

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition	:	
	:	
of	:	
	:	
KING CRAB 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 June 1, 1979	:	
through May 31, 1982.	:	

---

Petitioner, King Crab Restaurant, Inc., 871 8th Avenue, New York, New York 10019, 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, 1982 (File No. 43886).

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 March 12, 1985 at 10:45 A.M. Petitioner appeared by Gerald B. Tepper, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether the Audit Division's use of markup percentages as a basis for determining petitioner's sales of food, liquor, wine and beer was proper.

FINDINGS OF FACT

1. Petitioner, King Crab Restaurant, Inc., operated a restaurant and bar located at 871 8th Avenue, New York, New York.

2. On February 18, 1983, 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 June 1, 1979 through May 31, 1982

for taxes due of \$27,524.85, plus penalty and interest of \$11,694.87, for a total of \$39,219.72.

3. Petitioner executed consents extending the period of limitation for assessment of sales and use taxes for the period June 1, 1979 through November 30, 1979 to March 20, 1983.

4. Petitioner made the following books and records available for audit: general ledger, cash disbursements journal and purchase invoices for the period January, 1980 through May, 1982; guest checks; and bank statements. For the period prior to January, 1980, only the bank statements were available. Petitioner did not maintain any cash register tapes. The Audit Division examined the guest checks and found that they were not in any numerical sequence. The Audit Division determined that the records were inadequate and incomplete for audit purposes and therefore deemed it necessary to reconstruct petitioner's sales by marking up purchases of food, liquor, beer and wine.

Purchase invoices for April, 1982 and May, 1982 for liquor, beer and wine were reviewed and the following markup percentages were computed: liquor - 319.37 percent; wine - 247.38 percent; and beer - 251.67 percent. The markups were computed using drink sizes and selling prices provided by the petitioner. The Audit Division allowed 15 percent for spillage. The food markup was estimated to be 100 percent based on audit experience with similar restaurants. Prices of drinks served at the bar differed with the price charged at tables and therefore, in computing the markups, the auditor proportioned 66-2/3 percent of sales to the bar and 33-1/3 percent to tables.

Total purchases for the period March 1, 1980 through May 31, 1982 were \$423,901.34. These purchases were allocated as follows: food - \$314,873.91 (74.28%); liquor - \$41,711.89 (9.84%); wine - \$42,135.79 (9.94%); and beer - \$21,237.46 (5.01%). These percentages were based on an analysis of purchase

invoices for March, 1982 through May, 1982. Purchases were adjusted to \$380,567.42 to reflect supplies included in purchases, an inventory increase, employee meals and spoilage. The markup percentages were applied to applicable purchases to arrive at taxable sales of \$927,814.52. Petitioner reported taxable sales of \$630,518.00 for the same period, leaving additional taxable sales of \$297,296.52 or an increase of 47.15 percent. This percentage was used to determine total additional taxable sales and taxes due of \$26,120.61 for the entire audit period.

An analysis of three days' guest checks in May, 1982 revealed that petitioner overcollected sales tax of \$1.14. This amount was divided by tax reported of \$209.37 to arrive at an error factor of .54 percent. This percentage was applied to total sales tax reported to determine overcollections of \$440.14 for the audit period.

The audit also disclosed use taxes due of \$171.71 on expense purchases and \$792.32 on beverages consumed by employees.

5. Following a pre-hearing conference, the additional taxes due resulting from the markup test were adjusted to \$17,225.67. The revision was based on the following reductions to the markup percentages: food - 75 percent; liquor - 270 percent; wine - 215 percent; and beer - 251.67 percent. The penalty assessed was also waived at the conference.

6. Petitioner argued that it maintained complete books and records which were available for audit and therefore the Audit Division's use of markup percentages and estimates was improper.

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's guest checks were useless in serving as a verifiable record of taxable sales. They were not in numerical sequence and they could not be reconciled to cash register tapes. Moreover, there were no records for six months of the audit period. Accordingly, petitioner's books and records were clearly inadequate and unreliable for audit purposes (Matter of George Korba v. State Tax Commission, 84 A.D.2d 655). Under such circumstances, the Audit Division's use of a test period and a markup percentage audit was proper in accordance with section 1138(a) of the Tax Law (Matter of Hanratty's/732 Amsterdam Tavern, Inc. v. State Tax Commission, 88 A.D.2d 1028).

B. That the Audit Division reasonably calculated petitioner's tax liability and petitioner has failed to demonstrate by clear and convincing evidence that the audit method or the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. Tully, 84 A.D.2d 858).

C. That in accordance with Finding of Fact "5", the additional taxes due are reduced to \$18,629.87 and the penalty is cancelled.


D. That the petition of King Crab Restaurant, Inc. is granted to the extent indicated in Conclusion of Law "C"; the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use

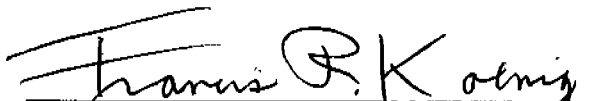
Taxes Due issued February 18, 1983; and that, except as so granted, the petition is in all other respects denied.

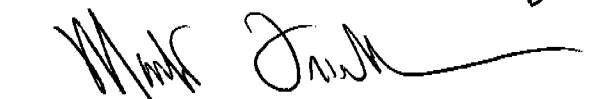
DATED: Albany, New York

OCT 30 1985

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER