

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
CATHERINE DUPREE	:	DECISION
D/B/A CATHERINE'S NEW WORLD LOUNGE	:	
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 December 1, 1979	:	
through November 30, 1982.	:	

Petitioner, Catherine Dupree d/b/a Catherine's New World Lounge, 48 North Swan Street, Albany, New York 12201, 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 December 1, 1979 through November 30, 1982 (File No. 45255).

A hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, Building #9, W. Averell Harriman State Office Building Campus, Albany, New York, on February 26, 1986 at 9:15 A.M., with all briefs to be submitted by April 30, 1986. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel).

ISSUE

Whether, as a result of a field audit, the Audit Division correctly determined the amount of sales tax due.

FINDINGS OF FACT

1. Petitioner, Catherine Dupree, operated a bar known as Catherine's New World Lounge ("Catherine's") in Albany, New York.

2. On March 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 to petitioner, Catherine Dupree d/b/a Catherine's New World Lounge, assessing

sales tax for the period December 1, 1979 through November 30, 1980 in the amount of \$3,083.71, plus penalty of \$770.91 and interest of \$1,042.11, for a total amount due of \$4,896.73. On May 20, 1983, the Audit Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period December 1, 1980 through November 30, 1982 in the amount of \$8,455.57, plus penalty of \$1,527.14 and interest of \$1,385.06, for a total amount due of \$11,367.77.

3. In the course of the audit, the Audit Division learned that it was petitioner's practice to discard purchase invoices at the time of payment. In addition, petitioner did not possess original sales records. Further, petitioner's purchase and sales journals were only maintained on a fragmented basis.

4. Since petitioner had few records available for audit, the Audit Division contacted petitioner's suppliers of liquor, wine and beer in order to determine the amount of petitioner's purchases during the audit period. Further, the Audit Division requested that petitioner retain her invoices for the month of January 1983. On the basis of the size of the bottles indicated on the invoices, and the drink size and the selling price indicated by Ms. Dupree, the Audit Division computed a markup of 314 percent on liquor sales and 178 percent on beer sales. The markup on liquor sales was computed after taking into account a 15 percent loss due to spillage. These markups were then multiplied by the purchases to determine the total sales including sales tax. This product was then divided by 107 percent resulting in audited gross sales. The audited gross sales were reduced by the sales which had been reported to determine the additional taxable sales.

5. Petitioner filed New York State and local sales and use tax returns for the periods ended February 28, 1980 through August 31, 1981. She did not file sales tax returns for the remainder of the periods in issue.

6. During the audit period, it was petitioner's practice to pour drinks containing a relatively large amount of liquor. Petitioner did this because the business was new and petitioner sought to attract customers. In determining the amount of sales taxes due, the Audit Division determined that petitioner's drinks utilized an average of one ounce of liquor per drink. In contrast, petitioner maintained that she utilized an average of three ounces of liquor per drink.

7. When the Audit Division contacted the liquor distributor of Graves & Rogers, Inc., the Audit Division was advised that due to computer software problems, petitioner's purchases of liquor for the months of January, February and March, 1980 were not available. Therefore, in calculating additional taxable sales, the Audit Division estimated petitioner's purchases for said months. At the hearing, petitioner presented evidence from Grave & Rogers, Inc. that, in fact, petitioner did not make purchases from Graves & Rogers, Inc. during the months of January through March, 1980.

8. One of petitioner's distributors contacted by the Audit Division to determine petitioner's purchases was Keis Distributors, Inc. For the period ended September 11, 1980, the Audit Division inadvertently overstated petitioner's purchases by \$150.30. Similarly, for the period ended March 5, 1981, the Audit Division inadvertently overstated petitioner's purchases by \$312.25.

9. At the hearing, petitioner maintained that the selling prices of drinks were lower than that utilized by the Audit Division. However, no documentary evidence of sales prices was presented. Further, petitioner

maintained that there were three thefts of inventory during the audit period which were not taken into account by the Audit Division in its assessment. Nevertheless, petitioner presented no documentary evidence to establish either the existence or amount of the thefts. Petitioner also asserted that it had a "happy hour" on Mondays, Tuesdays and Wednesdays of each week and that the Audit Division failed to take this into account. However, petitioner did not present any evidence to establish the amount of its sales during its "happy hour" period. Lastly, petitioner maintained that Keis Distributors, Inc. reported substantially more sales to petitioner during the years 1981 and 1982 than in fact occurred. However, no books or records were presented to substantiate this argument.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides, in part, that if a return required to be filed is incorrect or insufficient, the Tax Commission shall determine the amount of tax due on the basis of such information as may be available. This section further provides that, if necessary, the tax may be estimated on the basis of external indices.

B. That resort to the use of a test period to determine the amount of tax due must be based upon an insufficiency of record keeping which makes it virtually impossible to determine such liability and perform a complete audit (Matter of Chartair, Inc. v. State Tax Commission, 65 AD2d 44). Petitioner did maintain some books and records which were available to the Audit Division. These records, however, were insufficient for verification of taxable sales. Accordingly, the Audit Division's use of a markup audit to estimate the tax due from petitioner was reasonable under the circumstances (Matter of Licata v. Chu, 64 NY2d 873).

C. That in determining the amount of a sales tax assessment, it is the duty of the Audit Division to select a method "'reasonably calculated to reflect the taxes due' (Matter of Grant Co. v. Joseph, 2 NY2d 196, 206)" (Matter of Meyer v. State Tax Comm., 61 AD2d 223, 227 lv denied 44 NY2d 645). When the Audit Division employs such a method, it becomes incumbent upon the petitioner to establish error (Matter of Meyer v. State Tax Comm., supra).

D. That in view of petitioner's practice to pour drinks containing a relatively large amount of liquor, it is found that petitioner poured drinks containing, on average, two ounces of liquor. Therefore, the Audit Division is directed to adjust the results of its audit accordingly.

E. That in view of Finding of Fact "7", the Audit Division is directed to delete the sales tax due arising from the estimated purchases from Graves & Rogers, Inc. during the months of January through March 1980. Similarly, in view of Finding of Fact "8", the Audit Division is directed to reduce the sales tax due resulting from the overstated purchases for the periods indicated in said Finding of Fact.

F. That since no documentation has been presented as to the selling prices of petitioner's liquors, wines and beers, the selling prices utilized by the Audit Division are accepted. Further, petitioner has not presented sufficient evidence to establish the amount of an adjustment for theft losses. In addition, since there is no evidence as to the amount of petitioner's sales during its "happy hour", an adjustment for sales during these time periods is also unwarranted. Lastly, in the absence of documentary evidence to the contrary, the Audit Division's reliance on the records of Keis Distributors, Inc. was proper. It is noted that "exactness is not required when it is petitioner's

own failure to maintain proper records which prevents it (Matter of Markowitz v. State Tax Comm., 54 AD2d 1023, affd 44 NY2d 684).

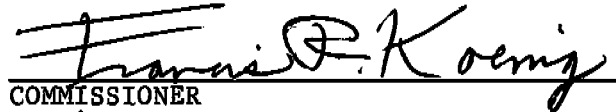
G. That the petition of Catherine Dupree d/b/a Catherine's New World Lounge is granted to the extent of Conclusions of Law "D" and "E"; that the Audit Division is directed to modify the notices of determination issued March 18, 1983 and May 20, 1983; and that, except as so granted the petition is, in all other respects, denied.

DATED: Albany, New York

STATE TAX COMMISSION

DEC 23 1986


PRESIDENT


COMMISSIONER


COMMISSIONER