

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

THERESA RONCONE
D/B/A RONCONE'S GRILL :

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 Periods Ended February 28, :
1979 through December 21, 1981. :

Petitioner, Theresa Roncone d/b/a Roncone's Grill, 158 Lake Vista Court, Apartment #4, Rochester, New York 14607, 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 periods ended February 28, 1979 through December 21, 1981 (File No. 47640).

A hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, 259 Monroe Avenue, Rochester, New York, on September 11, 1985 at 10:45 A.M., with all documents to be submitted by October 2, 1985. Petitioner appeared by Oscar S. Block, P.A. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly estimated petitioner's sales tax liability.

II. Whether there is reasonable cause for the cancellation of penalties.

FINDINGS OF FACT

1. On December 11, 1981, petitioner's representative mailed to the Department of Taxation and Finance a Notice of Sale, Transfer or Assignment in Bulk, advising that Theresa Roncone planned to sell a restaurant known as Roncone's Grill on December 21, 1981.

2. On January 15, 1982, the Audit Division mailed to petitioner a bulk sale questionnaire which requested financial data concerning the restaurant's operation. The bulk sale questionnaire was not received by petitioner and, consequently, was not returned by her to the Audit Division.

3. On March 10, 1982, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner for the periods ended February 28, 1979 through December 21, 1981 assessing tax in the amount of \$9,397.23, plus penalty in the amount of \$1,709.33 and interest in the amount of \$1,731.25, for a total amount due of \$12,837.81. The Notice explained that reported taxable sales were increased by twenty-five percent based upon a review of the returns filed and the failure to submit the information requested. Since no return was filed for the last month of the restaurant's operation, the Audit Division estimated that petitioner had taxable sales of \$12,500.00 for said month resulting in tax due of \$875.00. The Audit Division did not assess a penalty for this month.

4. On June 1, 1982, the Audit Division mailed a bulk sale questionnaire to petitioner's representative which was similar to the questionnaire that was mailed on January 15, 1982. A cover letter attached to the questionnaire stated, in part, that consideration would be given to an adjustment of the assessment if the new questionnaire was completed and returned. The Audit Division also requested an opportunity to review petitioner's books and records.

5. On June 18, 1982, petitioner's representative returned a completed bulk sale questionnaire to the Audit Division. The books and records were not supplied. The information furnished on the bulk sale questionnaire indicated that the amount assessed by the Audit Division was reasonable.

6. Roncone's Grill was a family-style restaurant and bar. Prior to his death in 1981, the restaurant was owned by petitioner's husband, Joseph Roncone. Upon her husband's death, petitioner inherited the business.

7. Because of deteriorating health and an inability to walk, petitioner was unable to operate the business. Petitioner did not enter the restaurant from the time of her husband's death until after its sale. Although petitioner paid purchase invoices, all ordering was made by employees of the restaurant. Further, the restaurant's sales records were compiled by employees of the restaurant and given to petitioner.

8. Petitioner's sales tax returns were prepared by petitioner's accountants on the basis of summary information supplied to them by petitioner. No evidence was presented at the hearing that petitioner maintained any original sales documentation such as cash register tapes or guest checks.

9. On November 24, 1982, petitioner filed a New York State and Local Sales and Use Tax Return for the period December 1, 1981 through December 21, 1981. On this return, petitioner reported taxable sales and services of \$12,363.00 and sales and use taxes due of \$865.41.

10. No evidence was offered at the hearing as to the basis for determining that petitioner's sales were underreported by twenty-five percent.

11. At the hearing, petitioner's representative argued that the increase in sales of twenty-five percent was arbitrary since no audit was conducted. Further, petitioner's representative maintained that the assessment was a reprisal for his having prevailed in another proceeding. Petitioner also asserted that the markups they applied to their purchases were consistent with industry practices. Lastly, petitioner argued that the restaurant suffered substantial losses due to theft.

CONCLUSIONS OF LAW

A. Section 1138(a)(1) 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,... rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors."

B. 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, subd. [a]; Matter of George Korba v. New York State Tax Comm., 84 A.D.2d 655 mot. for lv. to app. den. 56 N.Y.2d 502). However, the audit method adopted must be reasonably calculated to reflect the taxes due (Matter of Grant Co. v. Joseph, 2 N.Y.2d 196, 206, cert. den. 355 U.S. 869).

C. That the twenty-five 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 "determined from such information as may be available" nor was it "estimated on the basis of external indices." Accordingly, the assessment for the periods ended February 28, 1979 through November 30, 1981 is cancelled. Similarly, the assessment for the period December 1, 1981 through December 21, 1981 is reduced to the amount of tax reported due of \$865.41 (Matter of Hair and Nails, Inc., State Tax Commission, November 7, 1985; Matter of William G. Miley, Jr. d/b/a Honest Bills, State Tax Commission, October 30, 1985). It is noted that proof gathered after the assessment is issued, which indicates that the assessment is reasonable, does not eliminate the requirement that an assessment be based upon such information as may be available at the time the notice is issued.


D. That in view of Conclusion of Law "C", the issue of whether there is reasonable cause for the cancellation of penalties is moot.


E. That the petition of Theresa Roncone d/b/a Roncone's Grill is granted to the extent of Conclusion of Law "C" and the Audit Division is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due accordingly; the petition is, in all other respects, denied and, as modified, the Notice is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

MAR 11 1986


PRESIDENT


COMMISSIONER


COMMISSIONER