

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
DUBONNAY'S CAFE, LTD.	:	DECISION
and FRANK COLETT, AS OFFICER	:	
	:	
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 June 1, 1979	:	
through November 30, 1981.	:	

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Petitioners, Dubonnay's Cafe, Ltd. and Frank Colett, as officer, 50 Westside Avenue, Haverstraw, New York 10927, 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 June 1, 1979 through November 30, 1981 (File Nos. 46792 and 49138).

A hearing was held before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 14, 1986 at 1:15 P.M. Petitioner, Dubonnay's Cafe, Ltd., appeared by its President, Frank Colett and petitioner, Frank Colett, appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined petitioners' additional sales tax liability.

FINDINGS OF FACT

1. Petitioner, Dubonnay's Cafe, Ltd. (hereinafter "the corporation"), a New York corporation, owned and operated a tavern known as Dubonnay's at Lake Road and Kings Highway, Valley Cottage, New York from February, 1979 until the

end of November, 1981. Petitioner, Frank Colett, was the president of the corporation and operator of the tavern.

2. On December 15, 1981, the corporation sold the business to J.P.A. Lake Road Cafe, Ltd. A Notification of Sale, Transfer or Assignment in Bulk bearing the date of December 28, 1981 was filed by the escrow agent, Attorney Ralph T. Romano, said document having been received by the Sales Tax Bureau of the Department of Taxation and Finance on January 4, 1982. The Notification stated that the total sales price of the business was \$170,000.00. No amount was listed for furniture and fixtures.

3. On March 29, 1982, the Audit Division issued to the corporation a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period June 1, 1979 through November 30, 1981, asserting total tax due in the amount of \$4,025.89, plus penalty of \$539.12 and interest of \$414.27, for a total amount due of \$4,979.28. The Notice informed the corporation that a markup of its purchases reported on the completed Bulk Sale Questionnaire resulted in an increase in reported taxable sales of 9 percent. For the period ended November 30, 1981, in addition to asserting sales tax due in the amount of \$137.41, the Audit Division estimated that, upon its sale of the tavern business to J.P.A. Lake Road Cafe, Ltd., furniture and fixtures in the amount of \$50,000.00 were transferred and, therefore, asserted bulk sales tax due of \$2,125.00. At the hearing held herein, the Audit Division stated that this bulk sales tax estimate was incorrect and, after examination of the contract of sale, bill of sale and consent to assignment of lease, agreed that only \$15,000.00 was subject to tax. Therefore, the Audit Division reduced its assessment of bulk sales tax due from \$2,125.00 to \$637.50 and the total tax due for this period from \$2,262.41 to \$774.91. On the same date, the Audit Division issued

a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner Frank Colett for the same periods and amounts of tax, penalty and interest, said Notice stating that Frank Colett was personally liable as an officer of the corporation under sections 1131(1) and 1133 of the Tax Law. As in the case of the Notice issued to the corporation, the Audit Division agreed to a reduction in the assessment for the period ended November 30, 1981 from \$2,262.41 to \$774.91.

4. Subsequent to the issuance of the aforesaid assessments to the corporation and to Frank Colett as officer of the corporation, a field audit of the tavern was performed for the period September 1, 1979 through November 30, 1981. Petitioners were requested to provide register tapes, daily summaries, general ledgers, guest checks, cash receipts and disbursements journals, purchase records and invoices and Federal tax returns. The only records which were provided were incomplete bank statements and purchase invoices for beer and liquor from the year 1981. On December 26, 1980, a broken sprinkler head at the tavern resulted in a flood in the basement where all business records were stored, thereby destroying all purchase invoices of merchandise prior to said date. Purchase invoices for 1981 were made available by the corporation's representative from which the Audit Division determined total merchandise purchases for said year in the amount of \$83,030.00. The auditor attempted to perform a markup test, but information regarding sizes and prices of drinks was not made available. Based upon industry averages, a markup of 200 percent on beer and 250 percent on wine and liquor was used, resulting in a percentage of error on reported sales of 30.148 percent. From this calculation of the percentage of error, the Audit Division determined that, in addition to the assessments of March 29, 1982 in the amount of \$4,025.89, additional sales tax

in the amount of \$4,141.31 was due and owing. Accordingly, on December 30, 1982, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period September 1, 1979 through November 30, 1981 was issued by the Audit Division to each of the corporation and Frank Colett, as officer of the corporation, in the amount of \$4,141.31, plus penalty of \$977.10 and interest of \$1,109.72, for a total amount due of \$6,228.13.

5. Petitioner Frank Colett contends that a "happy hour" was held at the tavern each day between the hours of 3:00 p.m. and 7:00 p.m. at which time all drinks were discounted. However, no credible evidence was presented which would confirm the existence of a daily "happy hour" nor was any evidence presented to show drink prices charged during such periods.

6. Neither in his petition nor at the hearing held herein did petitioner Frank Colett contest the Audit Division's determination that, as an officer of the corporation, he was a person who, pursuant to the provisions of section 1131(1) of the Tax Law, was required to collect any taxes imposed by Article 28 of the Tax Law. Petitioner Frank Colett was, therefore, properly determined to be personally liable for the sales tax due from the tavern business.

#### CONCLUSIONS OF LAW

A. That section 1135 of the Tax Law requires every person to collect tax, to maintain records of its sales and to make such records available for inspection and examination. Where records are not provided or are incomplete or insufficient, the tax due may be determined on the basis of external indices (Tax Law §1138[a]).

B. That petitioners' records were not complete and could not be used by the Audit Division to determine petitioners' exact sales tax liability; therefore, the Audit Division's use of a markup of purchases audit utilizing a test period is permitted (Matter of Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44).

C. That the Audit Division reasonably calculated petitioners' tax liability. When a taxpayer's recordkeeping is faulty, exactness is not required of the examiner's audit (Matter of Meyer v. State Tax Commission, 61 A.D.2d 223). The burden rests upon the taxpayer to demonstrate by clear and convincing evidence that the method of audit or the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization v. Tully, 85 A.D.2d 858). Petitioners have not sustained their burden of proving that the audit method employed or the amount of tax assessed was erroneous.

D. That the petition of Dubonnay's Cafe, Ltd. and Frank Colett are denied and the notices of determination and demand for payment of sales and use taxes due dated March 29, 1982 and December 30, 1982, after modification in accordance with Finding of Fact "3", are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JUL 03 1986

Rodriguez  
PRESIDENT

Francis R. Koelmig  
COMMISSIONER

[Signature]  
COMMISSIONER