

STATE OF NEW YORK

STATE TAX COMMISSION

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**In the Matter of the Petitions**

of

GONDOLIER RESTAURANT, LTD.  
AND DOMINICK GALVANO AS OFFICER

DECISION

for Revision of Determinations or for Refunds  
of Sales and Use Taxes under Articles 28 and 29 :  
of the Tax Law for the Period December 1, 1980  
through February 29, 1984.

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Petitioners, Gondolier Restaurant, Ltd. and Dominick Galvano as Officer,  
39 DaVinci Drive, Rochester, New York 14624, filed petitions for revision of  
determinations or for refunds of sales and use taxes under Article 28 and 29 of  
the Tax Law for the period December 1, 1980 through February 29, 1984 (File  
Nos. 52891 and 54546).

A hearing was held before Timothy J. Alston, Hearing Officer, at the  
offices of the State Tax Commission, 259 Monroe Avenue, Rochester, New York on  
September 17, 1986 at 9:15 A.M. Petitioner, Dominick Galvano, appeared pro se  
and for Gondolier Restaurant, Ltd. The Audit Division appeared by John P.  
Dugan, Esq. (James Della Porta, Esq., of counsel).

**ISSUE**

Whether the Audit Division properly asserted additional sales tax due from  
petitioners and whether such tax was properly determined.

**FINDINGS OF FACT**

1. On April 9, 1984, the Audit Division issued to petitioners, Gondolier  
Restaurant, Ltd., and Dominick Galvano as Officer of Gondolier Restaurant,  
Ltd., notices of determination and demands for payment of sales and use taxes

due for the period December 1, 1980 through February 29, 1984, asserting additional tax due of \$56,172.14, plus penalty and interest.

2. On March 9, 1984, the Gondolier Restaurant, Ltd., by its president, Dominick Galvano, executed a consent: extending the period of limitation for assessment of sales and use taxes due for the period December 1, 1980 through February 28, 1981 until June 20, 1984.

3. At all times relevant herein petitioner Gondolier Restaurant, Ltd. operated a restaurant at 250 Pixley Road, Rochester, New York. Petitioner Dominick Galvano was president of Gondolier Restaurant, Ltd., running its operations throughout the period at issue. During 1981 and 1982 the restaurant operated a bakery next door to the restaurant. The bakery was sold in 1982.

4. On audit, the Audit Division requested that petitioner Gondolier Restaurant, Ltd. make its books and records available for review and inspection by the Audit Division. Petitioner failed to do so. The Audit Division therefore calculated the deficiency set forth in the April 9, 1984 notices of determination by calculating the ratio between petitioner's gross sales as set forth on its Federal corporate income tax returns and gross sales as set forth on its sales tax returns, and applying this error ratio to petitioner's reported gross sales for sales tax purposes. The Audit Division utilized petitioners' 1981 and 1982 Federal returns in calculating this error ratio, and estimated an error ratio for 1983 using the 1982 return. Subsequent to the application of the error rates, the Audit Division increased the resulting deficiencies by fifty percent to arrive at the deficiency asserted in the March 9, 1984 notices.

5. On March 5, 1985 the Audit Division issued to both petitioners revised notices of determination and demands for payment of sales and use taxes due for the period December 1, 1980 through February 29, 1984, asserting additional tax

due of \$37,404.29 plus penalty and interest. The tax asserted due in these revised notices was premised upon an application of the error ratios described in Finding of Fact "4". The Audit Division removed the fifty percent increase in the deficiencies premised upon the error ratios after a review of petitioners' books. Such books were, in the Audit Division's opinion, sufficiently consistent with petitioners' Federal returns to warrant the use of the Federal returns as the basis for the asserted deficiency without such a fifty percent increase. No guest checks or cash register tapes were ever produced by petitioner at any time during the course of the audit.

6. Subsequent to the issuance of the revised notices of determination, petitioner Gondolier Restaurant, Ltd. provided its 1983 Federal corporate return to the Audit Division. The actual margin of error between gross sales per the sales tax returns and gross sales per the Federal returns was then used in determining the error ratio for the final year of the audit. Additionally, petitioners substantiated certain exempt sales during the audit period, notably bakery sales and sales in connection with parties and banquets held by exempt organizations. The result of this documentation was an adjustment of the tax asserted due herein to \$15,997.03, plus penalty and interest.

7. Petitioner contended that the restaurant had additional exempt sales during the audit period. Specifically, petitioner contended that the restaurant had additional exempt sales in connection with parties and banquets for exempt organizations. Additionally, petitioner contended that the restaurant had continued to sell baked goods out of the restaurant after the sale of the bakery. Petitioner failed to submit any documentation with respect to these contentions and its testimonial evidence lacked any degree of specificity as to the amount charged, the dates of the banquets and parties, the names of the

purported exempt organization, and the amount of gross sales of the purported bakery operations subsequent to 1982.

CONCLUSIONS OF LAW

A. That in view of Finding of Fact "3", petitioner Dominick Galvano was a "person required to collect tax" under Article 28 of the Tax Law within the meaning of section 1131(1) of the Tax Law. The Audit Division therefore properly asserted the tax at issue herein against said petitioner as an officer of Gondolier Restaurant, Ltd.

B. That since petitioners failed to provide the Audit Division with complete and adequate records of Gondolier Restaurant, Ltd., the Audit Division properly and reasonably determined additional taxes due from petitioners from such information as was available in accordance with section 1138(a)(1) of the Tax Law (Matter of George Korba v. State Tax Commission, 84 AD2d 655). Petitioners have failed to demonstrate that the audit method or the amount of tax asserted due was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858). Under the circumstances herein, petitioners have failed to meet their burden of proof with respect to their contentions as discussed in Finding of Fact "7".

C. That petitioners have failed to establish that the failure to pay over the taxes found due and owing herein was due to reasonable cause within the meaning of section 1145(a) of the Tax Law and 20 NYCRR 536.5. Accordingly, the penalty asserted herein is sustained.

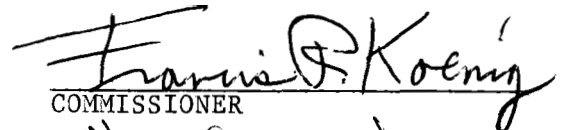
D. That the petitions of Gondolier Restaurant, Ltd. and Dominick Galvano, as Officer are in all respects denied and the revised notices of determination, as adjusted (Finding of Fact "6"), are sustained.

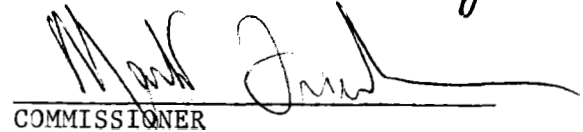
DATED: Albany, New York

STATE TAX COMMISSION

APR 06 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER