985

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER