

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

SORISI PIZZA, INC.
AND JOSEPH SORISI, AS OFFICER

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 March 1, 1981
through May 31, 1984.

Petitioners, Sorisi Pizza, Inc. and Joseph Sorisi, as Officer, 57-01
Waldron Street, Corona, New York 11368, 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, 1984 (File Nos. 55243,
55635, 56131 and 56132).

A hearing was held before Robert F. Mulligan, Hearing Officer, at the
offices of the State Tax Commission, Two World Trade Center, New York, New
York, on March 9, 1987 at 1:15 P.M. Petitioners appeared by Gerald Davidoff,
CPA. The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman,
Esq., of counsel).

ISSUE

Whether a field audit properly determined additional sales and use taxes
due.

FINDINGS OF FACT

1. **Petitioner Sorisi Pizza, Inc. operates a pizzeria at 107-21 71st**
Avenue, Forest Hills, New York. Petitioner Joseph Sorisi is president of the
corporation. (The term "petitioner" will hereinafter refer to petitioner
Sorisi Pizza, Inc.)

2. A sales tax audit of petitioner's business was performed by the Queens District Office:

(a) Gross sales per the sales tax returns were compared to gross sales reported on the United States corporation income tax returns:

Fiscal Year <u>Ending</u>	Sales Per Sales Tax Returns	Sales Per Federal Income Tax Returns
2/28/82	\$ 24,563.00	\$67,082.00
2/28/83	30,574.00	77,334.00
2/29/84	47,687.00	72,493.00
TOTAL	\$102,824.00	\$216,909.00

On this basis alone, the sales tax returns appeared to be understated by \$114,085.00.

(b) The auditors analyzed 20 purchase invoices from one supplier, Delicato Distributors, covering the period January 12, 1983 through December 27, 1983. These invoices showed purchases of \$29,355.10. Purchases reported on the Federal income tax returns for the several fiscal years involved were as follows:

Fiscal Year <u>Ending</u>	Purchases Per Federal Income Tax Returns
2/28/82	\$12,750.00
2/28/83	24,930.00
2/29/84	20,622.00

The auditors noted that the above invoices did not appear to represent all of petitioner's purchases from Delicato for 1983. For the quarter ending May 31, 1982, petitioner had thirteen invoices from purchase transactions with Delicato which would mean 52 invoices per year on an annual basis. The auditors concluded not only that petitioner had underreported purchases on its Federal returns, but that most purchase invoices for 1983 had not been presented.

(c) As cash register tapes and daily books were not available and, as not all invoices had been presented, the auditors estimated tax based on an analysis of the quarter ending May 31, 1982 and an observation test.

(d) Flour purchases for the test quarter were 7,450 pounds. The auditors assumed that one pound of flour represented one pizza pie.

(e) Observation tests were conducted from 11:35 A.M. to 2:15 P.M. on Tuesday, July 24, 1984 and from 5:00 P.M. to 10:00 P.M. on Monday August 13, 1984.

(f) The observation tests showed that 98% of the pies were plain cheese pizzas and 2% had extra topping. Only one percent were sold as whole pies; 99% of the pies were sold by the slice. Whole pies were sold at \$6.00 each and slices (eight per pie) were sold for 80 cents.

(g) Based on the observation test and the above assumption that one pound of flour represented one pie, the number of pies sold was found to be 7,450 and receipts from pizza sales were determined as follows:

	<u>Amount per Quarter</u>
Sales as whole regular pies	\$ 438.00
Sales of regular slices	46,259.00
Sales of extra topping pies	1,073.00
Total Pizza Sales	<u>\$47,770.00</u>

(h) Other sales (per observation test) were found to be:

	<u>Amount per Quarter</u>
10 Hero sandwiches per day at \$3.50	\$ 3,185.00
5 Hot plates per day at \$4.00	1,820.00
150 Cups of soda per day at 60¢	8,190.00
100 Cups of ices per day at 50¢ (summer only)	2,275.00
Total Other Sales	<u>\$15,470.00</u>

(i) Total sales per quarter ([g] + [h] above) amounted to \$63,240.00, tax included, which, after allowing for sales tax, resulted in net audited

were \$6,396.00, leaving additional taxable sales for the quarter of \$52,024.00. The error percentage was found to be 813.38 percent.

(j) The error percentage was applied to taxable sales of \$82,234.00 per sales tax returns for the period March 1, 1981 through November 30, 1983 and to one-half of taxable sales of \$41,279.00 reported for the periods ending February 28, 1984 and May 31, 1984 (as petitioner had doubled its reported taxable sales for said quarters), resulting in additional taxable sales of \$836,732.00 for the audit period. The additional tax amounted to \$68,784.35.

3. (a) On June 19, 1984, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Sorisi Pizza, Inc. for the period March 1, 1981 through May 31, 1981, for total tax due of \$6,329.52, total penalty due of \$1,582.38, plus interest. On November 26, 1984, the Audit Division issued a Notice of Assessment Review to Sorisi Pizza, Inc. adjusting the tax due for said period to \$3,887.92 and adjusting the penalty to \$971.98.

(b) On September 17, 1984, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Sorisi Pizza, Inc. for the period June 1, 1981 through May 31, 1984, for a total tax due of \$64,896.43, penalty of \$12,115.38, plus interest.

(c) Similar notices of determination and demands for payment of sales and use taxes due were issued to Joseph Sorisi, as President of Sorisi Pizza, Inc.

4. Petitioner actually obtains 36 eight-slice pizzas from every 50 pounds of flour, an average of 1.389 pounds of flour per pizza.

5. Petitioner submitted affidavits claiming that eight different persons purchased one 50 pound bag of flour from petitioner for personal use on a monthly,

weekly, or bi-weekly basis. The affidavits are found to be incredible, absent any testimony to support them.

CONCLUSIONS OF LAW

A. That Tax Law § 1138(a)(1) provides, in pertinent part, as follows:

"If a return required by this article is not filed, or 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, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors...."

B. That where a taxpayer's records are incomplete or insufficient, the Audit Division may select a method reasonably calculated to reflect the sales and use taxes due and the burden then rests upon the taxpayer to demonstrate by clear and convincing evidence that the method of audit or amount of tax assessed was erroneous. Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858.

C. That in this case, petitioner's records were incomplete and insufficient in that no cash register tapes or daily books were presented and only partial invoices were made available to the auditors. Moreover, petitioner's sales reported for sales tax purposes were only a fraction of its sales reported for Federal income tax purposes (Finding of Fact "2(a)"). Based on the auditors' analysis of purchases, the purchases reported on the Federal income tax returns and the corresponding sales would also appear to be underreported. Accordingly, it was proper for the Audit Division to perform a test period audit resulting in the assessments issued herein.


D. That petitioner sustained its burden of proof to show that the number of pizzas per quarter is to be reduced from 7,450 to 5,364 (Finding of Fact "4") and the assessments are to be reduced accordingly.

E. That the petition of Sorisi Pizza, Inc. and Joseph Sorisi is granted to the extent indicated in Conclusion of Law "D" and the notices of determination and demands for payment of sales and use taxes due dated June 19, 1984 (as reduced by the Notice of Assessment Review) and September 17, 1984 are to be modified as set forth therein. Except as so granted, the petition is denied and the notice of determination and demands for payment of sales and use taxes due are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JUN 25 1987



PRESIDENT



COMMISSIONER



COMMISSIONER