

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

MARTIN W. STILLWELL  
FORMERLY D/B/A MARTY'S RESTAURANT

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, 1979 :  
through May 31, 1983.

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Petitioner, Martin W. Stillwell, formerly d/b/a Marty's Restaurant, 87-26 79th Avenue, Glendale, New York 11385, 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, 1979 through May 31, 1983 (File No. 50551).

A hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 13, 1987 at 2:45 P.M. Petitioner appeared by Lawrence R. Cole, CPA. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

#### ISSUES

- I. Whether the Audit Division properly determined additional sales taxes due from petitioner based on an examination of available books and records.
- II. Whether it was proper for the Audit Division to extend an audit period beyond the initial period to be examined without the consent of the petitioner.

#### FINDINGS OF FACT

1. Petitioner, Martin W. Stillwell, formerly d/b/a Marty's Restaurant,

sales were generally for takeout. The premises had ten stools at a counter and three tables with four chairs at each table.

2. On December 9, 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 covering the period December 1, 1979 through May 31, 1983 for taxes due of \$7,796.89, plus penalty and interest of \$3,895.15, for a total of \$11,692.04.

3. Petitioner executed a consent extending the period of limitation for assessment of sales and use taxes for the period December 1, 1979 through August 31, 1982 to December 20, 1983.

4. Petitioner did not maintain any records of sales. A comparison of Federal income tax returns for 1980, 1981 and 1982 with sales tax returns filed covering the same periods revealed that gross sales shown on the Federal returns exceeded the sales tax returns by \$81,900.00. In order to verify the taxable sales reported, the Audit Division initially performed an observation test of the sales activity for several days. In addition, markup percentages were computed for soda, beer, coffee and food. The markup percentages were applied to the respective purchases from the books and records to estimate sales of \$127,791.40 for the period December 1, 1979 through November 30, 1982. Petitioner had reported taxable sales of \$23,100.00 for the same period, leaving additional taxable sales of \$104,891.40 with tax due thereon of \$8,329.20. An informal conference was held subsequent to the audit at which time adjustments were made for employee meals and self-consumption. The adjusted taxable sales substantially agreed with the gross sales reported on the Federal income tax returns. As a result, the Audit Division agreed to accept the accuracy of the

the difference between the gross sales on said returns and the sales tax returns as follows:

December 1979 (1/12 of \$31,000.00)	\$ 2,584.00
1980	31,000.00
1981	38,000.00
1982	36,000 .00
January 1983, February 1983 (2/12 of \$36,000.00) <sup>1</sup>	6,000.00
March 1983 to May 1983 (1/4 of \$36,000.00)	9,000.00
	<u>\$122,584.00</u>
Less: Reported taxable sales	31,350.00
Additional taxable sales	<u>\$ 91,234.00</u>
Tax Due	\$ 7,796.89

5. The Audit Division did not request any additional records for periods after November 30, 1982. Sales for these periods were determined as indicated above. There was no change in petitioner's method of operation throughout the entire period covered by the assessment. Petitioner objected to extending the initial period under audit without a request for additional records.

6. The luncheonette business was operated by Martin Stillwell and his wife, Eileen Stillwell. There were no other employees. Mr. Stillwell prepared the food while Mrs. Stillwell was the waitress and collected the receipts. Mrs. Stillwell also delivered breakfast and lunch orders to four nearby businesses on a daily basis. In return, she received the following tips:

	<u>Per Week</u>	<u>Per Person</u>	<u>Total</u>
Bush Terminal	\$5.00	15	\$ 75.00
Plywood Specialties	3.50	5	17.50
Phoenix Lighting	3.50	12	42.00
B. F. Gilmour & Co.	5.00	8	40.00
			<u>\$174.50</u>

Mrs. Stillwell commingled the tips with other business receipts, and the tips were included in gross sales on Federal **form** schedule C.

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<sup>1</sup> The Audit Division updated the audit period to include the periods ended

7. Petitioner had no knowledge of accounting or bookkeeping practices. Mrs. Stillwell prepared a worksheet of weekly receipts and pay outs which was turned over to Mr. Stillwell's sister-in-law, Ruth Marie Lambert, an accountant. Ms. Lambert prepared all the tax returns for the business until her death in June 1982.

CONCLUSIONS OF LAW

A. That section 1135(a) of the Tax Law provides that every person required to collect tax shall keep records of every sale and of all amounts paid, charged or due thereon and of the tax payable thereon. Such records shall include a true copy of each sales slip, invoice, receipt or statement.

B. That petitioner did not have cash register tapes, guest checks or any other records that would serve as verifiable records of taxable sales. Because of petitioner's inadequate recordkeeping, the audit procedures used by the Audit Division as a basis for determining petitioner's liability were proper in accordance with section 1138(a) of the Tax Law (Matter of Licata v. Chu, 64 NY2d 873).

C. That the Audit Division reasonably calculated petitioner's tax liability based on the books and records available for audit. When a taxpayer's record-keeping is faulty, exactness is not required of the examiner's audit (Matter of Meyer v. State Tax Commission, 61 AD2d 223). However, petitioner erroneously included nontaxable receipts from tips in gross sales reported on Federal income tax returns. Accordingly, the additional taxable sales found due on audit are reduced to \$59,475.00 ( $\$174.50 \times 13 \text{ weeks per quarter} \times 14 \text{ quarters} = \$31,759.00$ ). Except as indicated above, petitioner failed in his burden of establishing that the amount of tax assessed was erroneous (Matter of Licata v. Chu supra).

D. That petitioner's failure to pay over the taxes at issue was due to reasonable cause and not due to willful neglect. Accordingly, the penalty **is** cancelled and interest shall be reduced to the minimum amount prescribed by law (Tax Law § 1145 [a][1][iii]; 20 NYCRR 536.5[b]).

E. That the Audit Division is not limited as to the length of an audit period as long as such periods are not barred by the statute of limitations provided in section 1147(b) of the Tax Law. Petitioner did not change the nature of the business operations during the updated periods nor did he establish that there were any additional books and records for said period that would alter the audit results.

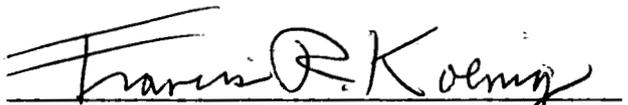
F. That the petition of Martin W. Stillwell, formerly d/b/a Marty's Restaurant, is granted to the extent indicated in Conclusions of Law "C" and "D"; the Audit Division **is** hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 9, 1983; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

APR 23 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER