

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

HAROLD J. LAUZON AND EMILY M. LAUZON
D/B/A CUB'S PLACE

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 June 1, 1980
through February 28, 1983.

Petitioners, Harold J. Lauzon and Emily M. Lauzon d/b/a Cub's Place, Townsend Road, Bombay, New York 12914, 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, 1980 through February 28, 1983 (File No. 47504).

A hearing was held before Jean Corigliano, Hearing Officer, at the offices of the State Tax Commission, 207 Genesee Street, Utica, New York, on August 12, 1986 at 2:45 P.M. Petitioners appeared by James McKee III, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUE

Whether the Audit Division properly estimated petitioners' tax liability.

FINDINGS OF FACT

1. On May 18, 1983, the Audit Division issued against petitioners, Harold J. Lauzon and Emily A. Lauzon d/b/a Cub's Place, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period June 1, 1980 through February 28, 1983, assessing a tax due of \$4,473.01 plus penalty and interest. The notice explained the basis of the assessment as follows:

"A markup of your purchases reported on the completed questionnaire has resulted in an increase in reported taxable sales of 40X. The following taxes are determined to be due in accordance with Section 1138 of the Sales Tax Law."

2. The questionnaire referred to in the notice was a bulk sale questionnaire completed by petitioners and timely submitted to the Central Office Audit Bureau. It shows that Cub's Place was a bar selling beer, wine, liquor and soft drinks. On the questionnaire, petitioners reported combined purchases of \$23,877.00 for the period December 1, 1981 through November 30, 1982. For the same period, petitioners reported taxable sales of \$51,256.00, which represents a markup of purchases of approximately 115 percent. The Audit Division's 40 percent increase in petitioners' reported taxable sales resulted from its determination that the markup reported by petitioners was too low.

3. As a result of petitioners' protest of the notice, the Audit Division granted what the auditor termed "a courtesy audit." The auditor reviewed petitioners' purchase invoices for the period September 1, 1982 through November 30, 1982 and determined total beer purchases for the period of \$9,817.98 and total liquor purchases of \$413.26. Using prices supplied by petitioners, the auditor estimated total audited sales for the period of \$22,684.85. Petitioners reported purchases for the period of \$5,313.00 and taxable sales of \$11,900.00.

4. The auditor included in purchases a group of invoices from A & M Beverages, Inc., showing sales of beer to the Fort Covington Bears Softball Team in the total amount of \$5,456.65. The invoices are marked "leave at Cub's Place" or "leave at Lauzon's." Cub's Place was located near the border of the St. Regis Indian Reservation. Deliveries of beer could not be made on the reservation. As a favor to their customers, petitioners allowed their place of business to be used as a drop-off point for beer sold to the softball team, whose members lived on the reservation. The beer was used for the team's

personal consumption and also was sold to raise money at dances and other social events held on the St. Regis reservation. The softball team paid the beer distributor directly for the beer it purchased.

CONCLUSIONS OF LAW

A. That the Audit Division, when conducting an audit, must determine the amount of tax due from such information as may be available. If necessary, the tax may be estimated on the basis of external indices (Tax Law §1138(a); Matter of George Korba v. New York State Tax Commn., 84 AD2d 655, 1v denied 56 NY2d 502). However, the audit method adopted must be reasonably calculated to reflect the taxes due (Matter of Grant Co. v. Joseph, 2 NY2d 196, 206, cert denied 355 US 869),


B. That the record does not reveal the basis for the Audit Division's determination that petitioners' reported markup was incorrect. Similarly, the source of the markup that was applied by the Audit Division is unknown. Under the circumstances, the forty percent increase in reported taxable sales which was assessed in the Notice of Determination and Demand for Payment of Sales and Use Taxes Due was not predicated upon an audit method reasonably calculated to reflect the taxes due. Furthermore, the audit conducted after the notice was issued included purchases made by a third party. When these purchases are excluded, there is no significant discrepancy between audited sales and reported sales.


D. That the petition of Harold J. Lauzon and Emily M. Lauzon d/b/a Cub's Place is granted, and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due is cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 30 1982


PRESIDENT


COMMISSIONER


COMMISSIONER