

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

KWIK SNACK INDUSTRIAL CATERERS, INC.

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 November 30, 1984.

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In the Matter of the Petition

of

EMMANUELE FALLACARO AND LOLA FALLACARO,  
OFFICERS OF KWIK SNACK INDUSTRIAL CATERERS, INC.

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 November 30, 1984.

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In the Matter of the Petition

Of

KING CATERING CORP.

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, 1981 :  
through November 30, 1984.

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Petitioner, Kwik Snack Industrial Caterers, Inc., 199 Kings Park Road, Commack, New York 11725, 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 November 30, 1984 (File Nos. 55901 and 59782).

Petitioners, Emmanuele and Lola Fallacaro, Officers of Kwik Snack Industrial Caterers, Inc., 199 Kings Park Road, Commack, New York 11725, 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 November 30, 1984 (File Nos. 59783 and 59784).

Petitioner, King Catering Corp., 120 Milbar Boulevard, Farmingdale, New York 11735, 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, 1981 through November 30, 1984 (File No. 60636).

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 December 9, 1986 at 1:15 P.M., with all briefs to be submitted by February 27, 1987. Petitioners Kwik Snack Industrial Caterers, Inc. and Emmanuele and Lola Fallacaro appeared by Gerald Ross, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

#### ISSUE

Whether a field audit properly determined sales tax due from Kwik Snack Industrial Caterers, Inc.

#### FINDINGS OF FACT

1. During the period at issue, petitioner Kwik Snack Industrial Caterers, Inc. (the "corporation") operated a catering supply and delicatessen business in a warehouse at 120 Milbar Boulevard, Farmingdale, New York. Prior to December 1982, the corporation's business consisted only of sales to operators of industrial catering trucks. In December 1982, the corporation opened the delicatessen in a portion of its building.

2. The corporation's employees prepared and wrapped sandwiches, rolls and similar items which were sold to the truck operators. The corporation also sold less perishable or nonperishable items such as potato chips, coffee,

coffee cups, etc. to the operators, as well as refrigerated items such as soda, milk, yogurt.

3. The delicatessen operation was in the front of the building and was separate from the catering supply operation. It had its own cash register. The auditor noted that the business was located in an industrial area and there appeared to be a substantial luncheon trade from factory workers. The delicatessen was in operation from early morning until the afternoon. It was not open evenings. Petitioner contends that the delicatessen closed at 2:00 or 3:00 P.M. daily.

4. The business was sold to King Catering Corp. on or about October 24, 1984.

5. The audit was commenced on June 3, 1983 and completed on March 13, 1985. The pertinent audit actions and findings are as follows:

(a) Sales per the general ledger were reconciled to sales per Federal income tax returns for the calendar years 1981, 1982 and 1983.

(b) Purchases per the general ledger were reconciled to the Federal returns for 1981 and 1982, but the auditor could not obtain an explanation as to why purchases per the books for 1983 were \$2,088,483.79 while purchases per the Federal income tax returns were \$2,282,564.00, a difference of  
\*  
\$194,080.21.

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\* Subsequent to the hearing, petitioner's representative submitted a copy of the purchases ledger entries for 1983 and they appear to tie into the Federal purchase figures. The same amounts are noted on the lower portion of Schedule E of the auditor's workpapers, apparently added at a date subsequent to the making of the original calculations. In any event, this would seem to be irrelevant since the accountant's purchase figures were used in the calculation of the assessment.

(c) No documentation was available for cigarette sales or sales made from the warehouse.

(d) No cash register tapes were retained for either the register in the warehouse or the register in the delicatessen.

(e) The auditor requested sales invoices for the period March 1, 1982 through May 31, 1982 and was told that none existed. Accordingly, the auditor asked the corporation's personnel to start saving invoices. A test was made of the retained invoices for sales made to drivers for the period March 1, 1984 through May 31, 1984.

(f) The auditor determined that the percentage of taxable sales compared to total sales for the test period was 14.9613 percent. This percentage was deemed to be reasonable in comparison to another field audit of a similar business in which all records were available and the percentage was 15.52 percent.

(g) An average markup per books of 39.82 percent was computed for the months of March and April 1984.

(h) Two separate calculations of audited taxable sales were made since the delicatessen operation was commenced part way through the audit period:

(1) Commissary and warehouse purchases of \$4,490,869.86 for the period June 1, 1980 through November 30, 1982 were reduced by inventory adjustments of \$57,508.01 to arrive at audited purchases of \$4,433,361.85. This figure was marked up 39.82 percent and the taxable percentage of 14.9613 percent was applied to arrive at audited taxable sales of \$927,410.07. Reported taxable sales were \$583,006.00. Thus, additional taxable sales were \$344,404.07 with additional tax due of \$24,503.13.

(2) For the period December 1, 1982 through November 30, 1984, commissary, warehouse and delicatessen purchases of \$3,809,767.17 were increased by an inventory adjustment of \$25,364.45 to arrive at audited purchases of \$3,835,131.62. This figure was marked up by 39.82 percent and multiplied by 5.0207 percent and an estimated taxable percentage for the delicatessen of 70 percent to arrive at audited taxable delicatessen sales of \$188,456.83. The marked up figure was multiplied by the taxable percentage of 14.9613 percent to arrive at audited taxable driver sales of \$802,266.95. Total audited taxable sales were \$990,723.78. Taxable sales reported were \$601,245.00. Accordingly, additional taxable sales were \$389,478.78 and additional tax due was \$28,236.85.

(i) An examination of expense purchases showed that tax was paid where due. Tax due on fixed assets was \$255.78. Tax was properly paid on the bulk sale to King Catering Corp.

6. On August 9, 1983 the corporation executed a consent extending the period of limitation for assessment of tax for the period June 1, 1980 through November 30, 1980 to March 20, 1984. On January 24, 1984, the corporation executed a second consent extending the period of limitation for assessment of tax for the period June 1, 1980 through May 31, 1981 to September 20, 1984.

7. (a) On September 20, 1983 the Audit Division issued the following notices of determination and demands for payment of sales and use taxes due:

<u>TO</u>	<u>PERIOD</u>	<u>TAX</u>	<u>PENALTY</u>	<u>INTEREST</u>
The Corporation	6/1/80 - 8/31/80	\$34,351.76	\$8,587.94	\$13,247.06
Emmanuele Fallacaro	6/1/80 - 8/31/80	34,351.76	8,587.94	13,247.06

(b) On September 20, 1984 the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to the corporation for the period September 1, 1980 through November 30, 1981 for \$205,460.37 in tax, \$51,365.11 in penalty and \$93,340.07 in interest.

(c) On January 25, 1985 the Audit Division issued the following notices of determination and demands for payment of sales and use taxes due:

<u>TO</u>	<u>PERIOD</u>	<u>TAX</u>	<u>PENALTY</u>	<u>INTEREST</u>
The Corporation	6/1/80 - 8/31/80"	\$ 2,722.73	\$ 680.68	\$ 1,728.63
The Corporation	9/1/80 - 11/30/81*	13,353.09	3,338.27	6,959.73
The Corporation	12/1/81 - 11/30/84	36,919.94	6,682.93	6,162.00
Emmanuele Fallacaro	6/1/80 - 8/31/80*	2,722.15	680.68	1,728.63
Emmanuele Fallacaro	9/1/80 - 11/30/81	13,353.09	3,338.27	6,959.73
Emmanuele Fallacaro	12/1/81 - 11/30/84	36,919.94	6,682.93	6,162.00
Lola Fallacaro	6/1/80 - 8/31/80	2,722.15	680.68	1,728.63
Lola Fallacaro	9/1/80 - 11/30/81	13,353.09	3,338.27	6,959.73
Lola Fallacaro	12/1/81 - 11/30/84	36,919.94	6,682.93	6,162.00
King Catering Corp.	12/1/81 - 11/30/84	36,919.94	6,682.93	6,162.00

\* These notices adjusted earlier assessments.

8. With the exception of the one page purchase ledger sheet (Finding of Fact 5(b)), petitioners offered no evidence in support of their position. Petitioners argue that the corporation's gross profit was 16 percent and, thus, a 39.82 percent markup **was** impossible. Petitioners claim that the corporation was treated as a retailer by the auditors, rather than as a wholesaler.

#### 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 accommodation and service, number of employees or other factors,"

B. That Tax Law §§ 1135 and 1142.5 and 20 NYCRR 533.2 require every person required to collect tax to maintain records of every sale and to make such records available for inspection and examination. 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.)

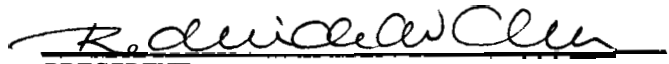
C. That in this case, the corporation's records were incomplete and it was proper for the Audit Division to perform a test period audit resulting in the assessments issued herein. Petitioners did not sustain their burden of proof to show either that the method of audit or the amount of tax assessed was erroneous. It is noted that the corporation was required to collect tax on prepared food sold to catering truck drivers. Resale certificates are not acceptable for such transactions (20 NYCRR 527.8[i]).

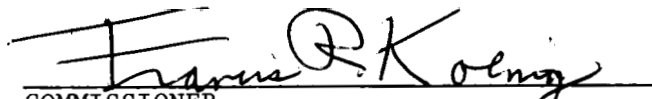
D. That the petitions of Kwik Snack Industrial Caterers, Inc., Emmanuele and Lola Fallacaro and King Catering Corp. are denied and the notices of determination and demands for payment of sales and use taxes due are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

AUG 27 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER