

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

JOAN O'ROURKE DELICATESSEN, INC.

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 August 31, 1982. .

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DECISION

In the Matter of the Petition

of :

JOAN O'ROURKE DELICATESSEN, INC.

for Redetermination of a Deficiency or for  
Refund of Corporation Franchise Tax under  
Article 9-A of the Tax Law for the Years 1978 :  
through 1982.

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Petitioner, Joan O'Rourke Delicatessen, Inc., 1812 Flatbush Avenue,  
Brooklyn, New York 11210, 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 August 31, 1982 (File No. 44419) and a  
petition for redetermination of a deficiency or for refund of corporation  
franchise tax under Article 9-A of the Tax Law for the years 1978 through 1982  
(File No. 54600).

A consolidated hearing was held before Jean Corigliano, Hearing Officer,  
at the offices of the State Tax Commission, Two World Trade Center, New York,  
New York, on March 18, 1986 at 1:45 P.M., with all briefs to be submitted by  
June 2, 1986. Petitioner appeared by William I. Shore, Esq. The Audit Division  
appeared by John P. Dugan, Esq. (Joseph W. Pinto, Esq., of counsel).

ISSUES

I. Whether the Audit Division correctly determined additional sales and corporation franchise taxes due from petitioner.

11. Whether petitioner's sales tax liability for the captioned period was irrevocably fixed when petitioner signed and filed a Statement of Proposed Audit Adjustment.

FINDINGS OF FACT

1. On February 10, 1983, as the result of a field audit, the Audit Division issued two notices of determination and demands for payment of sales and use taxes due against petitioner, Joan O'Rourke Delicatessen, Inc. The first assessed a tax due in the amount of \$31,133.11 plus penalty of \$7,662.10 and interest of \$10,941.58 for a total of \$49,736.79 for the period September 1, 1978 through August 31, 1981. The second notice assessed a tax due in the amount of \$12,199.17 plus penalty of \$1,672.18 and interest of \$1,297.22 for a total of \$15,168.57 for the period September 1, 1981 through August 31, 1982.

2. On November 16, 1982, petitioner, by its president, signed a consent extending the period of limitation for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1978 through November 30, 1979 to April 20, 1983.

3. On March 19, 1984, the Audit Division issued five notices of deficiency pursuant to Article 9-A of the Tax Law against petitioner as summarized below:

| <u>Period<br/>Ended</u> | <u>Tax</u> | <u>Interest</u> | <u>Add'l<br/>Charge</u> | <u>Total Due</u> |
|-------------------------|------------|-----------------|-------------------------|------------------|
| 12/31/78                | \$9,360.00 | \$5,018.00      | \$5,101.00              | \$19,479.00      |
| 12/31/79                | 9,360.00   | 4,219.00        | 4,540.00                | 18,119.00        |
| 12/31/80                | 9,360.00   | 3,419.00        | 3,604.00                | 16,383.00        |
| 12/31/81                | 9,360.00   | 2,149.00        | 3,416.00                | 14,925.00        |
| 12/31/82                | 9,360.00   | 569.00          | 2,855.00                | 12,784.00        |

4. Attached to each of the notices summarized above was a Notice of Failure to File Corporation Tax Form covering the same period as that covered by the notice. The franchise tax deficiencies were predicated solely on the results of the sales tax field audit.

5. Petitioner operated a combination grocery store and delicatessen, selling sandwiches and other prepared foods. At the commencement of the audit, a request was made for petitioner's books and records but none were made available. Consequently, the Audit Division resorted to an observation test to verify petitioner's reported taxable sales.

6. Petitioner's ordinary business hours were 9:30 A.M. to 7:30 P.M. **Two** auditors conducted the observation test on July 7, 1981 between the hours of 9:30 A.M. and 3:30 P.M. The auditors positioned themselves next to the sales counter where they could see each sale. As a sale was made, they determined whether or not the item being sold was or was not taxable and entered the selling price of the item on a schedule divided into the following categories: non-taxable, sandwiches, coffee, beer, cigarettes, soda and other sundries. At the end of the six hour test, the auditors had recorded gross sales of \$475.15 and taxable sales of \$270.91 or 57.02 percent of gross receipts. Because petitioner alleged that its sale of taxable items increased in the summer months and decreased in the winter, the auditor adjusted the taxable sales percentage to correspond to seasonal changes: 57.02% in the summer months; 47.02% in the autumn months; 30% in the winter months; and 45% in the spring months. He then applied these percentages to reported gross sales in the corresponding sales tax quarters which resulted in audited taxable sales of \$155,432.31 with a tax due on that amount of \$12,434.58. Finally, the auditor subtracted tax paid by petitioner to arrive at additional tax due of \$8,752.36.

7. The auditor prepared a Statement of Proposed Audit Adjustment, asserting a tax due of \$8,752.36 plus simple interest and submitted the same to petitioner on January 20, 1982. Petitioner, by its president, signed the statement and returned it to the Brooklyn District Office of the Department of Taxation and Finance on February 19, 1982.

8. The following explanation appears on the statement directly above the signature box:

"The Tax Law provides that a taxpayer is entitled to have tax due finally and irrevocably fixed by filing a signed consent with the State Tax Commission. Such consent, subject to approval of the State Tax Commission, waives the ninety (90) day period for fixing tax due but does not waive the taxpayer's right to apply for a credit or refund within the time limit set forth in the statute."

9. After receiving the signed statement, the auditor submitted petitioner's case to his supervisor for approval. Upon review, the supervisor noted that the audit method used did not take into account a substantial increase in gross sales revealed by the observation test. Consequently, the auditor recalculated petitioner's tax liability still using the results of the July 7 test. The auditor determined that during the six hour test period petitioner had averaged hourly gross sales of \$79.19. Based on a ten hour business day, the auditor calculated average daily gross sales of \$791.90. The taxable percentage of 57.02 was applied to this figure to determine average daily taxable sales of \$451.54. Sales tax of eight percent then was subtracted to obtain daily taxable sales of \$418.09. Utilizing a six day week and a thirteen week sales tax quarter, the auditor next computed audited taxable sales of \$32,611.02 for the period June 1, 1981 through August 31, 1981. An error rate of 845.2470 percent was calculated by dividing additional taxable sales by reported taxable sales. The error rate was applied to reported taxable sales for the period

September 1, 1978 through August 31, 1981 to obtain additional taxable sales. Reported and additional taxable sales then were combined yielding total audited taxable sales of \$435,191.70 with a sales tax on that amount of \$34,815.23. The tax already paid was subtracted from that figure to determine tax due of \$31,133.11.

10. In the course of the audit, it was determined that petitioner had failed to file sales tax returns for the period September 1, 1981 through May 31, 1982. Consequently, liability was assessed using audited taxable sales figures from the corresponding sales tax quarters **in** the prior year. Additional tax due was determined for the sales tax quarter ended August 31, 1982 using the methodology described in Finding of Fact "9". This resulted in a total tax due of \$12,199.17 for the period September 1, 1981 through August 31, 1982.

11. **On** the basis of the above calculations, the auditor prepared a second statement of proposed audit adjustment asserting a tax due of \$43,332.28 plus penalty and statutory interest. Petitioner rejected the second proposal. Because **of** petitioner's contention that the results **of** the first test were not representative of petitioner's overall sales, the Audit Division agreed to conduct a second observation test.

12. The second observation test was conducted on November 16, 1982, from 7 A.M. to 6 P.M. using exactly the same method **as** the first test. The results were similar. Gross sales for the day were determined to be \$677.71 of which 54.8155 percent were determined **to** be taxable sales. The Audit Division deemed the differences between the first and second test to be too insignificant to warrant an adjustment in the assessment issued.

13. Petitioner retained the services of an accountant throughout the audit period. Until receiving notices of failure to file corporation tax forms.

petitioner's president believed that the accountant had timely filed all State and Federal tax returns.

14. At hearing, petitioner's president asserted that he had informed the Audit Division of the availability of a daybook but had been told that it was not needed. He also alleged that a cash register was normally used during the audit period but was broken on the day of the test. It is petitioner's position that the results of the first observation test were not representative of its taxable sales. The only documentary evidence produced by the petitioner consisted of copies of late filed U.S. Corporation Income Tax Returns, State of New York Corporation Franchise Tax Reports, and City of New York General Corporation Tax Returns for years 1980 through 1983.

15. In the alternative, petitioner argues that pursuant to Tax Law §1138 the Tax Commission's failure to disapprove the offered consent within 90 days of its receipt irrevocably fixed the tax at the amount agreed to by the taxpayer.

#### CONCLUSIONS OF LAW

A. That Tax Law §1135(a) 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. Petitioner did not provide the Audit Division with any document which would serve as a verifiable record of taxable sales. Furthermore, there was no credible evidence adduced at hearing to show that reliable records existed which would satisfy the statutory requirement that records of individual sales be retained. Petitioner's failure to produce adequate records made it virtually impossible to verify taxable sales and conduct a complete audit. Consequently, the Audit Division's use of an observation test to determine petitioner's tax liability was proper and in accordance with Tax Law §1138(a)(1).

B. That the petitioner failed to establish any error in the method of audit **or** the tax assessed. In fact, the second observation test produced significantly similar results as the first test and tended to confirm the correctness of the audit.

C. That Tax Law §1138(c) of the Tax Law provides as follows:

"[a] person liable for collection or payment of tax (whether or not a determination assessing a tax pursuant to subdivision (a) **of** this section has been issued) shall be entitled to have a tax due finally and irrevocably fixed prior to the ninety-day period referred to in subdivision (a) of this section, by filing with the tax commission a signed statement in writing, in such form as the tax commission shall prescribe, consenting thereto."

D. That the Statement of Proposed Audit Adjustment, although not labeled as such, was a consent document within the meaning of Tax Law §1138(c). However, the language on the face of the document clearly states that it is "subject to approval of the State Tax Commission," and the Commission has held that such consents are "[s]ubject **to** review for any error" (Matter of Idris Sari d/b/a Corner Luncheonette, State Tax Comm., September 9, 1983; Matter of Adirondack Steel Casting Co., Inc., State Tax Comm., May 8, 1985). Furthermore, the Appellate Division has approved the Commission's reading of the statute (Adirondack Steel Casting Co. v. State Tax Comm., \_\_AD2d\_\_ [June 19, 1986]). Here, a routine supervisory review revealed a substantial error in the method of calculating taxable sales inasmuch as the audit method failed to take into account significant underreporting of gross sales. Accordingly, the consent did not preclude the Audit Division from **redetermining** petitioner's tax liability utilizing a method calculated to more accurately reflect the taxes due.

E. That Tax Law §1138(a)(1) provides that the Tax Commission's determination is final unless the taxpayer applies for a hearing within 90 days, or the Tax

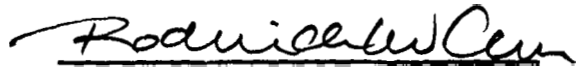
the statute, in conjunction with Tax Law §1138(c), in such a way as to require the Tax Commission to reject an offered consent within 90 days or be bound by it. There is simply no support **for** this interpretation of the statute. The 90 day period is triggered by the issuance of a notice of determination and has no relevance to other documents (West Mountain Corp., 105 AD2d 989).

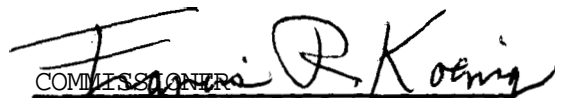
F. That the petitions **of** Joan O'Rourke Delicatessen, Inc. are denied and that the notices **of** determination and demands for payment of sales and use taxes due issued February 10, 1983 and the notices of deficiency issued March 19, 1984 are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

SEP 26 1986

  
PRESIDENT

  
COMMISSIONER  
COMMISSIONER

  
COMMISSIONER