

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

MARGARET AHLERS, AS OFFICER OF
GOLD LAKE DAIRY & DELICATESSEN, 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 November 30, 1982.

Petitioner, Margaret Ahlers, as officer **of** Gold Lake Dairy & Delicatessen, Inc., 355 West Street, Harrison, New York, 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 November 30, 1982 (File No. 44433).

A hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 5, 1985 at 9:15 A.M. Petitioner appeared by Howard W. Muchnick, Esq. (Rhonda Kaplan, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined petitioner's sales tax liability.

FINDINGS OF FACT

1. On February 11, 1983, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Margaret Ahlers, as an officer of Gold Lake Dairy & Delicatessen, **Inc.** ("the corporation"), in the amount of \$5,609.43,

plus interest of \$1,421.35, for a total due of \$7,030.78 for the period March 1, 1979 through August 31, 1982. On the same date, a second notice was issued against petitioner in the amount of \$129.38, plus interest of \$2.51, for a total due of \$131.89 for the period September 1, 1982 through November 30, 1982.

2. Petitioner was the secretary of the corporation which operated a delicatessen in Larchmont, New York during the period in issue. On October 25, 1982, the corporation sold the business to ADSU Gold Lake Restaurant, Inc. for \$70,096.88. The Audit Division was notified of the bulk sale on November 16, 1982. Petitioner and her husband had originally purchased the business in 1979 for approximately \$180,000.00.

3. Subsequent to the sale, the Audit Division commenced an audit of petitioner's business. The only records available on audit were a sales journal, a check disbursements journal and Federal income tax returns. The remainder of the records had either been destroyed in a flood or thrown away by the new owners. Gross sales as reported on sales tax returns were essentially the same as those reported in the sales journal and Federal tax returns. Since there were no invoices, guest checks or cash register tapes, the auditor decided to perform an observation test of the business under its new ownership. However, the new owners refused to allow the auditor to stay on the premises to conduct the test. As a result, the auditor increased taxable sales by 25 percent because she thought the business was primarily a restaurant rather than a take-out delicatessen. Petitioner had reported an average taxable percentage of 55.78 percent. Increasing taxable sales by 25 percent raised the taxable percentage to 70 percent which was more in line with the taxable percentage of a restaurant operation.

4. When petitioner and her husband first bought the delicatessen, it appeared to be a promising restaurant business, however, the restaurant portion of the business declined rapidly. Initially, the business was open seven days a week from 6:00 A.M. to 9:00 P.M. serving breakfast, lunch and dinner. Eventually, only one or two customers came in at night and the business closed at 6:00 P.M. each day and only breakfast and lunch were served. There were only 15 to 20 regular customers each day who ate breakfast and lunch in the restaurant section of the delicatessen. The remainder of the sales consisted of non-taxable sales of cold cuts and salads by the pound, cold fish, and dairy products and taxable sales of beer and soda. The busiest period of the week was Sunday morning when many customers came in to purchase bagels, cream cheese and cold fish to take home for breakfast. Again, very few customers remained to eat in the restaurant section.

5. During the period when petitioner owned the business, there was a counter with nine stools and some booths and tables with additional seating for 25 customers. At the time the auditor visited the business location, the new owners had increased the number of booths and tables to 15 creating a substantially increased seating capacity. Petitioner thought that she had less than 55 percent taxable sales, however, her accountant insisted that she report 55 percent because, on audits conducted prior to her taking over, the auditors had told the accountant that a 55 percent taxable ratio was correct for the type of business.

CONCLUSIONS OF LAW

A. That section 1135 of the Tax Law, in effect during the period in issue, requires every person required to collect sales tax to keep records of every sale and of the tax payable thereon. "Such records shall include a true copy of each sales slip, invoice, receipt, statement or memorandum...". Section 1138(a) provides that if a sales tax return "is not filed, or 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. If necessary, the tax may be estimated on the basis of external indices...".

"When records are not provided or are incomplete and insufficient, it is [the Tax Commission's] duty to select a method reasonably calculated to reflect the taxes due. The burden then rests upon the taxpayer to demonstrate...that the method of audit or the amount of the tax assessed was erroneous." Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 A.D.2d 858.

B. That inasmuch as petitioner had very limited records available, it was proper for the auditor to conduct an audit using external Indices. However, no consideration was given to the fact that the new owners considerably changed the primary nature of the business from that of a take-out delicatessen to that of a restaurant. A taxable ratio of 70 percent may have been the industry standard for restaurants, however, this business was not a standard restaurant. A large proportion of the business consisted of non-taxable take-out sales. Allowing for taxable sales of beer and soda, the 55 percent taxable ratio as reported by petitioner was accurate and petitioner's taxable sales will be accepted as reported.

C. That the petition of Margaret Ahlers, as officer of Gold Lake Dairy & Delicatessen, Inc. is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued February 11, 1983 is cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

APR 04 1986

Roderick W. Clem
PRESIDENT

Francis R. Koenig
COMMISSIONER

Walter J. Jank
COMMISSIONER

P 319 373 598

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL
(See Reverse)

★ U.S.G.P.O. 1985-480-794

PS Form 3800, June 1985

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Margaret Ahlers	
Office of Goldlake Dairy Delicatessen Inc	
355 West St.	
P.O., State and ZIP Code	
Harrison, NY	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt showing to whom and Date Delivered	
Return Receipt showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

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★ U.S.G.P.O. 1985-480-794

PS Form 3800, June 1985

Sent to	
Howard W Muchnick	
Street and No.	
555 Madison Ave.	
P.O., State and ZIP Code	
New York, 10022	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt showing to whom and Date Delivered	
Return Receipt showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
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