STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

ESTATE OF JAMES MANNO
AND DOMINICK MANNO D/B/A ASTORIAN MANOR

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, 1980 through November 30, 1983.

DECISION

Petitioners, Estate of James Manno and Dominick Manno d/b/a Astorian Manor, 25-18 Astoria Boulevard, Astoria, New York 11102, 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, 1980 through November 30, 1983 (File No. 55000).

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 December 3, 1986 at 9:15 A.M. Petitioner appeared by Gerstman, Blitzer & Gelfand, P.C. (Ralph Blitzer, CPA). The Audit Division appeared by John P. Dugan, Esq. (Gary Palmer, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined additional sales and use taxes due from petitioners based on an examination of available books and records.

FINDINGS OF FACT

1. Petitioners, Estate of James Manno and Dominick Manno d/b/a Astorian Manor, operated a catering business that prepared food and drink and furnished service personnel. The premises had ten banquet rooms which were used simultan-

eously for different affairs. The business was operated as a partnership through February 28, 1981. Thereafter, James Manno conducted business as a sole proprietor.

2. On June 11, 1984, as the result of an audit, the Audit Division issued two separate notices of determination and demands for payment of sales and use taxes due covering the period March 1, 1980 through November 30, 1983. The first notice was issued against the Estate of James Manno (deceased), Dominick Manno, et al, d/b/a Astorian Manor for the period of the partnership (March 1, 1980 through February 28, 1981) for taxes due of $27,790.29, plus penalty and interest of $20,909.98, for a total of $48,700.27. The second notice covered the period the business was operated by James Manno as a sole proprietorship (March 1, 1981 through November 30, 1983) and was issued against the Estate of James Manno (deceased) d/b/a Astorian Manor in amount of $83,637.04 for taxes due, plus penalty and interest of $38,115.97, for a total of $121,753.01.

3. James Manno executed four consents extending the period of limitation for assessment of sales and use taxes for the period March 1, 1980 through February 28, 1981 to June 20, 1984.

4. On audit, the Audit Division prepared a schedule of gross receipts by month from the cash receipts journal for the audit period. The gross sales were totalled for quarterly periods and found to be in agreement with the sales tax returns filed. Reported nontaxable sales for the period ending May 31, 1982 were verified by exemption certificates. The gross sales from the books and records were also in agreement with Federal income tax returns filed for the period of the partnership.

5. Petitioners maintained an appointment book wherein the banquet managers recorded pertinent information regarding a scheduled affair. This information included the following:

a) date and time of the affair
b) name, address and telephone number of the customer
c) number of guests
d) price per person
e) notations on meals, cocktail hour and equipment

The cancellation of an event was also noted in the appointment book. The Audit Division examined sales contracts for the period March 1, 1982 through August 31, 1982. The contracts were compared with the cash receipts journal and the appointment book. This procedure revealed that all the contracts in the file were recorded in the cash receipts journal and cancelled contracts were indicated as such in the appointment book. However, after cross checking the contracts with the appointment book, the auditor found that there were 57 affairs scheduled in the appointment book for which no contracts were in the file and the receipts from each such affair were not recorded in the cash receipts journal. Because of this discrepancy, the same procedures were followed for the period September 1, 1981 through August 31, 1983. This test disclosed that 175 affairs were scheduled in the appointment book and the receipts therefrom were not recorded in the books and records. The Audit Division contacted each of the customers by letter, telephone or personal visit using the information in the appointment books to verify that the affair took place. Thirty affairs were verified by an actual contract furnished by the customer. An additional 25 affairs were verified by either a written or oral statement from the customer. There were 105 individuals contacted who chose not to give information about the affair but did not deny that the affair took place. The Audit Division received no reply about the remaining 15 affairs and the information in the appointment book was incomplete. The sales generated by the 175 unrecorded affairs were determined as follows: The actual sale amounts were known for the 55 affairs verified by contract or statement; the sales for the 105 affairs with complete notations in the appointment book were estimated based on the approximate number of guests and price per person indicated in the appointment books; the sales for the 15 affairs for which there were incomplete notations were estimated using an average sales price of the previous 160 affairs. The total sales from the foregoing unreported affairs for the period September 1, 1981 through August 31, 1983 amounted to $440,179.95. In order to estimate sales for those periods that the appointment books were not examined, the Audit Division determined a separate percentage of increase of unreported sales over reported sales for each quarterly period to account for seasonal fluctuations in the catering business. The percentages of increase were applied to the applicable periods and derived total unreported sales for the audit period of $827,078.00 with tax due thereon of $16,638.37 for the period of the partnership and $50,811.04 under the sole proprietorship.

6. The Audit Division reviewed expense purchases for the period March 1, 1982 through May 31, 1982 to determine any use tax liability. Based on its analysis of the test period, the Audit Division assessed use taxes due of $24,344.07 for theentire audit period. A detailed review of fixed asset acquisitionsdisclosed taxes due of $19,633.85.

7. At the inception of the audit, petitioners' representative orally agreed to the use of a test period audit method for expense purchases and indicated that an agreement form would be signed when the audit was completed. Such an agreement was never executed and consequently, at the hearing the Audit Division conceded that the tax assessed on the expense purchases be reduced to $1,909.28, the actual amount found due for the test period. Additionally, the

Audit Division conceded that the tax due on fixed assets should be reduced to $16,294.99.[1]

8. Petitioners argued that it was not proper for the Audit Division to estimate sales for the periods for which the appointment books were not examined.

9. Petitioners adduced no evidence of any nature to establish that the assessments were in any way erroneous.

CONCLUSION OF LAW

A. That section 1138(a)(l) of the Tax Law 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" and authorizes, where necessary, an estimate of tax due "on the basis of external indices".

B. That the audit procedures followed by the Audit Division disclosed that petitioners' sales tax returns were patently erroneous in that gross and taxable sales were substantially underreported and clearly established the unreliability of petitioners' books and records. When books and records are, unreliable, the use of external indices *is* permissible (Matter of Korba v. State Tax Commission, 84 AD2d 655). Because of petitioners' inadequate record-keeping, it was proper under section 1138(a)(l) of the Tax Law forthe Audit Division to estimate additional taxable sales for certain periods without examining any additional books and records. (Matterof Urban Liquors, Inc. v. State Tax Commission, 90 AD2d 576).

1 The tax due on expense purchases of $1,909.28 *is* only for the period ending May 31, 1982. The reduction of the tax due on fixed assets is for the periods ending May 31, 1983 and November 30, 1983.

C. That the Audit Division reasonably calculated petitioners' tax liability for the period March 1, 1980 through November 30, 1983 and petitioners have failed to show that the audit method or tax assessed was erroneous (Matter of Urban Liquors, Inc. v. State Tax Commission, supra).

D. That the petitions of the Estate of James Manno and Dominick Manno d/b/a Astorian Manor are granted to the extent of the adjustments conceded by the Audit Division in Finding of Fact "7"; the Audit Division is hereby directed to modify the notices of determination and demands for payment of sales and use taxes due issued June 11, 1984; and that, except as so granted, the petitions are in all other respects denied.

DATED: Albany, New York

JUN 18 1987

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER