

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

LOUIS BREGOU  
OFFICER OF PIES OF SYRACUSE

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 March 1, 1980  
through November 30, 1982.

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Petitioner, Louis Bregou, 102 Hafner Drive, North Syracuse, New York 13212, 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 March 1, 1980 through November 30, 1982 (File No. 48127).

A hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on January 28, 1987 at 1:15 P.M., with all briefs to be submitted by March 1, 1987. Petitioner appeared by Joseph W. Ward, P.A. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined additional taxes due from Pies of Syracuse, Inc. based on the use of test period and markup percentage audit methods.

11. Whether petitioner Louis Bregou was personally liable for the taxes determined due from Pies of Syracuse, Inc.

FINDINGS OF FACT

1. Pies of Syracuse, Inc., ("the corporation"), operated a restaurant, bar and bakery located at 8081 Brewerton Road, Cicero, New York.

2. On September 20, 1983, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Louis Bregou, as officer of the corporation, covering the period March 1, 1980 through November 30, 1982 for taxes due of \$10,056.97, plus interest of \$2,204.78, for a total of \$12,261.75. The Audit Division also assessed the corporation and Paul Bregou, as officer, however, no petitions were tiled with respect to those two notices.

3. Paul Bregou, president of the corporation, executed a consent extending the period of limitation for assessment of sales and use taxes for the period March 1, 1980 through May 31, 1980, to September 20, 1983.

4. The Audit Division analyzed the corporation's sales and purchases of food for September 1981 and October 1981. The analysis showed a food markup per books of 168 percent which the auditor deemed reasonable for this type of business operation. The auditor also accepted the accuracy of bakery sales based on a reported markup of 138 percent. The auditor determined that the corporation's books and records were inadequate for purposes of verifying bar sales in that cash register tapes were not available, In order to verify the accuracy of such receipts, the auditor performed a markup test for liquor and beer using purchase invoices for the months of September, October and November 1981. The selling prices and sizes of drinks were obtained from a bar fact sheet completed by Linda Bregou on behalf of the corporation. The resultant markups were 351 percent for liquor and 256 percent for beer. These percentages were applied to the applicable purchases for the period March 1, 1980 through August 31, 1981 (books and records were not available for periods after November 1981) to arrive at sales of \$127,853.00. This amount was combined with food sales of \$407,607.00 (\$152,092.00-purchases for test period X 168 percent

markup plus cost) to determine taxable sales of \$535,430.00. The corporation reported taxable sales of \$466,499.00 for the same period, leaving additional taxable sales of \$68,931.00 or an error factor of 14.77 percent. The error percentage was applied to reported taxable sales for the audit period to arrive at total additional taxable sales of \$143,611.00 and tax due thereon of \$10,056.97.

5. Petitioner took the position that the audit was improperly based on markup procedures when complete and adequate books and records of the corporation were available and should have been used to determine and verify taxable sales. Notwithstanding this position, petitioner argued that the markup test did not give consideration to fluctuations in selling prices of drinks and inventory over the entire audit period.

6. The corporation maintained a general ledger, sales journal, purchase journal, cash receipts and disbursements journal. The corporation used two cash registers, one in the bar area and the other in the restaurant. At the end of each day's business, each register was closed out and the cash reconciled to the cash register tape. The corporation kept a record of the daily cash register readings by category of sales and tax collected. The cash register tapes were not available for examination by the Audit Division.

7. There was no significant variation in the corporation's inventory as shown on Federal income tax returns filed for the years at issue. The application of the markup percentages determined by the Audit Division for the test period to beer and liquor purchases produced sales of \$27,130.00. The corporation reported liquor and beer sales of \$26,362.00 for the same period.

8. Petitioner Louis Bregou was vice-president of the corporation. He signed sales tax returns and corporation franchise tax reports. Mr. Bregou was active in the day-to-day management of the business. The auditor observed

petitioner ordering supplies, paying bills and signing checks. Mr. Bregou received a salary of \$300.00 a week. Petitioner severed his relationship with the corporation after the period of audit.

9. Petitioner argued that Paul Bregou, his father and president of the corporation, made all financial decisions for the corporation which included what creditors were to be paid and whether tax monies were to be diverted to pay priority creditors. On September 4, 1985, the Internal Revenue Service determined that petitioner was not subject to a penalty for failure to pay Federal withholding taxes for the period September 30, 1981 to March 31, 1983.

#### CONCLUSIONS OF LAW

A. That section 1138(a) 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" and authorizes, where necessary, an estimate of tax due "on the basis of external indices".

B. That section 1135(a) of the Tax Law provides that every person required to collect tax shall keep records of every sale and all amounts paid, charged or due thereon. Such records shall include a true copy of each sales slip, invoice, receipt or statement. Hand-recorded entries on a worksheet were not reliable records to satisfy the statutory requirements that records of individual sales be retained (Matter of Skiadas v. State Tax Commission, 95 AD2d 971). Accordingly, the Audit Division's use of a test period and markup percentage audit was a proper basis for determining petitioner's beer and liquor sales pursuant to the provisions of section 1138(a) of the Tax Law (Matter of Licata v. Chu, 64 NY2d 873; Matter of Murray's Wines and Liquors v. State Tax Commission, 78 AD2d 947).

C. That the audit procedures followed by the Audit Division are generally accepted procedures established by the Audit Division and are used to verify the accuracy of books and records. The Audit Division concluded that the corporation's books and records adequately reflected sales of food and bakery items, which represented approximately 70 percent of total sales. The Audit Division, however, erroneously determined that beer and liquor sales were understated. The results of the markup test as set forth in Finding of Fact "7" confirmed that the books and records were also sufficient with respect to beer and liquor sales. Accordingly, the additional tax due of \$10,056.97 is cancelled.

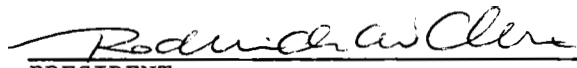
D. That inasmuch as the sales tax determined due on audit is cancelled, the question of petitioner's personal liability is, in effect, rendered moot.

E. That the petition of Louis Bregou is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 20, 1983 is cancelled.


DATED: Albany, New York

STATE TAX COMMISSION

AUG 12 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER