

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

DOUBLEDAY'S TAVERN

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, 1980
through November 30, 1983.

Petitioner, Doubleday's Tavern, 529 Thurston Road, Rochester, New York 14619, 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, 1980 through November 30, 1983 (File No. 54199).

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 18, 1986 at 1:15 P.M., with all briefs to be submitted by April 9, 1987. Petitioner appeared by Joseph F. Shramek, **Esq.** The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether the Audit Division's use of the markup method of audit as a basis for determining petitioner's taxable sales was proper and, if so, whether the additional taxable sales determined as a result thereof were correct.

FINDINGS OF FACT

1. On May 22, 1984, following an audit, the Audit Division issued to petitioner, Doubleday's Tavern, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period December 1, 1980 through

November 30, 1983, asserting \$10,596.62 in tax, plus penalty of \$2,246.12 and interest of \$2,432.98, for a total amount due of \$15,275.72.

2. Petitioner is and was at all times relevant herein a partnership owning and operating a neighborhood-type bar located at 529 Thurston Road, Rochester, New York. The individual partners who owned petitioner were James W. Kapinos and Donald D. Shortino. Petitioner sold beer, wine, liquor and snacks.

3. On March 19, 1984, petitioner, by Mr. Kapinos, executed a consent extending the period of limitation for assessment of sales and use tax for the period December 1, 1980 through February 28, 1981, to June 20, 1984.

4. Petitioner did not have guest checks or cash register tapes available for audit. In order to verify the accuracy of reported taxable sales, the Audit Division, therefore, reconstructed such sales by marking up purchases of beer, liquor, wine and snacks for November 1983. The Audit Division used petitioner's purchase invoices which were paid in November 1983 to determine purchases. Selling prices and drink sizes were determined from a bar questionnaire which was completed by Mr. Kapinos on January 17, 1984. The Audit Division ultimately determined a markup of 236 percent over cost for beer and 208 percent over cost for liquor¹. The Audit Division allowed a 15 percent spillage rate in its calculations and made an adjustment to petitioner's purchases to allow for promotional and employee consumption. The Audit Division also determined a 37 percent markup over cost for snacks. This portion of the

1 Petitioner's purchases and sales of wine were included in the Audit Division's calculation of the liquor markup.

markup was determined through use of petitioner's purchase invoices for snacks and sales of snacks as set forth in petitioner's sales journals.

5. The markup percentages determined for the month of November 1983 were subsequently applied throughout the audit period with petitioner's purchase invoices again used as the basis of these calculations. The application of these markups ultimately resulted in a calculation of \$47,163.86 in tax due on sales for the audit period and, subsequent to an allowance of \$37,139.00 for tax previously reported, \$10,024.86 of the deficiency herein.

6. With respect to the amounts allowed for employee and promotional consumption, the Audit Division asserted use tax on these purchases of \$39.41 per quarter for the audit period, which amounted to \$472.92 of the deficiency herein. The amounts allowed for such consumption were based upon statements made during the audit by Mr. Kapinos regarding such consumption. Petitioner introduced no evidence to refute the use tax component of the deficiency.

7. The Audit Division also asserted as part of the deficiency herein \$98.84 in additional tax due on capital acquisitions during the audit period. Petitioner did not take issue with this portion of the assessment.

8. Petitioner contended first, that it had maintained its books and records within the requirements of the Tax Law and that therefore resorting to the markup method of audit was improper. With respect to the Audit Division's calculation of the deficiency herein, petitioner argued that it had raised its drink prices as of January 1, 1984, and had erroneously listed its prices as of that date on the bar questionnaire, rather than the prices in effect during the audit period. This argument was unsupported by any documentation. Petitioner also maintained that the drink sizes listed on the bar fact questionnaire were

too small, because drinks were "free-poured" and therefore more than 1½ ounces of liquor were poured per drink.

9. Petitioner further claimed that it had made a large volume vodka purchase at a special price during the test period which resulted in an erroneous liquor markup figure. Petitioner introduced no evidence to substantiate this claim. Additionally, it is noted that, subsequent to the issuance of the notice of determination herein, the Audit Division performed a markup of petitioner's purchases of beer and liquor for the month of April 1983, and calculated a markup of 221 percent over cost for liquor and 267 percent over cost for beer.

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. Petitioner did not have cash register tapes, guest checks or any other record that would serve as a verifiable record of taxable sales. Under such circumstances, the Audit Division's use of a test period and a markup percentage audit was proper in accordance with section 1138(a)(1) of the Tax Law (Matter of Urban Liquors, Inc. v. State Tax Commission, 90 AD2d 576; Matter of Hanratty's/732 Amsterdam Tavern, Inc. v. State Tax Commission, 88 AD2d 1028).

B. That the Audit Division reasonably calculated petitioner's tax liability and petitioner has failed to show wherein the audit method or the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858). Specifically, petitioner's failure to submit any documentation regarding the change in prices or drink sizes after Mr. Kapinos

himself had completed the bar questionnaire results in petitioner's failure to substantiate its contentions.

C. That, in view of petitioner's failure to maintain adequate records as required by section 1135(a) of the Tax law, the Audit Division's imposition of penalty herein was proper.

D. That the petition of Doubleday's Tavern is in all respects denied, and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, issued May 22, 1984, is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

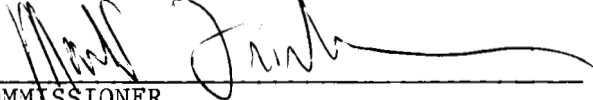
JUN 25 1987



PRESIDENT



COMMISSIONER



COMMISSIONER