

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition

of

TUGAL RESTAURANT, INC.  
D/B/A EL GAUCHO

DETERMINATION

:

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 December 1, 1979 :  
through May 31, 1984.

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Petitioner, Tugal Restaurant, Inc. d/b/a El Gaucho, c/o Cesar Lazarte, 33 Bank Street, New York, New York 10014, 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 December 1, 1979 through May 31, 1984 (File No. 59225).

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 March 10, 1987 at 9:30 A.M. Petitioner appeared by John Joseph Sutter, Esq. The Audit Division appeared by John P. Dugan, Esq. (Michael B. Infantino, Esq., of counsel).

ISSUE

Whether assessments of sales and use tax were properly determined by an observation test of petitioner's restaurant.

FINDINGS OF FACT

1. During the period at issue, petitioner, Tugal Restaurant, Inc. d/b/a El Gaucho, operated a restaurant at 93 McDougal Street, in the Greenwich Village section of Manhattan.

2. A sales tax field audit of petitioner's business was conducted by the Metropolitan Audit Group. The audit was commenced on November 26, 1982 and completed on or about December 24, 1984. The audit was basically conducted as follows:

(a) Records available for audit consisted of sales tax returns, Federal and State income tax returns, sales journal, cash receipts journal, purchases journal, purchase invoices, general ledger and monthly bank statements. The auditor requested cash register tapes and guest checks, but they were not produced by petitioner. All of the purchase invoices produced were for purchases paid by check. There were no invoices presented for cash purchases.

(b) The auditor found that the general condition of the available records was poor and that the records were insufficient for audit purposes.

(c) Gross sales as per the general ledger agreed with sales reported on the sales tax returns and Federal income tax returns.

(d) Purchases as per books agreed with purchases shown on the Federal income tax returns.

(e) The auditor started a markup test but subsequently decided that, in view of the sales shown by an observation test, infra, there were cash purchases and thus all invoices had not been presented for audit and the markup test could not be used.

(f) Credit card sales for the period January 1, 1983 through June 30, 1983 were reconciled to the credit card statements and cash receipts books.

(g) Since petitioner's records were deemed inadequate, an observation test was performed:

(i) The auditor observed petitioner's sales on March 2, 1984, a Friday, between 5:00 P.M. and 2:00 A.M. (the restaurant was open evenings

only), and found \$810.50 in food sales and \$371.50 in beer, wine and liquor sales, for net sales of \$1,182.00.

(ii) The auditor observed sales again on Monday, March 26, 1984 and found \$326.55 in food sales and \$164.50 in bar sales, for net sales of \$491.03.

(iii) The results of the two observations were averaged, resulting in \$836.53 in daily sales.

(iv) At petitioner's request, a third observation test was performed on Thursday, August 9, 1984, when \$513.55 in food sales and \$224.20 in bar sales were observed, for net sales of \$737.75. In this test, the auditor noted that of the fourteen guest checks issued, six were paid by cash and eight by credit cards. The average cash check was \$45.48, while the average credit card check was \$60.95.

(v) The average of the three days observed was \$803.60, which was multiplied by seven to find weekly sales of \$5,625.20. Audited annual sales were \$292,510.40, with quarterly sales of \$73,127.60.

3. On December 20, 1984, the Audit Division issued two notices of determination and demands for payment of sales and use taxes due to petitioner:

(a) the notice for the period December 1, 1979 through May 31, 1983, assessed tax due of \$47,039.27 and interest of \$17,498.86; and

(b) the notice for the period June 1, 1983 through May 31, 1984, assessed tax due of \$12,094.10 and interest of \$1,088.38.

4. Petitioner executed consents extending the period of limitation for assessment for the period December 1, 1979 through May 31, 1984 to June 20, 1985.

5. Petitioner offered no testimony or documentary evidence at the hearing.

b. Petitioner's criticism of the audit appears to be as follows:

(a) the auditor failed to recognize that lower prices were in effect during the period 1979 through 1983;

(b) the auditor did not ask how many days the restaurant was open in the years 1979 through 1983, but assumed it was open seven days as it was when the audit was conducted;

(c) no allowance was made for the business being closed for vacations, etc.;

(d) that since credit card sales were correctly reflected in petitioner's records, an observation test could be valid only as to cash sales.

#### CONCLUSIONS OF LAW

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

"If a return required by this article is not tiled, 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 amount of tax assessed was erroneous (Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858).

C. That the records of Tugal Restaurant, Inc. d/b/a El Gaucho were incomplete and it was proper for the Audit Division to estimate taxes based on observations of the business. However, allowance should have been made to


reflect lower prices which generally prevailed in the years prior to the year in which the audit was actually conducted, i.e., 1984. Accordingly, the sales for the period December 1, 1979 through November 30, 1980 are to be reduced by 24 percent; the sales for the period December 1, 1980 through November 30, 1981 are to be reduced by 18 percent; the sales for the period December 1, 1981 through November 30, 1982 are to be reduced by 12 percent; and the sales for the period December 1, 1982 through November 30, 1983 are to be reduced by 6 percent.

D. That except as set forth in Conclusion of Law "C", petitioner failed to sustain its burden of proof to show that either the method of audit or the amount of tax assessed was erroneous. As noted in Finding of Fact "4", petitioner offered no evidence in support of its position.

E. That the petition of Tugal Restaurant, Inc. d/b/a El Gaucho is granted to the extent indicated in Conclusion of Law "C" but is otherwise denied and the notices of determination and demands for payment of sales and use taxes due issued on December 20, 1984, as so modified, are sustained.

DATED: Albany, New York

SEP 17 1987

  
ADMINISTRATIVE LAW JUDGE