

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

JACK P. ELSTON
D/B/A JACK'S LIQUOR STORE

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 September 1, 1978
through June 8, 1981.

Petitioner, Jack P. Elston d/b/a Jack's Liquor Store, RD f2, Waverly, New York, 14892, 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 September 1, 1978 through June 8, 1981 (File No. 42707).

A hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, State Office Building Annex, 164 Hawley Street, Binghamton, New York, on November 19, 1986 at 10:45 A.M., with all briefs to be submitted by December 22, 1986. Petitioner appeared by Walter R. Mandeville, P.A. The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUE

Whether the Audit Division's estimation and assessment of additional sales tax against petitioner was proper.

FINDINGS OF FACT

1. During the period at issue herein, petitioner Jack P. Elston operated as a sole proprietorship a liquor store known as Jack's Liquor Store. On June 8, 1981, petitioner sold this business and, a few days thereafter, notified the Audit Division of the sale.

2. On October 13, 1981, the Audit Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period September 1, 1978 through June 8, 1981 assessing sales tax due in the amount of \$2,158.90, plus penalty and interest. This notice contained the following explanation:

"As a result of a review of returns filed and your failure to submit information requested, your reported taxable sales have been increased by 25%. The following taxes are determined to be due in accordance with Section 1138 of the Sales Tax Law."

3. As explained at the hearing, a bulk sale questionnaire was sent to petitioner by the Audit Division's Central Office. When the Audit Division did not receive back the completed questionnaire (the noted "failure to submit information requested"), petitioner's reported taxable sales were increased by 25 percent and the aforementioned assessment was issued.

4. The noted 25 percent increase in reported taxable sales represents also a 25 percent increase in petitioner's reported gross sales, inasmuch as reported gross and reported taxable sales were the same amount with no nontaxable sales having been reported by petitioner.

5. Included with the October 13, 1981 assessment to petitioner was another bulk sale questionnaire, which questionnaire was completed and returned to the Audit Division on or about December 29, 1981.

6. Upon receipt of the completed bulk sale questionnaire, a "desk audit" analysis was performed by the Audit Division whereby petitioner's wine and liquor purchases were marked **up** by 40 percent and 15 percent, respectively. This markup analysis of sales, when compared to petitioner's reported sales, resulted in an 8 percent margin of error, which margin of error was the basis used to arrive at "audited" tax due. After allowing credit for taxes paid,

a deficiency of \$661.19 resulted. Accordingly, on May 12, 1982 a Notice of Assessment Review was issued to petitioner indicating that the October 13, 1981 assessment (\$2,956.51) had been reduced to \$661.19, plus penalty and interest, which amount is at issue in this proceeding.

7. Petitioner maintained books and records including sales records, complete purchase invoices and cash register tapes. The cash register tapes, however, did not specifically identify individual items sold and petitioner did not prepare a sales slip identifying the individual items sold to each customer. On or about June 24, 1981, approximately one week after the sale of the business, petitioner voluntarily brought his records to the Binghamton District Office in an effort to "clean up" all items with regard to the sale of the business. An analysis of the books and records was performed at the Binghamton District Office, and petitioner was advised he owed \$3,592.73 in taxes, penalty and interest if paid by July 20, 1981. Petitioner paid this amount **in** full **on** July 20, 1981, at which time he also signed and surrendered his Certificate of Authority (to collect sales and/or use taxes) to the Binghamton District Office. It was after these actions that petitioner received the assessment at issue herein (since revised downward to \$661.19) from the Central Office in Albany.

8. **Gross** profit and markup percentages, as derived from petitioner's books and records were as follows:

<u>Year</u>	<u>Markup Percentage</u>	<u>Gross Profit Percentage</u>
1978	22.8	18.555
1979	13.9	12.182
1980	10.5	9.53009534
1981	.006	less than 1.00

9. The Audit Division asserts that the 15 and 40 percent markups used in the revised assessment were "normal" markups based **on** office experience, and

notes further that the State Liquor Authority's then-required 12 percent minimum markup **on** liquor was not being imposed by petitioner during some of the period in question, thus indicating an abnormally **low** markup per petitioner's books and records and casting doubt upon their reliability.

10. By contrast, petitioner asserts that accurate and reliable books and records were maintained, were voluntarily presented for audit in Binghamton in an effort to clean up **any** potential liability and were utilized in arriving at a liability which petitioner paid. Petitioner notes that the subsequent October **13**, 1981 assessment from the Albany Central Office was based solely **on** an arbitrary 25 percent increase to petitioner's reported taxable (and gross) sales without any audit work whatsoever, and with no correlation made between such assessment and the Binghamton analysis and resulting payment.

11. Petitioner further maintains that his markups were not unrealistically low, noting that his markups exceeded the State Liquor Authority's 12 percent minimum mandatory markup for 1978 and 1979. For the years when petitioner's markup was **less** than 12 percent (1980 and 1981) the 12 percent minimum markup was **no** longer in effect for wine and there was then an ongoing "price war" among liquor store owners in petitioner's area requiring petitioner to drastically drop his prices in order to stay competitive. **In** this regard, petitioner notes that during the period in question, there were four liquor stores, including his, competing for business in an area with a total population of approximately 4,800 persons.

CONCLUSIONS OF LAW

A. That section 1138(a)(1) of the Tax Law provides that:

"[I]f 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. If necessary, the tax may be estimated on the basis of external

indices, such as stock on hand, purchases, ... rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors."

B. That the Audit Division, when conducting an audit, must determine the amount of tax due from such information as may be available. If necessary, the tax may be estimated **on** the basis of external indices (Tax Law, § 1138[a]; Matter of George Korba v. New York State Tax Commn., 84 AD2d 655 lv denied 56 NY2d 502). However, the audit method adopted must be reasonably calculated to reflect the taxes due (Matter of Grant Co. v. Joseph, 2 N.Y.2d 196, 206, cert denied 355 U.S. 869).

C. That the 25 percent increase in reported taxable sales which was assessed in the October 13, 1981 Notice of Determination and Demand for Payment of Sales and Use Taxes Due was not "determined from such information as may be available" nor was it "estimated on the basis of external indices." Accordingly, the assessment is cancelled. (Matter of Theresa Roncone d/b/a Roncone's Grill, State Tax Commn., March 11, 1986; Matter of La Pineta, State Tax Commn. February 18, 1986.).

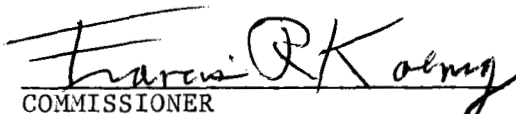
D. That the petition of Jack P. Elston d/b/a Jack's Liquor Store is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued October 13, 1981 is hereby cancelled.


DATED: Albany, New York

STATE TAX COMMISSION

APR 06 1987


PRESIDENT


COMMISSIONER


COMMISSIONER