

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

EVELYN R. MACFARLAND  
D/B/A COUNTRY CORNER 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 June 1, 1980  
through February 29, 1984.

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Petitioner, Evelyn R. MacFarland d/b/a Country Corner Restaurant, c/o Edward Keogh, 24379 Willis Lane, Sunnymead, California 92388, 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 June 1, 1980 through February 29, 1984 (File No. 55113).

On October 31, 1986, petitioner advised the State Tax Commission, in writing, that she desired to waive a hearing and to submit the case to the State Tax Commission based upon the entire record contained in the file, with the submission of additional evidence by November 20, 1986. After due consideration of said record, the Commission renders the following decision.

ISSUE

Whether the Audit Division properly estimated petitioner's sales tax liability.

FINDINGS OF FACT

1. On February 21, 1984, the Audit Division received notification that Daniel Towers d/b/a Lake Luzerne Venture planned to purchase a business in Lake Luzerne, New York, known as Evelyn R. MacFarland d/b/a Country Corner Restaurant ("restaurant").

2. On February 23, 1984, the Audit Division issued a Notice of Claim to Purchaser.

3. On March 7, 1984, the Audit Division received a Bill of Sale showing a transfer of the furniture and equipment of the restaurant for \$5,000.00. In addition, petitioner's attorney remitted a check in the amount of \$350.00.

4. On March 12, 1984, the Audit Division issued a Notice to Seller to Ms. MacFarland requesting, among other things, copies of Federal income tax returns for the years 1980 through 1982, a final sales tax return, sales tax returns for **all** periods which petitioner had not filed and payment of all outstanding assessments. The Audit Division also requested that petitioner prepare a Bulk Sale Questionnaire.

5. On March 23, 1984, the Audit Division received a partially completed Bulk Sale Questionnaire. Petitioner attached a letter to this form which stated that she did not have all of the information available at that time to complete the form.

6. On May 18, 1984, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner assessing a deficiency of sales tax for the periods ended August 31, 1980 through February 29, 1984 in the amount of \$7,482.75, plus penalty **of** \$1,383.90 and interest of \$1,710.62, for a total amount due of \$10,577.27. This assessment was in addition to three other notices.

7. On June 21, 1984, the Audit Division issued a Notice of Assessment Review which stated that an error had been made in the computation **of** the original assessment. As adjusted, the Audit Division's assessment **of** tax due was \$5,990.63, plus penalty and interest of \$3,683.76, for a total amount due of \$9,674.39. The Notice of Assessment Review explained that this notice was

in addition to an assessment for the period ended May 31, 1982 with a balance then due of \$399.65 and an assessment for the period ended February 29, 1984 with a balance due of \$952.01.

8. On March 11, 1985, petitioner paid the outstanding assessments of \$399.65 and \$952.01.

9. The original notice issued May 18, 1984, as well as the amended notice issued June 21, 1984, were premised upon the Audit Division's estimated markup. This, in turn, was based upon an industry average of restaurants which sold alcoholic beverages.

10. The restaurant did not sell alcoholic beverages.

#### CONCLUSIONS OF LAW

A. That section 1138(a)(1) 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. If necessary, the tax may be estimated on the basis **of** external indices, such as stock on hand, purchases,... scale of 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 George 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 (~~see~~ Matter of Ristorante Puglia v. Chu, 102 AD2d 348, 350).


C. That reliance upon industry averages **is** a proper external index upon which to conclude that taxes are due. In this instance, however, the restaurant did not sell alcoholic beverages. Therefore, the Audit Division incorrectly determined that additional sales tax was due.

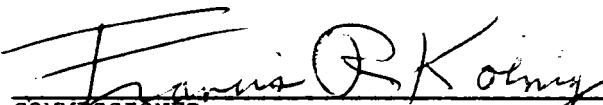
D. That the petition of Evelyn R. MacFarland d/b/a Country Corner Restaurant is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated May 18, 1984 and adjusted June 21, 1984, is cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

JUN 25 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER