

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
EAST SIDE WINE & LIQUOR CORP.	:	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 December 1, 1978	:	
through November 30, 1981.	:	

Petitioner, East Side Wine & Liquor Corp., 60 Clinton St., New York, New York 10002, 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 December 1, 1978 through November 30, 1981 (File No. 48131).

A 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 December 17, 1985 at 10:15 A.M. and continued to conclusion at the same location on March 18, 1986 at 9:15 A.M., with all briefs to be submitted by July 21, 1986. Petitioner appeared by Louis F. Brush, Esq. The Audit Division appeared by John P. Dugan, Esq. (Michael J. Glannon, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined petitioner's sales tax liability for the period under consideration through a purchase markup audit.

II. Whether, if tax is found to be due, penalty and interest in excess of the statutory minimum should be abated.

FINDINGS OF FACT

1. On April 20, 1982, as the result of a field audit, the Audit Division issued against petitioner, East Side Wine & Liquor Corp., a Notice of Determination

and Demand for Payment of Sales and Use Taxes Due asserting a tax liability of \$38,079.86, plus penalty of \$7,454.12 and interest of \$6,508.10, for a total of \$52,042.08 for the period December 1, 1978 through November 30, 1981.

2. By its president, Adrian Delgado, petitioner executed a consent extending the period of limitation for assessment of sales and use taxes under Articles 28 & 29 of the Tax Law for the period December 1, 1978 through May 31, 1979 to September 20, 1982.

3. In response to the tax auditor's request for books and records, Mr. Delgado and petitioner's accountant stated that all records for the audit period had been destroyed as the result of a fire. The auditor was provided with petitioner's Federal income tax returns for fiscal years ended October 31, 1979 and 1980. The Federal returns were reconciled with New York State sales tax returns for the same period, revealing that petitioner had reported \$107,074.00 more in gross sales on its Federal returns than on its state returns. Because no books and records were available, the auditor decided to employ a markup of purchases to determine taxable sales. The auditor's methodology and results are summarized below.

a. Using petitioner's check stubs from November 1981, the auditor identified eight of petitioner's wine and liquor suppliers. These suppliers provided the auditor with petitioner's purchases for the fiscal years ended October 31, 1980 and 1981. Because no purchase records were available for the first eleven months of the audit period (December 1, 1978 through October 31, 1979), the auditor used an indirect method to estimate purchases. A comparison was made between actual purchases for fiscal year 1980 (as reported by petitioner's suppliers) and purchases as reported on petitioner's Federal income tax return.

This resulted in a determination that petitioner had underreported purchases in the amount of \$72,553.00, or 85.20 percent. Consequently, purchases reported on petitioner's Federal income tax return for fiscal year 1979 were increased by 85.20 percent to obtain estimated purchases for that year. Purchases for the last month of the audit period were taken from petitioner's check stubs. The auditor then accumulated purchase figures for the entire audit period as follows:

<u>PERIOD</u>	<u>SOURCE</u>	<u>PURCHASES</u>
12/1/78 - 10/31/79	adjusted federal tax return	\$142,753.40
11/1/79 - 10/31/80	wine and liquor suppliers	157,713.04
11/1/80 - 10/31/81	wine and liquor suppliers	185,016.18
11/1/81 - 11/30/81	check stubs	21,124.95
		<u>\$506,607.57</u>

b. Purchases were reduced by \$5,286.00 to reflect inventory losses from the same fire that allegedly caused the destruction of petitioner's books and records. This figure was obtained from insurance documents provided by petitioner.

c. Using purchase invoices for the month of February 1982 and shelf prices for the same month, the auditor calculated a combined liquor and wine markup of 28.83 percent.

d. The auditor applied the markup to purchases to obtain audited taxable sales for the period under consideration of \$645,852.87. Subtracting reported taxable sales from audited taxable sales yielded additional taxable sales of \$474,432.57 with a tax due on that amount of \$38,079.86. No adjustments were made for pilferage or breakage.

4. Petitioner maintained that its liquor was always priced at the legal minimum set forth in "Beverage Media", a monthly beverage industry publication which compiles individual bottle prices by supplier and calculates a twelve

percent minimum resale price for dozens of brands of liquor. No documentation was offered to show petitioner's actual markup.

5. Petitioner ran monthly specials offering discounts on seven to eight selected brands of liquor. However, no information was provided which would establish the effect these specials had on petitioner's overall taxable sales. Petitioner requested a nine percent allowance for breakage and pilferage and claimed that the loss of inventory from fire exceeded the amount allowed.

6. Adrian Delgado, petitioner's president, speaks primarily Spanish and has had a limited education. He hired an accountant to prepare all sales tax returns. The accountant did so, using bank statements provided by Mr. Delgado. The returns were signed by Mr. Delgado. As a result of the audit, petitioner has obtained a new accountant.

CONCLUSIONS OF LAW

A. That in the absence of any records from which reported sales could be verified, the Audit Division properly resorted to external indices to determine petitioner's tax liability (Tax Law §1138[a][1]; Matter of Sakran v. State Tax Comm., 73 AD2d 989). Moreover, the audit methodology, which consisted of a reconstruction of purchases from available information and the use of a test period markup procedure, was reasonably calculated to reflect the sales and use taxes due. Petitioner provided no credible evidence that its liquor markup was less than the percentage arrived at by the auditor (28.83 percent); that inventory losses from the fire were greater than that allowed; or that an allowance should have been given for breakage.

B. That Tax Law §1145(a)(1) authorizes the imposition of penalties and interest above the statutory minimum for failure to file a return or pay over a tax when due. Penalties may be waived if the taxpayer establishes that failure

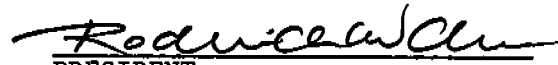
to comply with the law was due to reasonable cause. "Ignorance of the law, however, will not be considered reasonable cause" (20 NYCRR 536.5[b][6]). In this case, the audit revealed significant underreporting of sales and a notable discrepancy between purchases and reported sales. Under the circumstances, petitioner's reliance on its accountant to accurately report sales and taxes due does not constitute reasonable cause for failure to comply with the Tax Law.

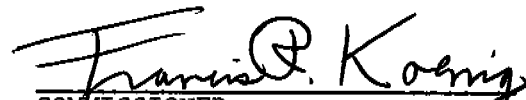
C. That the petition of East Side Wine & Liquor Corp. is denied, and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on April 20, 1982 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

OCT 15 1986


PRESIDENT


COMMISSIONER


COMMISSIONER