

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
DU HYON PAK	:	DECISION
D/B/A PAK FISH MARKET	:	
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 April 1, 1981	:	
through February 28, 1983.	:	

Petitioner, Du Hyon Pak d/b/a Pak Fish Market, 75-17 41st Avenue, Apt. 3D, Elmhurst, New York 11373, 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 April 1, 1981 through February 28, 1983 (File No. 46062).

A hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 8, 1985 at 9:15 A.M., with all briefs to be submitted by December 8, 1985. Petitioner appeared by Kevin Lee, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUE

Whether the audit method used to determine additional sales and use taxes due from petitioner was proper and correct.

FINDINGS OF FACT

1. On August 19, 1983, the Audit Division, as a result of a field examination, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner for the period April 1, 1981 through February 28, 1983. Said Notice assessed additional sales and use taxes due of \$14,438.75, plus simple interest of \$2,188.17, for a total amount due of \$16,626.92.

2. Petitioner was in the business of selling fresh (raw) fish and also cooked fish and soda. Petitioner's records included sales tax returns, federal and state income tax returns, depreciation schedules, sales journal and cancelled checks. Mr. Pak did not have cash register tapes, guest checks or any other records that could be used to verify the accuracy of reported taxable sales. Petitioner estimated the taxable sales reported on his sales tax returns.

3. Since petitioner's books and records were inadequate, the Audit Division resorted to the use of an observation test to verify the accuracy of reported taxable sales. The auditor assigned to the case recorded petitioner's taxable sales for a three (3) day period and projected the results of said three (3) day observation test over the entire audit period. The following table details the manner in which additional taxable sales of \$139,874.42 were computed:

Taxable sales for days observed		
Monday, May 9, 1983	\$234.81	
Tuesday, May 10, 1983	212.65	
Friday, May 27, 1983	<u>373.35</u>	
Total for three (3) days		\$ 820.81
Multiplied by 2 to compute weekly sales		x 2
Total for six (6) day week		<u>1,641.62</u>
Multiplied by 13 weeks per quarter		x 13
Taxable sales per quarter		<u>21,341.06</u>
Multiplied by seven (7) quarters		x 7
Taxable sales for audit period		<u>149,387.42</u>
Less reported taxable sales		9,513.00
Additional taxable sales		<u>\$139,874.42</u>

The Audit Division's assertion of additional taxable sales of \$139,874.42 produced a sales tax deficiency of \$11,491.83.

4. In addition to the aforementioned sales tax deficiency, the Audit Division also determined a use tax deficiency of \$2,946.92. Sometime in April of 1981, petitioner rented a vacant store and thereafter made certain leasehold improvements and purchases of machinery totalling some \$42,700.00. The sales

tax auditor requested that petitioner submit evidence to prove that sales tax had been paid on said leasehold improvements and machinery. Petitioner was able to produce purchase invoices which showed that sales tax had been paid on only \$5,863.56. No invoices were submitted for the balance of \$36,836.44 and a use tax deficiency of \$2,946.92 was therefore assessed ($\$42,700.00 - \$5,863.56 \times .08$).

5. Petitioner argued that his business was seasonal and that the Audit Division's three (3) day observation test was conducted during his busiest season, therefore producing a distorted result. No credible documentary or other evidence was adduced at the hearing to support this contention. Furthermore, petitioner presented no evidence to show that sales tax had been paid on the balance of purchases of leasehold improvements and machinery totalling \$36,836.44.

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 did not have cash register tapes, guest checks or any other documents which would serve as a verifiable record of taxable sales. Under the circumstances, the Audit Division's use of an observation test was proper in accordance with section 1138(a) of the Tax Law (Matter of Licata v. Chu, 64 N.Y.2d 873; Matter of Sakran v. State Tax Commission, 73 A.D.2d 989).

B. That the Audit Division reasonably calculated petitioner's tax liability and petitioner has failed to demonstrate that the audit method or the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 A.D.2d 858).

C. That the petition of Du Hyon Pak d/b/a Pak Fish Market is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued August 19, 1983 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

APR 04 1986


PRESIDENT


COMMISSIONER


COMMISSIONER