

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

ANGELO CASALE
D/B/A ANGELO'S RESTAURANT

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 February 29, 1984.

Petitioner, Angelo Casale d/b/a Angelo's Restaurant, 424 3rd Avenue, Brooklyn, New York 11215, 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 February 29, 1984 (File No. 58001).

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 September 9, 1986 at 1:15 P.N., with all briefs to be submitted by February 10, 1987. Petitioner appeared by Lawrence R. Cole, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Michael J. Glannon, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly assessed additional sales taxes on the basis of a one day observation test.

11. Whether consent forms extending the statutory period of limitation for the assessment of additional tax were so defective as to render them void.

FINDINGS OF FACT

1. On November 20, 1984, the Audit Division issued to petitioner, Angelo Casale d/b/a Angelo's Restaurant, two notices of determination and demands for payment of sales and use taxes due under Articles 28 and 29 of the Tax Law.

The first notice was for the period June 1, 1980 through August 31, 1981, and it asserted sales and use taxes due in the amount of \$13,789.90, plus penalty and interest. The second notice, for the period September 1, 1981 through February 28, 1984, asserted sales and use taxes due in the amount of \$33,661.11, plus penalty and interest.

2. Three consents extending the period of limitation for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law were executed by or on behalf of the petitioner.

(a) Two consents were signed by Angelo Casale and dated September 19, 1983 and March 12, 1984, respectively. The first extended the period of limitation for the assessment of sales and use taxes for the taxable period June 1, 1980 through November 30, 1980 to March 20, 1984. The second consent extended the period of limitation for assessment of sales and use taxes for the taxable period June 1, 1980 through February 28, 1981 to June 20, 1984.

(b) The third consent was signed by Robert Mollenhauer, Jr., who then held petitioner's power of attorney, and it extended the period of limitation for the assessment of sales and use taxes for the taxable period June 1, 1980 through August 31, 1981 to December 20, 1984.

(c) The three consents in question identify the vendor as "Angelo's Restaurant".

3. Angelo's Restaurant served breakfast and lunch five days a week from 6:00 A.M. to 4:00 P.M. It also sold cigarettes, cigars and newspapers. It is located in a factory area.

4. On or about February 16, 1983, an Audit Division auditor sent a letter to petitioner scheduling a field examination of his books and records. The

letter requested that all records pertaining to petitioner's sales tax liability be made available on the appointment date.

5. Petitioner did not use guest checks and the restaurant's cash register did not produce a tape. The only records made available to the auditor were sales tax returns and State and Federal income tax returns with related worksheets prepared by petitioner's accountant. These records were deemed inadequate to verify reported taxable sales.

6. The auditor began a test period markup of purchases audit, but he discontinued it because the invoices provided by petitioner did not appear to be complete. Petitioner's Federal tax worksheets showed purchases for the three month test period of \$6,289.06, while the invoices provided totalled \$5,802.92. In addition, the auditor knew from observation that petitioner sold beer, but no beer invoices were provided. Consequently, the auditor decided to use an observation test to estimate taxable sales.

7. On December 7, 1983, three auditors, working in shifts, observed and recorded all taxable sales made by petitioner from 6:00 A.M. until closing. Total taxable sales for the day amounted to \$914.03. The auditor then used this figure to estimate taxable sales for the sales tax quarter. To allow for vacations and holidays, the auditor assumed a $12\frac{1}{2}$ week rather than a 13 week sales tax quarter. He then multiplied \$914.03 by five to reflect a five day work week, and he multiplied the resulting figure by $12\frac{1}{2}$ to obtain a quarterly figure of \$57,126.88 and taxable sales for the period December 1, 1982 through November 30, 1983 of \$228,507.52. The auditor used this figure as a base from which to calculate audited taxable sales for the audit period. Allowing for a 10 percent inflation rate per year, the auditor estimated total taxable sales for the audit period of \$768,059.00 with a tax due on that amount of \$62,796.21.

Crediting petitioner for taxes paid, the auditor found a total tax liability of \$47,451.01.

8. Petitioner has challenged the audit results on the following grounds:

(1) that the auditor was required by the Tax Law to perform a markup test where adequate records existed to make such a test possible; (2) that all purchase invoices were available for the audit period and would have been provided had the auditor requested them; and (3) that the consents extending the period of limitation for assessment of sales and use taxes due were defective in that the vendor was incorrectly identified.

9. Petitioner submitted several documents in support of its position:

(1) A statement of petitioner's daily gross sales for a one week period ended December 13, 1985 was prepared by petitioner's accountant from records provided by petitioner, including bank deposit slips and register tapes. The statement shows daily fluctuations in gross sales.

(2) A letter from petitioner's landlord corroborates Yr. Casale's testimony that many businesses moved into petitioner's neighborhood during the audit period. A second letter, this one from a customer, states that petitioner's business increased after a nearby restaurant went out of business in the latter part of 1983.

(3) A daybook for the period January 1, 1980 through March 31, 1983 was submitted as a contemporaneous record of daily sales receipts. The book has two columns, showing "food sales" and "food bills". Monthly operating expenses such as rent and utilities are also recorded. No explanation was offered regarding the manner in which daily "food sales" were computed.

CONCLUSIONS OF LAW

A. That under section 1135 of the Tax Law, every person required to collect tax is also required to keep records of every sale and of all the amounts paid, charged or due on that sale and of the tax payable on each sale. Such records are to "be available for inspection and examination at any time upon demand by the tax commission or its duly authorized agent or employee" and to be preserved for a period of three years (Tax Law § 1135). Where such records are not made available upon demand, or where, upon examination, the records are deemed insufficient to verify taxable sales, the Audit Division is required by Tax Law § 1138(a)(1) to determine the amount of tax due from such information as may be available; where necessary, the tax may be estimated on the basis of external indices. A "markup test" is one type of external index. It is frequently used by the Audit Division to estimate sales, and its use, under the proper circumstances, has been sanctioned by the courts (see, e.g., Skiadas v. State Tax Commission, 95 AD2d 971). However, it is not an audit method required or preferred by statute (see Tax Law § 1138[a][1]). In the absence of the records required to be kept under section 1135, the Audit Division may select any audit methodology reasonably calculated to reflect sales taxes due, and the taxpayer must then show that the method of audit or amount of tax assessed was erroneous (Carmine Restaurant, Inc. v. State Tax Commission, 99 AD2d 581). Because petitioner did not keep a record of every sale as required by section 1135, it was necessary for the Audit Division to estimate taxes due, and the one day observation test was a reasonable method for doing so. Exactness is not required from the audit where petitioner's own faulty recordkeeping has prevented it (Micheli Contracting Corp. v. New York State Tax Commission, 109 AD2d 957).

B. That petitioner has not shown any error in the audit methodology or the results obtained. The daybook presented at hearing is not an adequate record of sales absent guest checks, cash register tapes or other sales invoices with which to verify its accuracy. General observations about the changing character of petitioner's neighborhood and fluctuations in daily sales, even if believed, do not **show** that the audit methodology was unreasonable, nor do they form the basis for an adjustment in the audit results.

C. That the consent forms signed by Angelo Casale and the one signed by his representative were not rendered defective by their failure to completely and accurately state petitioner's registered vendor name. There is not even an allegation in the record that petitioner was misled in any way by this purely technical error.

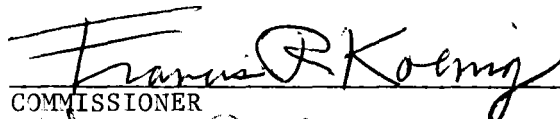
D. That the petition of Angelo Casale d/b/a Angelo's Restaurant **is** denied, and the notices of determination and demands for payment of sales and use taxes due issued on November 20, 1984 are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

MAR 20 1987

PRESIDENT


COMMISSIONER


COMMISSIONER