

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
WILLIAM BOWIE	:	DECISION
AS PARTNER OF FIREHOUSE PIZZA	:	
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 April 1, 1981	:	
through December 31, 1981.	:	

Petitioner, William Bowie, as partner of Firehouse Pizza, 8 Riverview Road, Binghamton, New York 13902, 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 April 1, 1981 through December 31, 1983 (File No. 49851).

A hearing was held before James J. Morris, Jr., Hearing Officer, at the offices of the State Tax Commission, State Office Building, 164 Hawley Street, Binghamton, New York, on May 21, 1985 at 10:45 A.M. Petitioner appeared by Kramer, Wales & Wright (Robert Wedlake, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

#### ISSUES

I. Whether the Audit Division properly determined additional taxes due from Firehouse Pizza for the period April 1, 1981 through December 31, 1981.

II. Whether petitioner was a person responsible for the payment of sales and use taxes of Firehouse Pizza for such period.

#### FINDINGS OF FACT

1. On November 30, 1983, the Audit Division issued to petitioner, William Bowie, as partner of Firehouse Pizza, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, assessing tax due for the period April 1,

1981 through December 31, 1981 in the amount of \$686.33 plus interest accrued to the date of issuance of the notice. The notice provided on its face the following explanation as the basis for issuance, together with a detailed breakdown of the amounts assessed for each of the periods at issue:

"[Y]ou are personally liable as officer of Firehouse Pizza under Sections 1131(1) and 1133 of the Tax Law for the following taxes determined to be due in accordance with Section 1138(a) of the Tax Law.

THE TAX ASSESSED HEREIN HAS BEEN ESTIMATED AND/OR DETERMINED TO BE DUE IN ACCORDANCE WITH THE PROVISIONS OF SECTION 1138 OF THE TAX LAW AND MAY BE CHALLENGED THROUGH THE HEARING PROCESS BY THE FILING OF A PETITION WITHIN 90 DAYS.

<u>Period Ending</u>	<u>Tax Due</u>	<u>Simple Interest Due</u>
05/31/81 - 481	\$190.00	\$56.82
08/31/81 - 182	209.00	56.66
11/30/81 - 282	225.00	52.97
12/31/81 - 382	62.33	12.49"

2. The above assessment was the result of a field audit performed upon the books and records of Firehouse Pizza for the period March 1, 1981 through December 31, 1982.

3. Firehouse Pizza was a partnership consisting of William Bowie and his partner who operated a take-out pizzeria at 782 Chenango Street, Binghamton, New York.

4. Petitioner ceased working in the business on or about December 26, 1981 and he sold his interest in the partnership to his partner on or about January 5, 1982.

5. Petitioner's former partner continued operating the business as a sole proprietorship through the remaining period (1982) which was the subject of the audit.

6. During the periods at issue, Firehouse Pizza sold pizza, calzones, submarine sandwiches and soda for "take out". Said business also had some sales of nontaxable items such as bread, milk, ice cream bars and luncheon meats sold by the pound.

7. For the year 1981, petitioner maintained the records of Firehouse Pizza. He completed and filed the sales tax returns. He shared authority with his partner to sign checks and hire and fire employees. After selling his interest in Firehouse Pizza, petitioner no longer had access to the business records for the year 1981, did not have access to the business records for later periods and did not participate in the audit that was conducted.

8. Firehouse Pizza recorded all its sales upon a cash register tape which failed to distinguish between taxable and nontaxable items. Taxable items were sold tax included. Nontaxable item sales were, in addition to being recorded on the cash register, listed on a separate sheet of paper. To arrive at taxable sales, total nontaxable sales were deducted from the register total and then the sales tax was factored out. Firehouse Pizza did not use "guest checks".

9. The audit performed by the Audit Division:

a) determined purchases of supplies of taxable items other than pizza, determined the markup for such items and marked up the purchases accordingly;

b) based upon conversations with petitioner's former partner and on-site observations (1) submarine sandwich sales were estimated to be 50 per week, (2) sales of calzones were estimated to be 40 per week in 1981 and 50 per week in 1982, (3) whole pizzas sold by the slice were estimated to be 26 pizzas a week for 1981 and 30 pizzas a week for 1982; and

c) total pizza sales were then determined by allocating the number of pizza boxes purchased by the business to calzones, half pizzas, plain pizzas and pizzas sold with toppings.

Multiplying the above number of items by the selling price supplied by petitioner's partner and factoring out the sales tax included in such prices generated audited taxable sales of \$69,813.00 for 1981 and \$89,021.00 for 1982, for a total of \$158,834.00 through December, 1982. Reducing said amount by \$5,000.00 reported sales in December, 1982 and \$700.00 for products removed for employee and self use resulted in \$153,134.00 in audited taxable receipts compared to \$133,960.00 in taxable receipts reported from April of 1981 through the quarter ended November 30, 1982. This results in a 14.31 percent margin of error which error was then applied to Firehouse Pizza's quarterly reported taxes to compute the additional tax due herein.

10. To verify the accuracy of the audit method herein, the auditor separately determined Firehouse Pizza's total flour purchases for the year 1982 and the amount of dough such flour generated allowing a modest 1 percent for waste. Based upon petitioner's former partner's statement that  $7/8$  of a pound of dough was used to make each pizza or calzone, it was determined that 19,046 calzones and pizzas were developed to be sold in 1982 as compared with 19,371 of same determined by the audit methodology. The auditor's audit report then suggests that such finding indicated that the audit procedures used were quite accurate.

11. The sales and use tax returns of Firehouse Pizza for the periods ended May 31, 1981, August 31, 1981, November 30, 1981 and February 28, 1982 reported taxable sales of \$18,921.00, \$20,870.00, \$22,496.00 and \$18,675.00, respectively.

12. Petitioner asserted that the selling prices in effect in 1981 were less than those used on audit for such year and that the Audit Division's allowance for self use was less than adequate.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides that the amount of tax due shall be determined from such information as may be available, but "if necessary, the tax may be estimated on the basis of external indices."

B. That petitioner's books and records were inadequate and incomplete for purposes of verifying taxable sales or substantiating nontaxable sales. When books and records are incomplete, as here, the use of external indices is permissible (Matter of Korba v. N.Y.S. Tax Commission, 84 A.D.2d 655). Accordingly, the Audit Division's use of external indices and estimates in the determination of additional taxable sales and sales taxes due was proper pursuant to section 1138(a) of the Tax Law.

C. That the audit of petitioner's books and records disclosed \$19,174.00 in unreported taxable sales for the period April 1, 1981 through November 30, 1982. However, Firehouse Pizza reported taxable sales of \$62,287.00 for the period April 1, 1981 through November 30, 1981. One third of the taxable sales reported for the quarter ended February 28, 1982 is \$6,225.00 which, when added to sales through November 30, 1981, shows that Firehouse Pizza reported approximately (due to estimating amounts for the month of December, 1981 and January through February, 1982) \$68,512.00 in taxable sales through the period ended December, 1981. Comparing these reported taxable sales to the audited taxable sales figure of \$69,813.00 and taking into account petitioner's lower selling prices in effect for such year, employee and personal use, and the estimating of sales for December from the quarter ended February 28, 1982, it is concluded

that Firehouse Pizza filed proper and accurate returns reporting all sales and use taxes due for the period April 1, 1981 through December 31, 1981.


D. That Issue II is moot.


E. That the petition of William Bowie is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated November 30, 1983 asserting liability from petitioner as partner of Firehouse Pizza for the period April 1, 1981 through December 31, 1981 is cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 17 1986

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

