

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
RAMON GONZALEZ :
D/B/A DeKALB WINE & LIQUOR :
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 February 29, 1984. :

DECISION

Petitioner, Ramon Gonzalez d/b/a DeKalb Wine & Liquor, 905 DeKalb Avenue, Brooklyn, New York 11221, 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 February 29, 1984 (File No. 55920).

A hearing was commenced before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 4, 1986 at 1:30 P.M. and continued to conclusion on June 18, 1986 at 9:15 A.M. Petitioner appeared by Raymond M. Suarez, Esq. (Alfred Torres, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Mark F. Volk, Esq., of counsel).

ISSUES

I. Whether, in the conduct of a field audit, the Audit Division properly determined petitioner's markups on wine and liquor based upon a two-month test of purchase invoices which did not include purchases from petitioner's major supplier.

II. Whether penalties and interest in excess of the minimum statutory rate should be waived.

FINDINGS OF FACT

1. During the period at issue, Ramon Gonzalez owned and operated a retail liquor store at 905 DeKalb Avenue in Brooklyn, New York doing business as DeKalb Wine & Liquor. Petitioner's major supplier of wine and liquor (supplying approximately 80 percent) was Charmer Industries.

2. On June 20, 1984, the Audit Division, as the result of a field audit, issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due assessing a sales tax due of \$24,453.46, plus penalty of \$4,948.81 and interest of \$5,679.65, for a total amount due of \$35,081.92 for the period March 1, 1981 through February 29, 1984. Ramon Gonzalez timely filed a petition for redetermination of the above assessment.

3. On audit, the petitioner made available to the auditor copies of sales tax returns, copies of Federal and State income tax returns, sales worksheets, purchase worksheets, purchase invoices (test period), cancelled checks and monthly bank statements. The auditor requested but was not provided with cash register tapes, general ledger, cash receipts journal and check disbursements journal.

4. For sales tax reporting purposes, the petitioner utilized the amount credited to his checking account. Since this was a completely cash business, the auditor deemed this method of reporting unacceptable and therefore concluded that petitioner's books and records were inadequate.

5. The auditor first compared average monthly purchases per invoices of \$19,064.53 to average monthly purchases per books of \$18,414.17 and computed a difference of \$650.36, or a margin of error of 3.532 percent. Purchases per invoices for the months of March, April and May 1983 were analyzed. During this three-month period, petitioner's purchases totalled \$57,193.58 of which

\$46,915.08 were from Charmer Industries. The results of the purchase analysis revealed liquor purchases of 83.87 percent and wine purchases of 16.13 percent. Next, purchase markup tests were performed utilizing April and May 1984 purchase invoices and current selling prices, resulting in a liquor markup of 27.82 percent and a wine markup of 68.93 percent. It should be noted that liquor and wine purchases for the two-month test period totalled only \$2,932.25 (\$1,930.14 + \$1,002.11) and did not include any purchases from Charmer Industries which supplied approximately 80 percent of petitioner's merchandise during the period at issue. The auditor then computed a margin of error on reported taxable sales as follows:

| | <u>Liquor</u> | <u>Wine</u> | <u>Total</u> |
|---------------------------------------------|---------------|-------------|--------------|
| Purchases per records | | | \$ 743,622 |
| Percentage of error - invoices over records | | | 3.532% |
| Audited purchases | | | \$ 769,887 |
| Percentage of purchases | 83.87% | 16.13% | |
| Applicable purchases | \$645,704 | \$124,183 | \$ 769,887 |
| Markup percentage | 27.82% | 68.93% | |
| Markup amount | \$179,635 | \$ 85,599 | \$ 265,234 |
| Audited taxable sales | \$825,339 | \$209,782 | \$1,035,121 |
| Reported taxable sales | | | \$ 736,931 |
| Additional taxable sales | | | \$ 298,190 |
| Percentage increase in taxable sales | | | 40.464% |

The margin of error of 40.464 percent was applied to reported taxable sales to compute the additional sales tax due of \$24,453.46. It is notable that petitioner's purchases per books (\$743,622) exceed his reported taxable sales (\$736,931).

6. Petitioner contests the above computation of additional sales tax primarily on the ground that the markup test failed to consider purchases from Charmer Industries. The petitioner submitted an analysis of purchases from Charmer Industries during February and March 1986 using June 1986 selling prices. Except for shrinkage, the analysis revealed the following:

| | <u>Liquor</u> | <u>Wine</u> |
|----------------|--------------------|-------------------|
| Selling price | \$24,877.08 | \$3,187.06 |
| Cost | 20,531.43 | 2,017.99 |
| Profit | <u>\$ 4,345.65</u> | <u>\$1,169.07</u> |
| Markup on cost | 21.17% | 57.93% |

7. At the hearing, the petitioner claimed a loss for breakage and pilferage. However, he failed to offer evidence to establish such loss.

8. Petitioner failed to present evidence that the failure to pay the taxes at issue was due to reasonable cause and not due to willful neglect.

CONCLUSIONS OF LAW

A. That the books and records of Ramon Gonzalez d/b/a DeKalb Wine & Liquor were incomplete and inadequate and, therefore, the Audit Division properly determined additional taxes due from such information as was available in accordance with section 1138(a)(1) of the Tax Law (Matter of George Korba v. State Tax Commission, 84 A.D.2d 655).

B. That, however, the markups on liquor and wine as computed by the Audit Division did not properly reflect petitioner's business during the period at issue in that the Audit Division failed to consider purchases from petitioner's major supplier. Therefore, the Audit Division is hereby directed to combine its two-month markup test with petitioner's analysis of purchases from Charmer Industries (see Findings of Fact "5" and "6") and recompute petitioner's markups.

C. That since petitioner did not explain or show that reasonable cause existed for the understatement of his tax liability, penalty and maximum interest are due on the additional sales tax determined.

D. That the petition of Ramon Gonzalez d/b/a DeKalb Wine & Liquor is granted to the extent indicated in Conclusion of Law "B"; the Audit Division is

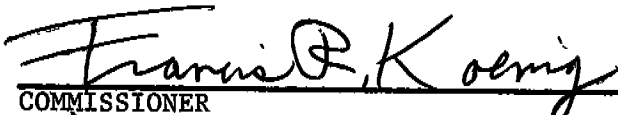
hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 20, 1984; and that except as so granted, the petition is denied.

DATED: Albany, New York

STATE TAX COMMISSION

NOV 12 1986


PRESIDENT


COMMISSIONER


COMMISSIONER