

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of :

JOE-GAL PIZZA, 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, Joe-Gal Pizza, Inc., 1701 Broadway, New York, New York 10019, 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 No. 59049).

A hearing was held before Joseph W. Pinto, Jr., Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 28, 1986 at 1:15 P.Y. Petitioner appeared by John H. March, Esq., and Jeff R. Pearlman, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Michael B. Infantino, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined additional sales taxes due from petitioner based upon an examination of available books and records.

FINDINGS OF FACT

1. Petitioner, Joe-Gal Pizza, Inc. (hereinafter "Joe-Gal") operated a pizza/fast food store at 1701 Broadway in New York City between 53rd and 54th Streets. The store made sales of various foods including pizza, whole and by the slice, spaghetti, ziti and manicotti, various entrees, hot, cold and baked

hero sandwiches, and various breakfast specials, including eggs, bacon, cakes and donuts.

2. On November 1, 1984, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Joe-Gal for the period June 1, 1981 through May 31, 1984 stating sales taxes due of \$126,305.29, penalty of \$22,986.80 and interest of \$23,173.50 for a total amount due of \$172,465.59. Said notice was dated September 4, 1984.

3. Petitioner executed a consent extending the period of limitation for assessment of sales and use taxes for the period in issue to December 20, 1984.

4. The Audit Division performed an audit of petitioner's books and records. An observation test was requested but disallowed by the petitioner because it felt that such a test would not accurately reflect its tax liability. The Audit Division made a standard request for all business records for the audit period including Federal returns, worksheets for Federal returns, sales tax returns, worksheets for sales tax returns, the general ledger, invoices, purchase invoices, tapes, cash register tapes, guest checks and any other information which would be pertinent in determining tax liability. The original oral request for these records was made on May 3, 1984 to petitioner's former accountant. Pursuant to this request, petitioner made available to the Audit Division sales tax returns, Federal income tax returns, some purchase invoices, a general ledger and monthly bank statements for the period December 1983 through May 1984. Notably, the Audit Division was not provided with cash receipts, cash register tapes or worksheets for any of the tax returns provided.

5. Based on the records that were produced to the Audit Division upon request, it was determined that most purchases were made in cash and that lack substantiating documentation such as cash register tapes, guest checks or a

day book made it impossible for the Audit Division to reconcile gross sales reported on Federal returns or sales tax returns.

6. The Audit Division analyzed petitioner's sales tax returns and bank deposits for the period December 1983 through May 1984. This analysis revealed that petitioner had bank deposits totaling \$18,702.00 and reported sales of \$57,434.00. An examination of bills for this same period of time revealed that there were \$26,085.00 in purchases, including \$110.00 in cheese purchases and \$62.00 in spaghetti, ziti and lasagna purchases. It was noted that petitioner made no pasta on its premises. Since petitioner admittedly operated on a cash basis during the audit period, it was determined that these records were not reliable in determining tax liability for the audit period.

7. The Audit Division chose to use a purchase markup test of invoices of petitioner's flour purchases from Ferro Foods Corporation of 25 53rd Street, Brooklyn, New York to determine tax liability. The auditor used purchases of flour from Ferro for the quarter ending May 31, 1982. For that period, flour purchases were determined to be 6,300 pounds. Based upon its experience in auditing numerous pizza establishments, the Audit Division calculated 1 pizza per pound of flour and each pizza was valued at \$6.50 per petitioner's income resulting in \$40,950.00 in pizza sales for the quarter ended May 31, 1982. However, the petitioner's menu is substantial, consisting of a four-page brochure which included many other items besides pizza. Pizza items occupy one page of the menu. As a result, the Audit Division determined that pizza sales were only one-third of total sales. The remaining two-thirds consisted of all other food and drink sales and amounted to \$81,900.00.

8. Using these figures, the Audit Division determined that taxable sales for the quarter ended May 31, 1982 were \$122,850.00. The taxable sales reported

for the same period of time were \$17,080.00, yielding additional taxable sales for the quarter ended May 31, 1982 of \$105,770.00. This figure was divided by the \$17,080.00 reported for the same quarter on petitioner's sales tax return, which yielded an error rate on taxable sales reported of 619%, or additional taxable sales for the entire audit period from June 1, 1981 through May 31, 1984 of \$1,533,826.00. When the applicable tax rate was applied additional tax of \$126,305.29 was determined to be due.

9. Petitioner contended that the Audit Division's estimate of one pound of flour for one pizza pie is too low and that a large pie uses a minimum of 1½ pounds of dough, or 20% more flour. No substantiating evidence was submitted to support this contention. Further, the menus submitted by both parties covering the entire audit period indicated that the price chosen by the Audit Division, \$6.50, was the price charged for a small pizza in 1983, with no toppings and without regard to the fact that pizza sales by the slice significantly increase the price of an entire pizza.

10. Petitioner also claims that there was substantial waste and personal use of the products purchased for the business. However, there was no substantiating evidence for these claims.

11. Petitioner contends that the percentage of sales made by it were improperly determined by the Audit Division. Petitioner believed that sales of pizza were 40% of its sales as opposed to the 30% determined by the Audit Division. In support of this contention, the petitioner submitted affidavits and statements from numerous pizza store owners and operators in and around the New York City area. These vendors state that their sales are 60% pizza and 40% other foods. Except for an affidavit of petitioner's president who did not

appear at the hearing, no evidence was submitted with regard to petitioner's sales of food particularly the percentage of its sales which were pizza sales.

12. Petitioner operates between the hours of 6 A.M. and 11 P.M. every day except Sunday, when it operates between the hours of 11 A.M. and 10 P.M.

13. During the audit period, Ferro Foods Corporation claimed it shipped products to a vendor in the vicinity of petitioner and billed petitioner for said shipments. However, substantiating documentation was not submitted to support shipments or payments by petitioner.

CONCLUSIONS OF LAW

A. That petitioner's failure to maintain records of sales as required by section 1135 of the Tax Law, made it virtually impossible for the Audit Division to verify the accuracy of its reported taxable sales. Under the circumstances, the Audit Division's resort to external indices to estimate the sales tax due was proper in accordance with section 1138(a) of the Tax Law, and the audit methodology was reasonable under the circumstances, since petitioner's records were unreliable and incomplete. (Matter of Urban Liquors, Inc. v. State Tax Commission, 90 AD2d 576.)

B. That petitioner maintained inadequate books and records for purposes of verifying taxable sales. Accordingly, the Audit Division was authorized to select a method reasonably calculated to estimate sales tax liability. (Tax Law § 1138[a][1]; Matter of Ristorante Puglia v. Chu, 102 AD2d 348, 350).

C. That the use of a test period to determine the amount of tax due founded upon insufficiency of recordkeeping which made it virtually impossible to verify petitioner's taxable sales receipts and to conduct a complete audit of petitioner's records was proper herein. (Chartair, Inc. v. State Tax Commission, 65 AD2d 44).

D. That the Audit Division reasonably calculated petitioner's tax liability and petitioner has failed to demonstrate by clear and convincing evidence that the audit method or the amount of tax assessed was erroneous. (Matter of Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858).

E. That the penalty and interest imposed by the Audit Division under section 1145(a) of the Tax Law is sustained, as petitioner has not established that reasonable cause for abatement exists.

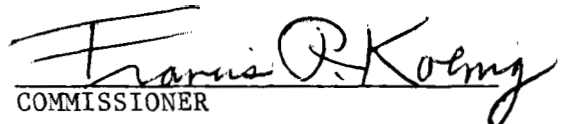
F. That the petition of Joe-Gal Pizza, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated September 4, 1984 **is** sustained.

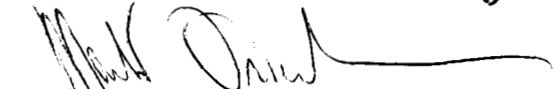
DATED: Albany, New York

STATE TAX COMMISSION

MAR 20 1987


PRESIDENT


COMMISSIONER


COMMISSIONER