

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
GLENN CARROZZA	:	DECISION
d/b/a GLENN'S WINES & LIQUORS	:	
	:	
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, 1980	:	
through February 28, 1983.	:	

Petitioner, Glenn Carrozza, d/b/a Glenn's Wines & Liquors, 145 13th Street, Verplanck, New York 10596, 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, 1980 through February 28, 1983 (File No. 45138).

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 October 8, 1985 at 1:15 P.M. with all briefs to be submitted by January 10, 1986. Petitioner appeared by Lorentz W. Hansen, Esq. and Marshall L. Goldstein, Esq. 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 April 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, Glenn Carrozza d/b/a Glenn's Wines & Liquors in the

amount of \$8,376.67 plus interest of \$1,490.85 for a total due of \$9,867.52 for the period March 1, 1980 through February 28, 1983.

2. Petitioner operated a liquor store in Larchmont, New York. On January 3, 1983, petitioner sold the business to one Joong J. Lee. Pursuant to the bulk sale, the Audit Division commenced an audit of the business. Due to an apparent misunderstanding with respect to which records the auditor needed to conduct the audit, petitioner produced only a portion of his available books and records. As a result, the auditor deemed his records to be inadequate to conduct a complete audit and performed a markup test utilizing the purchase invoices and selling prices of the new owner for the month of February, 1983. The auditor computed a markup on wine sales of 46.63 percent and on liquor sales of 17.75 percent or a combined markup of 27.96 percent. Petitioner's combined markup based on his general ledger figures was 14.5 percent. The recomputed combined markup was applied to total purchases for the audit period to obtain additional taxable sales of \$154,252.80 resulting in tax due on sales of \$8,067.88. The auditor also determined \$162.50 in sales tax due on fixed asset purchases and \$146.29 sales tax due on miscellaneous expense purchases. The latter amounts have not been contested.

3. Petitioner utilized one cash register at the store. The register had two compartments, one for wine sales and one for liquor sales, and was programmed to automatically compute sales tax on each sale. Each night petitioner would obtain the sales totals and sales tax collected totals for the day. The daily totals were then entered on a monthly report sheet which was sent to petitioner's accountant. Petitioner retained all of his cash register tapes and all of his monthly report sheets at his accountant's office. At the hearing petitioner produced all of his tapes except for one two week period. None of the tapes

or the monthly report sheets was used during the audit. Petitioner's accountant prepared general ledgers from the monthly report sheets and other bills and invoices supplied by petitioner. The accountant also prepared petitioner's sales tax returns and income tax returns from the information provided by petitioner. Each day's sales during the audit period were easily traceable from the cash register tape to the appropriate sales tax return.

4. Petitioner maintained a separate bank account for sales tax collected. When sales tax was due each quarter, he withdrew the money from the account and sent a bank check to the Department of Taxation and Finance.

5. Petitioner maintained that the discrepancy between the markup on audit and the markup per his general ledger could be explained by the fact that the new owner immediately raised the prices of the entire inventory. Petitioner's aunt, who occasionally worked at the store, remained after the sale to assist Mr. Lee, the new owner, in changing prices. She spent ten days raising the price of virtually every item in the store. The price changes occurred in the middle of January, 1983 and the auditor used the following month to compute the markup.

CONCLUSIONS OF LAW

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

"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, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors."

Such external indices may not be used unless it is "virtually impossible to verify taxable sales receipts and conduct a complete audit" with available records. Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44, 46.


B. That petitioner maintained all the register tapes for the period, along with other accounting papers with which a complete audit could have been performed. "[I]t is the lack of adequate records that authorizes the use of the [markup] test." Christ Cella v. State Tax Commission, 102 A.D.2d 352. 354; Matter of STW Sales, Inc., State Tax Commission, January 18, 1985. Although cash register tapes may be considered inadequate records if they do not indicate clearly whether an item is taxable or nontaxable, Licata v. Chu, 64 N.Y.2d 873, in this case all of petitioners sales were of taxable items. Moreover, the Audit Division's markup test was inaccurate in light of the fact that the new owner raised all the prices. Therefore, resort to the use of external indices was not warranted and petitioner's sales are accepted as reported. The assessment will be reduced to \$308.79 plus interest which was the tax due on fixed asset and expense purchases.

C. That the petition of Glenn Carrozza d/b/a Glenn's Wines & Liquors is granted to the extent indicated in Conclusion of Law "B"; that the Audit Division is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued April 11, 1983; and that, except as so granted the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

APR 15 1986


PRESIDENT


COMMISSIONER


COMMISSIONER