

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
DANIEL BIANGASSO :
D/B/A D & S BAR & GRILL :
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 May 31, 1978 :
through December 18, 1980. :

DECISION

Petitioner, Daniel Biangasso d/b/a D & S Bar & Grill, 30-06 72nd Street, Jackson Heights, New York 11372, 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 May 31, 1978 through December 18, 1980 (File No. 47831).

A formal hearing was held before Jean Corigliano, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 12, 1985 at 10:00 A.M., with additional information submitted on September 30, 1985. Petitioner appeared by Dante C. Senise, P.A. The Audit Division appeared by John P. Dugan, Esq. (Joseph W. Pinto, Jr., Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined additional sales tax due based on a markup audit of petitioner's purchases of beer, liquor, wine and food.

II. Whether penalty and interest in excess of the minimum statutory rate should be cancelled.

FINDINGS OF FACT

1. Petitioner, Daniel Biangasso, was the sole owner and proprietor of a neighborhood bar and grill during the audit period in issue. Sales consisted primarily of beer, wine and liquor; however, as a matter of convenience to the bar's customers, food was also sold. Petitioner worked full time in this business and also employed a bartender and waitress.

2. On or about December 18, 1980, petitioner sold the business to a third party. Upon proper notification of sale, the Audit Division requested that petitioner complete a bulk sale questionnaire giving information regarding purchases and gross sales. Based on its knowledge of industry-wide standards, the Audit Division determined that petitioner's markups of beer, wine, liquor and food were too low and adjusted those markups accordingly. This resulted in a 60 percent increase in petitioner's reported taxable sales and an assessment of \$16,886.24.

3. On March 30, 1981, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner asserting taxes due in the amount of \$16,886.24, plus penalty of \$3,240.10 and interest of \$2,952.59, for a total amount due of \$23,078.93.

4. As a consequence of petitioner's request for an assessment review, the Audit Division conducted an audit of all available records. Cash register tapes were not provided and the guest checks made available to the auditor were undated, incomplete and sometimes illegible. The only other records available for audit were a daybook in which petitioner recorded daily sales and purchase transactions, Federal income tax returns, sales tax returns and purchase invoices. A reconciliation of 1979 Federal and state tax returns revealed a discrepancy in reported sales of approximately \$13,000.00.

5. In order to verify the accuracy of taxable sales reported, the Audit Division reconstructed sales through a markup of food, beer, liquor and wine. A combined liquor and wine markup of 237 percent was computed using purchases for a three month period in 1979, selling prices in effect at that time, a 15 percent allowance for spillage, one ounce servings of liquor and five ounce servings of wine. A beer markup of 155 percent was calculated in the same manner using an eight ounce glass. In a similar manner, the food markup was estimated to be 100 percent. Application of these markups to purchases yielded a 46.56 percent increase in reported sales. This 46.56 percent rate of error was then applied to petitioner's reported taxable sales for the entire audit period which resulted in audited taxable sales of \$515,598.00, with tax due thereon of \$41,247.84. Petitioner reported sales of \$351,798.00 and paid a tax thereon of \$28,143.95. Accordingly, the Audit Division issued a notice of assessment review to petitioner reducing the amount of tax due to \$13,103.89 plus penalty and interest.

6. At a tax conference, the Audit Division conceded that the markup on food should be reduced from 100 percent to 90 percent and that an allowance of 7.5 percent should be given for employee consumption of food and waste. These adjustments resulted in a revised tax liability of \$11,606.53.

7. Petitioner's employees free poured liquor serving an average of 1 7/8 ounces in each drink. In addition, much of petitioner's inventory was pilfered by his employees, and his bartender and waitress frequently gave away drinks and food to customers with whom they were friendly. These practices were so excessive that petitioner was eventually forced to sell the business. Petitioner produced no documentary evidence to verify the extent of the employee theft or buybacks.

8. Petitioner is not an experienced businessman; he opened the bar and grill to supplement his retirement income. Petitioner relied on his former accountant to maintain business records, advise him of proper accounting procedures and prepare all sales tax returns. The former accountant failed to properly advise petitioner. For example, during the audit period, petitioner's accountant consistently late filed tax returns resulting in the imposition of penalty and interest for each quarter. Petitioner was not aware of the problem until he received notices showing taxes were remitted but imposing penalties for the late filings. Petitioner paid these assessments and has retained a new accountant.

CONCLUSIONS OF LAW

A. That where a filed return is incorrect or insufficient, the amount of tax due shall be determined from such information as may be available but, "[i]f necessary, the tax may be estimated on the basis of external indices" (Tax Law, section 1138, subd. [a]). Petitioner's failure to retain any verifiable record of sales receipts as required by section 1135 of the Tax Law necessitated the use of a markup percentage audit by the Audit Division; the audit method employed was reasonable under the circumstances (Matter of Urban Liquors, Inc. v. State Tax Commission, 90 A.D.2d 576).

B. That petitioner has failed to show that the entire difference between his audited sales and reported sales was due to employee theft, free pouring and buybacks. However, the Audit Division has conceded that the tax due should be reduced to \$11,606.53 (Finding of Fact "6", supra). In addition, the Audit Division is directed to recalculate petitioner's markup on liquor by using a 1 7/8 ounce serving (Finding of Fact "7", supra) and to recompute petitioner's taxable sales accordingly.

C. That petitioner has shown that his failure to accurately report and pay over taxes due resulted from reasonable reliance on his accountant who he trusted to maintain business records and accurately calculate sales taxes due. Where, as here, the taxpayer has affirmatively shown that failure to accurately report and pay over taxes due resulted from reasonable cause and was not due to willful neglect, the Tax Commission may remit penalties and that portion of the interest in excess of the statutory minimum (20 NYCRR 536.1). Accordingly, the penalty is cancelled and interest shall be reduced to the minimum statutory rate.


D. That the petition of Daniel Biangasso d/b/a D & S Bar & Grill is granted to the extent indicated in Conclusions of Law "B" and "C"; that the Audit Division is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on March 30, 1981 accordingly; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

JAN 28 1986


PRESIDENT


COMMISSIONER


COMMISSIONER