

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition

of

301 73RD STREET RESTAURANT CORPORATION

DETERMINATION

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, 1981  
through May 31, 1983.

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Petitioner, 301 73rd Street Restaurant Corporation, c/o Gary Marcus, 2965 Bluepoint Court, Wantagh, New York 11793, 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, 1981 through May 31, 1983 (File No. 50575).

A hearing was held before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 16, 1987 at 1:15 P.M. Petitioner appeared by Gary Marcus, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Herbert Kamrass, Esq., of counsel).

#### ISSUE

Whether, based upon petitioner's response to a bulk sale questionnaire, the Audit Division properly determined additional tax due.

#### FINDINGS OF FACT

1. After having received notification of a bulk sale of a bar transacting business as The Wooden Horse at 7221 3rd Avenue, Brooklyn, New York, which was operated by 301 73rd Street Restaurant Corporation (hereinafter "petitioner"), the Audit Division sent a bulk sale questionnaire to petitioner on October 7, 1983.

2. On December 15, 1983, the Audit Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due in the amount of \$13,300.00, plus penalty of \$2,370.00 and interest of \$2,546.51, for a total amount due of \$18,216.51. At the time of the issuance of the assessment, the Audit Division had no record of any sales tax returns having been filed for the period. The notice contained the following information:

"Since you did not send the information requested the following tax has been determined to be due in accordance with the provisions of Section 1138 of the Sales 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 ENDED</u>	<u>TAX DUE</u>	<u>PENALTY</u>	<u>INTEREST</u>
11/30/80 - 281	\$1,000.00	\$250.00	\$397.31
2/28/81 - 381	1,000.00	250.00	366.67
5/31/81 - 481	1,000.00	250.00	335.35
8/30/81 - 182	1,000.00	250.00	301.82
11/30/81 - 282	1,000.00	250.00	265.68
2/28/82 - 382	1,000.00	250.00	220.22
5/31/82 - 482	1,000.00	220.00	194.98
8/31/82 - 183	1,000.00	190.00	159.75
11/30/82 - 283	1,000.00	160.00	124.80
2/28/83 - 383	1,000.00	130.00	91.29
5/31/83 - 483	1,000.00	100.00	59.97
8/31/83 - 184	1,000.00	70.00	28.67
*9/27/83 - 284	1,300.00	0.00	0.00

<u>LOCALITY</u>	<u>AMOUNT</u>
8002	\$4,000.00
8009	9,300.00

\*Bulk sale Tax included - value of furniture & fixtures \$10,000.00  
@ 8½% = \$825.00"

3. On April 25, 1984, the Audit Division mailed a second bulk sale questionnaire to petitioner's representative which was similar to the questionnaire sent to petitioner on October 7, 1983. A cover letter attached to the questionnaire stated, in part, that consideration would be given to an adjustment of the assessment if the new questionnaire was completed and

returned. Petitioner was never requested to provide books and records for examination by the Audit Division. Shortly thereafter, petitioner returned to the Audit Division a partially completed questionnaire. The questionnaire indicated that petitioner had collected bulk sales tax in the amount of \$825.00.

4. At a pre-hearing conference, it was determined that petitioner had filed some sales tax returns for the periods at issue and had made some sales tax payments. Petitioner had filed under the business name "The Wooden Horse" using Identification Number NY8265060, while the assessment had been issued to the corporation using Identification Number MU3024989. It was further conceded by the Audit Division at the hearing held herein that petitioner was not in business for the four sales tax quarters ending November 30, 1980, February 28, 1981, August 31, 1983 and September 27, 1983. The assessment was, therefore, reduced to \$9,000.00 (\$1,000.00 for each of the nine sales tax quarters from March 1, 1981 through May 31, 1983) plus bulk sales tax in the amount of \$825.00 (value of furniture and fixtures \$10,000.00 @  $8\frac{1}{4}\%$  = \$825.00) minus \$1,667.88 (credit for taxes previously paid) for a total amount of tax due of \$8,157.12, plus penalty and interest.

5. Petitioner operated a country western bar known as The Wooden Horse at 7221 3rd Avenue, Brooklyn, New York from March 1, 1981 through May of 1983 when the bar was sold under a management arrangement. In November of 1983, Vincent Troise, the corporation's secretary and the owner of the real property upon which the bar was located, sold the real property.

6. The completed questionnaire indicated that petitioner's gross sales had been \$10,484.00 for 1981 and \$18,290.00 for 1982. An examination of the sales tax returns filed for these years revealed reported gross sales of

\$8,526.00 for 1981 and \$6,214.00 for 1982. The Audit Division thereby calculated an underreporting percentage of approximately 95 percent. The Audit Division, by marking up reported beer and liquor purchases for the four sales tax quarters of 1982, determined estimated taxable sales of \$31,695.00 compared with reported taxable sales of \$6,214.00 for a 410 percent underreporting percentage. Petitioner was able to produce only a day book for the period January 4, 1982 through June 7, 1982 as its books and records for the audit period. No guest checks or cash register tapes were presented. Petitioner offered no sales or purchases invoices.

#### CONCLUSIONS OF LAW

A. That Tax Law § 1138(a)(1) 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. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, ...rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors."

B. That the Audit Division, when conducting an audit, must determine the amount of tax due from such information as may be available. If necessary, the tax may be estimated on the basis of external indices (Tax Law § 1138[a]; Matter of Korba v. New York State Tax Commn., 84 AD2d 655, 1v denied 56 NY2d 502). However, the audit method adopted must be reasonably calculated to reflect the taxes due (Matter of Grant Co. v. Joseph, 2 NY2d 196, 206, cert denied 355 US 869).

C. That an assessment of tax due in the amount of \$1,000.00 per sales tax quarter in the Notice of Determination and Demand for Payment of Sales and Use Taxes Due was not "determined from such information as may be available" nor was it "estimated on the basis of external indices." As indicated by the computations made by the Audit Division after receipt of the completed bulk

sale questionnaire and by the lack of petitioner's books and records for the audit period (see Finding of Fact "6"), the assessment herein may well have been reasonable. However, proof gathered after the assessment is issued, which indicates that the assessment is reasonable, does not eliminate the requirement that an assessment be based upon such information as may be available at the time the notice is issued (Matter of Theresa Roncone d/b/a Roncone's Grill, State Tax Commission, March 11, 1986).

D. That, with the exception of the bulk sales tax of \$825.00 (value of furniture and fixtures \$10,000.00 @ 8½% = \$825.00) which is due from petitioner from the sale of its business, the balance of the assessment (\$8,157.12 - \$825.00 = \$7,332.12), as reduced by the Audit Division at the hearing (see Finding of Fact "4"), is cancelled.

E. That the petition of 301 73rd Street Restaurant Corporation is granted to the extent indicated in Conclusion of Law "D"; the Audit Division **is** directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 15, 1983 accordingly; and, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

SEP 17 1987

  
ADMINISTRATIVE LAW JUDGE