

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

LOUIS A. VARGAS

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, 1979
through May 31, 1982.

Petitioner, Louis A. Vargas, 90-10 Springfield Boulevard, Queens Village, New York 11429, 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, 1979 through May 31, 1982 (File No. 57729).

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 January 27, 1987 at 9:30 A.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUE

Whether an observation test properly determined the amount of taxes owed by petitioner as a partner in the partnership Jamaica Grocery Store.

FINDINGS OF FACT

1. Petitioner, Louis A. Vargas, together with Edilio Peralta, purchased a grocery business known as Jamaica Grocery Store, located at 195-52 Jamaica Avenue, Queens, New York, on August 29, 1978. They operated the business as a partnership.

2. On November 12, 1980, petitioner sold his interest in the store to Mr. Peralta for \$1 nnn nn

3. Mr. Peralta sold the business to a third party on March 29, 1982.

4. A sales tax audit of Jamaica Grocery Store was commenced in February 1982:

(a) Records of the grocery store were determined to be inadequate.

The only records available were incomplete purchase invoices for 1981, the 1980 United States Partnership Return and a daily sales book for 1981. The daily sales book had two entries labeled "March 3", thereby giving that month 32 days. Accordingly, the daily sales book was given no credibility by the auditor.

(b) It was noted that the sales per the above-mentioned daily sales book for 1981 disagreed with the sales tax returns. The total sales per the daily sales book for the period March 1 through November 30, 1981 were \$66,596.00, while the sales tax returns for the same period reported \$60,458.00, a difference of \$6,138.00. The sales per daily sales book were not supported by cash register tapes.

(c) A six and one-half hour observation test was made at the store on Monday, May 10, 1982, which revealed taxable sales of \$263.83 and nontaxable sales of \$129.02, for a total of \$392.85. Since the store was open thirteen hours per day, these amounts were multiplied by two, resulting in \$785.70 in sales for the entire day. This figure was projected over the audit period and resulted in audited gross sales of \$883,126.80. The day of the observation test was sunny and was considered to be a representative day. Taxable sales of \$263.83 were reduced by applicable excise and sales tax on cigarettes, for net audited taxable sales of \$247.61. This figure was multiplied by two and projected over the audit period to result in taxable sales of \$556,627.28. Taxable sales reported over the audit period were \$47,731.00.

(d) On June 16, 1982, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period March 1, 1979 through March 29, 1982 was issued to petitioner, Louis A. Vargas, partner of Jamaica Grocery Store, in the amount of \$41,280.91 in total tax due, with \$7,901.63 in total penalty due, plus interest.

(e) At a conference, the Audit Division agreed to adjust sales for inflation as follows: sales for 1979 were reduced by 45 percent; sales for 1980 by 30 percent; and sales for 1981 by 15 percent.

(f) Audited taxes due were reduced to \$29,457.07, which amount included taxes on \$5,000.00 in fixed assets sold in bulk (estimated) and \$1,500.00 in fixed assets purchased in bulk during the audit period.

(g) The taxable percentage of gross sales revealed by the observation of the premises was 63.03 percent. The field audit report indicated that taxable purchases were 61.19 percent of total purchases. However, according to those field audit papers in the record, taxable purchases were 53.47 percent of total purchases.

5. Due to differences in business operations between the period at issue and the date of the observation test, which was performed under new ownership,¹ the correct taxable percentage of sales is to be based on the available purchase invoices and is hereby found to be 53.47 percent.

CONCLUSIONS OF LAW

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

¹ For example, the new owner introduced the sale of sandwiches, which are taxable items.

"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 the amount **of** tax **assessed was erroneous** (Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858).

C. That the records of Jamaica Grocery Store were incomplete and it was proper for the Audit Division to estimate sales based on a record of the actual sales made during a physical observation of the premises. However, petitioner sustained his burden of proof to show that business operations during the period at issue were different from those under the ownership at the time the observation test was performed, Accordingly, the taxable percentage **is** to be reduced to 53.47 percent, as per Finding of Fact "5".

D. That petitioner ceased being a partner in Jamaica Grocery Store as of November 12, 1980 and taxes due on sales made subsequent to that date may not be assessed against him.

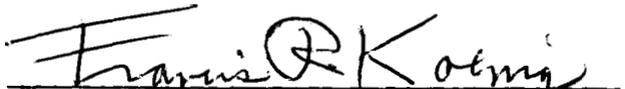
E. That the petition of Louis A. Vargas is granted to the extent set forth in Conclusions of Law "C" and "D" and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 16, 1982, as adjusted (Finding of Fact "4[f]"), is to be further reduced in accordance therewith. Except as so modified, the Notice of Determination and Demand for Payment of Sales and Use Taxes Due is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JUN 25 1987


PRESIDENT


COMMISSIONER


COMMISSIONER