

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
RISTAN CORPORATION	:	DECISION
D/B/A LA CHANSONNETTE	:	
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 September 1, 1978	:	
through August 31, 1982.	:	

Petitioner, Ristan Corporation d/b/a La Chansonnette, c/o Stanley Brilliant, 249 East 48th Street, New York, New York 10017, 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 September 1, 1978 through August 31, 1982 (File No. 50498).

A hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 18, 1985 at 1:15 P.M., with all briefs to be submitted by January 20, 1986. Petitioner appeared by Stanley Brilliant, President. 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 additional sales and use taxes due.

II. Whether the Audit Division properly determined petitioner's sales and use taxes due as a result of overcollection of tax from customers.

FINDINGS OF FACT

1. On October 1, 1982, pursuant to a field audit performed by the Audit Division, petitioner, Ristan Corporation d/b/a La Chansonnette, executed a Consent to Fixing of Tax Not Previously Determined and Assessed for sales and use tax due in the amount of \$11,818.08 plus interest of \$2,666.71 for a total due of \$14,484.79 for the period September 1, 1978 through August 31, 1982. On November 9, 1981, petitioner had executed a consent extending the period of limitation for assessment of sales and use taxes due for the period September 1, 1978 through August 31, 1981 to December 20, 1982. Petitioner paid the tax and interest in full by check dated October 5, 1982.

2. On April 18, 1983, petitioner filed an Application for Credit or Refund of State and Local Sales or Use Tax claiming a refund of \$13,136.61 for the period September 1, 1978 through August 31, 1982. On January 10, 1984 the Audit Division denied petitioner's refund claim in full.

3. Petitioner operated a bar and restaurant in Manhattan until July, 1982 when petitioner sold the business. On audit, petitioner agreed to the use of a test period audit of its books and records. The auditor accepted petitioner's food sales as reported. Petitioner's wine and liquor markup per its books was 278 percent for the audit period. The auditor performed a markup test on wine, beer and liquor sales for the month of March, 1981. The auditor compared all of petitioner's purchases of those items for the month to sales prices during the period to arrive at a markup of 388 percent. This markup was applied to beer, wine and liquor purchases for the entire audit period resulting in taxable beer, wine and liquor sales of \$536,424.00. This figure was added to petitioner's food sales as reported to arrive at total audited taxable sales of \$1,318,970.00. Petitioner had reported taxable sales of \$1,177,533.00, thus,

additional taxable sales per audit amounted to \$141,437.00. Applying the appropriate sales tax rate to the additional taxable sales resulted in additional sales tax due of \$11,391.04.

4. Petitioner determined its quarterly sales tax by deducting exempt sales from gross sales and multiplying the result by the applicable sales tax rate. In using such a method, petitioner may not have been remitting all the sales tax actually collected. The auditor, therefore, analyzed petitioner's guest checks for the week of March 2 through March 8, 1981 and found an over-collection percentage of .3439 percent. This percentage was applied to total tax collected during the audit period resulting in tax due from overcollections of \$365.16.

5. The auditor also determined that \$750.00 worth of liquor was withdrawn for the personal use of petitioner's officers. This resulted in use tax of \$61.88 which is not contested by petitioner.

6. Petitioner maintains that the markups computed by the auditor were erroneous, but an analysis of wine and liquor purchases for March, 1981 performed by petitioner's president and submitted into evidence resulted in a markup of 440 percent, which was higher than the audited markup. Petitioner also submitted guest checks into evidence. The checks were undated and it was impossible to determine when the sales were made. Moreover, some of the guest checks did not have the item sold listed on the check. The auditor, in conducting his audit, utilized a price list supplied by petitioner or its accountant and calculated the price per drink by allowing two ounces of liquor per drink and applying a 15 percent allowance for spillage.

7. Petitioner also maintains that it had many exempt sales to United Nations diplomats. The auditor pointed out, however, that all of petitioner's exempt sales were accepted as reported.

CONCLUSIONS OF LAW


A. That section 1138(a)(1) of the Tax Law provides, in part, that "[i]f a return required by this article is not filed, or 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." Petitioner consented to the use of a test period audit to determine its sales tax liability and now challenges the accuracy of that test. The burden of proving that the test was not accurate is on petitioner. See Licata v. Chu, 64 N.Y.2d 873. Undated guest checks are insufficient to prove the inaccuracy of the audit, especially in view of the facts that the audit was performed utilizing information provided by petitioner and that petitioner's own markup analysis revealed a higher markup than that determined on audit. Likewise, petitioner failed to prove that the overcollection test was erroneous.

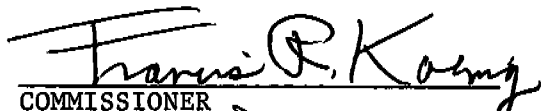
B. That the petition of Ristan Corporation d/b/a La Chansonnette is denied and the denial of refund issued January 10, 1984 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

APR 15 1986


PRESIDENT


COMMISSIONER


COMMISSIONER