

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

HOT COFFEE VENDING SERVICE, 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, 1981
through May 31, 1984.

Petitioner, Hot Coffee Vending Service, Inc., 2421 McDonald Avenue,
Brooklyn, New York 11223, 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, 1981 through May 31, 1984 (File Nos. 56359 and 61728).

A hearing was held before Jean Corigliano, Hearing Officer, at the offices
of the State Tax Commission, Two World Trade Center, New York, New York, on
December 9, 1986 at 9:30 A.M. with all briefs to be submitted by January 30,
1987. Petitioner appeared by Summit, Rovins and Feldesman (Ira G. Greenberg,
Esq. and Lawrence P. Eagel, Esq., of counsel). The Audit Division appeared by
John P. Dugan, Esq. (Michael B. Infantino, Esq., of counsel).

ISSUE

Whether petitioner has substantiated that twenty percent of its gross
sales were exempt from sales tax during the audit period.

FINDINGS OF FACT

1. On September 17, 1984, the Audit Division issued to petitioner, Hot
Coffee Vending Service, Inc., a Notice of Determination and Demand for Payment
of Sales and Use Taxes Due for the period June 1, 1981 through November 30,
1981 asserting a total tax due of \$31,374.05 plus interest. By the issuance of

a Notice of Assessment Review, the tax asserted for this period was reduced to \$10,330.34 plus interest.

2. On March 20, 1985, as the result of a field audit, the Audit Division issued a second Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner for the period December 1, 1981 through May 31, 1984 asserting a total tax due of \$47,324.89 plus interest.

3. Petitioner operates cafeterias in a number of New York State and City colleges and universities. These student cafeterias have very limited seating. They are designed and operated in a manner that allows students to either eat the food purchased in the cafeteria or take it out of the cafeteria. The cafeterias serve sandwiches, hot and cold beverages, fruits, cartons of yogurt, salads, baked goods, soups and snacks. Students select food either from a cafeteria-style lineup or from refrigerator and freezer cases. Petitioner prepares food to go and also provides paper bags and plastic film to enable students to wrap and carry out food if they so desire.

4. Petitioner considered 20 percent of its gross sales to be exempt from sales tax because they allegedly consisted of supermarket type items sold for consumption off the premises. Consequently, for each sales tax quarter it subtracted 20 percent from its gross sales and reported the remainder as taxable sales.

5. After two earlier audits, the Audit Division had agreed to estimate petitioner's nontaxable sales using a figure of 20 percent. That figure was arrived at following a Tax Appeals conference. Subsequently, petitioner continued to use the figure of 20 percent to estimate its nontaxable sales.

6. Petitioner's cashiers used registers which produced a tape; however the tapes did not segregate taxable and nontaxable sales. The tapes were not

used by petitioner to prepare its sales tax returns. They were not reviewed by the Audit Division because they were not deemed to be adequate records of taxable sales. Petitioner did not utilize guest checks or other memoranda of individual sales.

7. Following a field audit, the Audit Division conceded that $12\frac{1}{2}$ percent of petitioner's gross sales were of supermarket type items purchased for consumption off the premises, and it determined that the remaining $7\frac{1}{2}$ percent of claimed nontaxable sales were, in fact, taxable. This resulted in additional audited taxable sales of \$521,469.00 with a tax due on that amount of \$42,947.67.

8. On audit, it was also determined that petitioner failed to pay sales tax on recurring purchases of napkins, straws and other paper products as well as on purchases of certain fixtures and equipment. In addition, a review of petitioner's books disclosed that a mathematical error led to underreporting of taxable sales for the sales tax quarter ended August 31, 1981. Petitioner's total tax liability stemming from these portions of the audit amounts to \$14,707.56, and this liability was conceded by the petitioner,

9. Petitioner performed an analysis of its own purchases for the months of May 1983, October 1983, February 1984 and May 1984. This analysis showed that approximately 30 percent of petitioner's food and drink purchases were of items typically sold in supermarkets such as fruits, cartons of yogurt, ice cream, potato chips and baked goods. This analysis was similar in method to an earlier one performed by the Audit Division at the request of a Tax Appeals Bureau conferee and for the purpose of resolving a disputed audit.

10. In November 1986, petitioner conducted a survey of its student customers from which it concluded that 37 percent of all its customers purchased food for

consumption off the premises and that about three-quarters of all supermarket type items were purchased for consumption off the premises.

CONCLUSIONS OF LAW

A. That Tax Law § 1105(d)(i) imposes a tax upon the receipts of every sale of food or drink in all instances where the sale is for consumption on the premises where sold (Tax Law § 1105[d][i][1]). It also imposes a tax in those instances where the sale *is* for consumption off the premises of the vendor, "except where food (other than sandwiches) or drink or both are (A) sold in an unheated state and, (B) are of a type commonly sold for consumption off the premises and in the same form and condition, quantities and packaging, in establishments which are food stores other than those principally engaged in selling foods prepared and ready to be eaten" (Tax Law § 1105[d][i][3]).

B. That there is a statutory presumption that all sales receipts for property or services mentioned in Tax Law § 1105 are subject to tax until the contrary *is* established, and the burden of overcoming the presumption is placed upon the person required to collect the tax (Tax Law § 1132[c]). Neither cash register tapes nor any other records of sales maintained by petitioner were adequate to verify its claim that 20 percent of its sales were nontaxable on the grounds that they fell within the statutory exception found in section 1105(d)(i). Furthermore, the surveys conducted by petitioner yielded nothing more than the roughest estimate of nontaxable sales. The fact that petitioner employed a method of estimating nontaxable sales similar to one previously employed by the Audit Division for the purposes of resolving a prior audit does not bind the State Tax Commission to accept its results. Since petitioners presented no verifiable records of exempt sales, the Audit Division was justified


in determining sales tax to be due on all but 12/2 percent of petitioner's cafeteria sales (of. Matter of Sunny Vending Company v. State Tax Commission, 101 AD2d 666, confirming State Tax Commission, March 14, 1983).

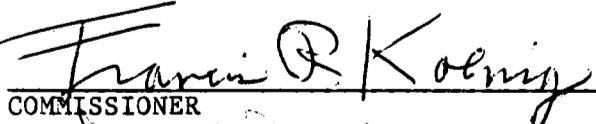
C. That the petition of Hot Coffee Vending Service, Inc. is denied, and the notices of determination and demands for payment of sales and use taxes due issued on September 17, 1984 and March 20, 1985, respectively, as revised are sustained.

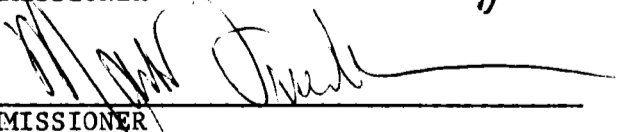
DATED: Albany, New York

STATE TAX COMMISSION

MAY 26 1987


PRESIDENT


COMMISSIONER


COMMISSIONER