

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
NORTH EAST SEAFOOD TRADING CO., 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 December 1, 1979	:	
through October 5, 1982.	:	

Petitioner, North East Seafood Trading Co., Inc., c/o Maloney & Porcelli, 225 Broadway, New York, New York 10007, 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 December 1, 1979 through October 5, 1982 (File No. 42134).

A hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 24, 1985 at 9:15 A.M. Petitioner appeared by Maloney & Porcelli (William P. Maloney, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUE

Whether it was proper for the Audit Division to assess additional tax due based upon an estimate that 95 percent of reported gross sales were taxable sales.

FINDINGS OF FACT

1. On October 12, 1982, the Audit Division received a Notification of Sale, Transfer or Assignment in Bulk from Golden Harvest Seafood, Inc. wherein it indicated that it had purchased petitioner's business on October 5, 1982. As the result of having received the aforementioned Notification, the Audit

Division, on October 25, 1982, sent a Bulk Sale Questionnaire to petitioner requesting information concerning petitioner's sales and purchases for the period at issue. As of January 6, 1983, the Audit Division had not received a reply to its Bulk Sale Questionnaire.

2. On January 6, 1983, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner for the period December 1, 1979 through October 5, 1982. Said Notice assessed additional sales tax due of \$25,430.14, plus penalty of \$4,584.78 and interest of \$4,419.42, for a total amount due of \$34,434.34. The Notice also contained the following explanation:

"As a result of a review of returns filed and you (sic) not sending information requested, 95% of your reported gross sales are held to be taxable."

3. Petitioner timely filed a protest in response to the aforementioned Notice and, as a result of said protest, the Audit Division assigned this case to one of its field auditors for further review. Said field auditor contacted petitioner's accountant and requested that petitioner's books and records, including such items as guest checks, cash register tapes, sales journal, purchase journal, sales invoices and purchase invoices, be made available for examination. No records were provided for examination and, accordingly, the field auditor recommended that the Notice dated January 6, 1983, be sustained.

4. Petitioner's facility was located in New York City and business activities consisted of the wholesale and retail sale of fresh (uncooked) fish and also the operation of a restaurant which served prepared meals for consumption both on and off the premises. Petitioner also sold soda and beer in its restaurant operation. Petitioner's wholesale activities were conducted in the early morning hours and lasted until approximately 9:00 A.M. Retail sale of

fresh fish occurred between 9:00 A.M. and 6:00 P.M., while the restaurant was open for business from 11:00 A.M. to 3:00 P.M.

5. At the hearing held herein petitioner submitted in evidence sales ledgers¹ which contained hand-recorded entries of gross sales for each day of operation. The sales ledgers contained separate columns for recording wholesale, retail and restaurant sales. With the exception of the aforementioned sales ledgers, petitioner offered no other books or records in evidence.

6. Petitioner also argued that the business was sold in March of 1982 and that it was thereafter operated by the purchaser, although said purchaser used petitioner's corporate name. On a bulk sale questionnaire petitioner's president indicated that the business was sold on "3/20/83 Closed 6/83". No credible evidence was presented to establish the date petitioner sold its business and ceased operations.

CONCLUSIONS OF LAW

A. That section 1135(a) of the Tax Law provides that 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. Such records shall include a true copy of each sales slip, invoice, receipt or statement. Petitioner did not have cash register tapes or any other record that would serve as a verifiable record of taxable sales. Hand-recorded entries in a ledger of gross sales figures for each day were not reliable records to satisfy the statutory requirements that records of individual sales be retained (Matter of Skiadas v. State Tax Commission, 95 A.D.2d 971). Accordingly, it was proper audit methodology

¹ The sales ledgers encompassed only the period June 1, 1980 through January 31, 1982. The audit period in question herein encompassed the period December 1, 1979 through October 5, 1982.

for the Audit Division to estimate that 95 percent of petitioner's gross sales were taxable sales [Tax Law §1138(a)].

B. That in the instant matter petitioner's wholesale and retail sale of fresh fish were transactions exempt from sales tax; while the sale of prepared meals and beverages were taxable transactions. Section 1132(c) of the Tax Law provides, in pertinent part, that:

"...it shall be presumed that all receipts for property or services of any type mentioned in subdivisions (a), (b), (c) and (d) of section eleven hundred five... are subject to tax until the contrary is established, and the burden of proving that any receipt...is not taxable hereunder shall be upon the person required to collect tax..."

C. That the Audit Division accepted petitioner's reported gross sales, however, it asserted that 95 percent of said reported gross sales were taxable sales. The Audit Division, in effect, disallowed a substantial portion of petitioner's claimed non taxable sales. Petitioner has failed to sustain its burden of proof pursuant to Tax Law section 1132(c) to show that 95 percent of its gross sales were not taxable sales.

D. That petitioner has also failed to establish that it sold its business and ceased all operations effective March of 1982.

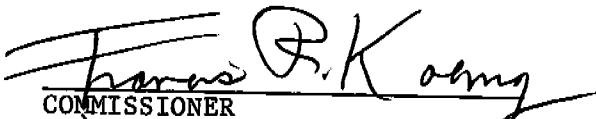
E. That the petition of North East Seafood Trading Co., Inc. is denied and the Notice dated January 6, 1983 is sustained.

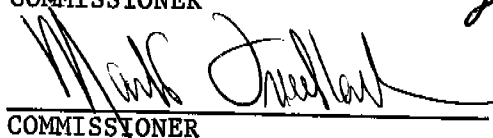
DATED: Albany, New York

FEB 18 1986

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER