

STATE OF NEW YORK

STATE TAX COMMISSION

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In the **Matter** of the Petitions

of

ROBERT MORGAN RESTAURANT CORP.  
AND CECIL VOLK, AS OFFICER

DECISION

for Revision of Determinations or for Refunds :  
of Sales and Use Taxes under Articles 28 and 29  
of the Tax Law for the Period March 1, 1979  
through February 28, 1982.

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Petitioners, Robert Morgan Restaurant Corp. and Cecil Volk, as officer, c/o Cecil Volk, 179 Kings Point Road, Great Neck, New York 11024, 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 March 1, 1979 through February 28, 1982 (File **Nos.** 42116 and 48649).

A 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 October 21, 1986 at 1:15 P.M., with all briefs to be submitted by March 30, 1987. Petitioners appeared by Isidore Feldman, CPA. The Audit Division appeared by John P. Dugan, Esq. (Gary Palmer, Esq., of counsel).

#### ISSUES

I. Whether the Audit Division properly determined the sales and use tax liability of petitioner Robert Morgan Restaurant Corp. based on the use of a markup percentage and test period audit method.

11. Whether Robert Morgan Restaurant Corp. is liable for sales tax collected from customers that exceeded the actual sales tax due based on the amount of each receipt.

FINDINGS OF FACT

1. Petitioner Robert Morgan Restaurant Corp. ("the corporation") operated a restaurant located at 141 West **38th** Street, New York, New York. Petitioner Cecil Volk was president of the corporation.

2. On December 20, 1982, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against the corporation covering the period March 1, 1979 through February 28, 1982 for taxes due of \$22,195.16, plus interest of \$5,590.56, for a total of \$27,785.72. On the same date, a notice was also issued to Cecil Volk, as officer of the corporation, under the provisions of sections 1131(1) and 1133 of the Tax Law, in the amount of \$17,143.42, plus applicable interest. Mr. Volk was not assessed personally for use taxes determined due from the corporation.

3. Cecil Volk executed consents on behalf of the corporation which extended the period of limitation for assessment of sales and use taxes for the period March 1, 1979 through February 28, 1982 to December 20, 1982.

4. On audit, the Audit Division found that the corporation's books and records were inadequate in that cash register tapes were not available and guest checks were not in numerical sequence. The Audit Division reconciled gross sales from the books and records with Federal income tax returns and sales tax returns. In order to verify the accuracy of the taxable sales reported, the Audit Division performed a markup test for food, liquor and beer using purchases for November 1981. The combined liquor and beer markup was 378.2 percent. This percentage was applied to liquor and beer purchases for the audit period to arrive at sales of \$1,017,700.46 as compared to reported liquor and beer sales of \$879,133.63, leaving additional taxable sales of \$138,566.84 and tax due thereon of \$11,116.94. The Audit Division accepted

food sales as reported since the books and records reflected a markup of 122 percent. Liquor and beer purchases were adjusted by \$33,375.00 for the audit period to allow for self-consumption by the corporation, i.e., promotional and buybacks, cooking, gifts and consumption by employees. The corporation was held liable for use tax of \$2,684.30 on these purchases.

5. The corporation's guest checks had been transferred to microfilm. Using a microfilm viewer, the auditor analyzed 120 checks for November 1982. The amount of tax actually collected was compared with the tax that was required to be collected and revealed that tax of \$5.11 was overcollected from customers. This represented an error factor of 2 percent which was applied to tax reported for the audit period, plus the additional tax due as determined above, to arrive at total overcollections of \$6,027.31.

6. The audit also disclosed use taxes due of \$2,367.44 on purchases of expense items. However, at the hearing, the corporation conceded this liability. Petitioner Cecil Volk also conceded his personal responsibility for the taxes determined to be due from the corporation.

7. Following a conference held with representatives of the New York district office, the additional tax due on liquor and beer sales was reduced to \$9,675.11 based on a revised markup of 329.19 percent. In addition, certain overcollections of tax were considered extraordinary and were deleted from the test. This adjusted the tax due on overcollections to \$2,399.00. At the hearing, counsel for the Audit Division amended the amount at issue to \$17,125.85.

8. Approximately three to four percent of the corporation's receipts were from cash sales. The balance of receipts were from house charge accounts and major credit cards. The corporation employed a bookkeeper who recorded receipts

on a daily basis from a cash register tape and the charge receipts. The bookkeeper also reconciled cash and prepared the bank deposit. The corporation did not retain the cash register tapes.

9. The corporation retained an accounting firm that, as part of the services rendered, performed certain internal auditing procedures monthly. These included a bank reconciliation and, in conjunction therewith, guest checks and the daily total were reconciled with the cash receipts. The accountants also did a gross profit analysis.

10. The corporation explained that guest checks were not in sequential order because each waiter was assigned a different book of checks and had the responsibility to account for each check. The corporation maintained a record to control the checks issued to each waiter. After ninety days, the guest checks were put on microfilm.

11. The corporation hired investigators to observe the efficiency and honesty of bartenders.

12. The corporation submitted its own analysis of liquor and beer purchases for November 1981. The sales estimated from these purchases substantially agreed with those computed by the Audit Division. The analysis adjusted the sales to account for beer and wine used for cooking, gifts, complimentary drinks and employee consumption. These adjustments reduced the markup percentage from 378.20 to 260.18 percent. The categories of allowances used by the corporation were the same as those considered by the Audit Division; only the amount of the allowance differed. The additional sales of liquor and beer determined by the corporation using the reduced markup percentage amounted to \$7,608.00.

CONCLUSIONS OF LAW

A. That section 1138(a)(1) of the Tax Law provides that "if a return when filed **is** incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available" and authorizes, where necessary, an estimate of tax due "on the basis of external indices".

B. That section 1135(a) of the Tax Law provides that every person required to collect tax shall keep records of every sale and all amounts paid, charged or due thereon and of the tax payable thereon. Such records shall include a true copy of each sales slip, invoice, receipt or statement.

C. That the corporation did not have cash register tapes available for audit. Moreover, the guest checks were useless in serving as a verifiable record of taxable sales. Accordingly, the books and records of the corporation were inadequate for audit purposes. Under such circumstances, the Audit Division's use of a test period and markup percentage audit as a basis for determining the corporation's sales and use tax liability was proper pursuant to the provisions of section 1138(a) of the Tax Law (Yatter of Licata v. Chu, 64 NY2d 873; Matter of Korba v. State Tax Commission, 84 AD2d 655, lv denied 56 NY2d 502).

D. That the corporation failed to carry its burden of showing that the amount of tax assessed was erroneous or that the allowances granted by the Audit Division, as set forth in Finding of Fact "4", were insufficient. (Matter of Urban Liquors, Inc. v. State Tax Commission, 90 AD2d 576).

E. That the corporation is liable for the sales tax overcollected from customers in accordance with section 1137(a)(11) of the Tax Law.

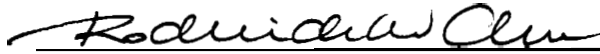
F. That the petition of Robert Morgan Restaurant Corp. is granted to the extent that the additional taxes due are reduced to \$17,125.85 as indicated in

Finding of Fact "7"; 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. The petition of Cecil Volk, as officer, is granted to the extent that the taxes assessed are reduced to \$12,074.11 and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 20, 1982 shall be adjusted accordingly; and that, except as so granted, the petitions are in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

AUG 14 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER