

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
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176 PLANDOME AVE. 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 March 1, 1979	:	
through May 31, 1982.	:	

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Petitioner, 176 Plandome Ave. Restaurant, Inc., 176 Plandome Avenue, Manhasset, New York 11030, 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 March 1, 1979 through May 31, 1982 (File No. 42117).

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 September 12, 1985 at 1:15 P.M. Petitioner appeared by Edmund Shenkman, CPA. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

#### ISSUE

Whether the audit procedures used by the Audit Division in an examination of petitioner's books and records were proper and whether the additional taxable sales determined as a result thereof were correct.

#### FINDINGS OF FACT

1. Petitioner, 176 Plandome Ave. Restaurant, Inc., operated a luncheonette known as the Village Coffee Shop located at 176 Plandome Road, Manhasset, New York.

2. On December 7, 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 petitioner covering the period March 1, 1979 through May 31, 1982 for taxes due of \$17,372.08, plus interest of \$3,584.08, for a total of \$20,956.16. On the same date, a notice in the same amount was issued to Patricia Lucatorto, individually, as officer of the corporation.

3. Patricia Lucatorto, on behalf of petitioner, executed a consent extending the period of limitation for assessment of sales and use taxes for the period March 1, 1979 through February 28, 1980 to June 20, 1983.

4. On audit, the Audit Division reconciled the cash receipts journal with the federal income tax return for the fiscal year ended April 30, 1980. This disclosed a discrepancy of \$26,541.00 which was attributable to wages paid in cash and not recorded in the cash receipts journal. This amount also was not reported on the sales tax returns filed. This discrepancy did not occur in the fiscal year ended April 30, 1981. Petitioner did not retain cash register tapes or guest checks. These documents were destroyed after they were recorded in the records. In the absence of any verifiable record of receipts, the Audit Division determined petitioner's sales by marking up purchases as follows:

<u>Category</u>	<u>Cost</u>	<u>Markup</u>	<u>Sales</u>
Coffee	\$ 2,533.22	200%	\$ 7,599.66
Soda	1,997.75	700%	15,982.00
Pie and ice cream	1,088.80	200%	3,266.40
Other food	23,837.94	150%	59,594.85
			<u>\$86,442.91</u>

The above purchases were for the period July 1, 1981 and November 30, 1981.

The markup percentages were based on audits of similar businesses in the Mineola area. The estimated sales of \$86,442.91 were 44.97 percent greater than reported sales for the same period. This percentage was applied to

taxable sales of \$331,767.00 per books for the period March 1, 1979 through November 30, 1981 plus \$30,840.00 in unrecorded sales (wages paid in cash, including \$4,299.00 in wages for March and April, 1979) to arrive at additional taxable sales of \$193,717.00. The audit was updated to include the period December 1, 1981 through May 31, 1982 which increased the additional taxable sales to \$245,571.00 with tax due thereon of \$17,372.08.

5. Petitioner computed its own markup percentages as follows: coffee - 27%; soda - 343%; pie - 70%; ice cream - 116% and food - 99%. The costs were obtained from purchase invoices for the various components of a product, i.e. coffee, sugar, milk, container and lid. The selling prices were taken from two menus that were used during 1980 and 1981. The markups included a factor of 10 percent for waste and employee consumption. The application of the foregoing markup percentages to the same purchases used by the Audit Division determined taxable sales of \$61,921.00 which were comparable to those reported on petitioner's sales tax returns.

6. Petitioner submitted a publication entitled "Cost of Doing Business Ratios Corporations", published by Dun and Bradstreet in 1980. This publication showed that in the category of "eating & drinking places", the ratio of sales to cost of goods sold was 2.2 to 1 which is substantially the same as the ratio reflected in petitioner's books and records.

7. The purchases to which the markup percentages were applied did not include paper products. These purchases were recorded separately under expenses. Therefore, petitioner erroneously included paper products as a cost element in its markup computations. Moreover, petitioner offered no evidence to establish the allowance it claimed for waste and employee consumption. Petitioner also incorrectly computed the cost per pound for coffee. The actual cost per pound was \$2.80 rather than \$3.20.

8. Petitioner's markup percentages with the above cost factors excluded are as follows: coffee - 132%; soda - 446%; pie - 87%; ice cream - 149% and food - 131%.

9. In addition to petitioner's disagreement with the estimated markups used by the Audit Division, it took exception to the use of a test period audit.

#### CONCLUSIONS OF LAW

A. That section 1138(a) 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 petitioner did not have cash register tapes or any other record that would serve as a verifiable record of taxable sales. Because of petitioner's inadequate record keeping, the Audit Division's use of a test period and markup percentage audit as a basis for determining petitioner's liability was proper in accordance with section 1138(a) of the Tax Law (Matter of Urban Liquors, Inc. v. State Tax Commission, 90 A.D.2d 576).

D. That the Audit Division reasonably calculated petitioner's tax liability by using markup percentages based on office experience with similar businesses. Petitioner, therefore, had the burden of showing that the amount of tax assessed was erroneous (Matter of Urban Liquors, Inc., supra). Petitioner established that the estimated markup percentages should be revised as set forth in Finding

of Fact "8" and, accordingly, the additional taxable sales are adjusted as follows for the test period:

<u>Category</u>	<u>Cost</u>	<u>Markup Percentage Plus Cost (100%)</u>	<u>Sales</u>
Coffee	\$ 2,533.22	232%	\$ 5,877.07
Soda	1,997.75	546%	10,907.74
Pie & ice cream	1,088.80	200% <sup>1</sup>	2,177.60
Other food	23,837.94	231%	55,065.64
			<u>\$74,028.05</u>
		Reported taxable sales	59,629.00
		Margin of error	1.24

The revised margin of error reduces the additional taxable sales for the audit period to \$148,963.20 (including unreported cash wages).

E. That the petition of 176 Plandome Ave. Restaurant, Inc. is granted to the extent indicated in Conclusion of Law "D"; the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 7, 1982; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

MAR 27 1986

Rodwin A. Chin  
PRESIDENT

Francis R. Koenig  
COMMISSIONER

[Signature]  
COMMISSIONER

<sup>1</sup> The individual markups on pie and ice cream were averaged since purchases of such items were combined.