STATE OF NEW YORK

STATE TAX COMMISSION

In the Hatter of the Petition

of

JOHN NATALIE
D/B/A NATALIE'S FAMOUS PIZZA

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.

DECISION

Petitioner John Natalie, d/b/a Natalie's Famous Pizza, 4364 Culver Road, Rochester, New York 14622 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. 59355).

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 October 30, 1986 at 9:30 A,M. Petitioner appeared by Louis Sternbach and Co. (Stewart Rerger, C.P.A.). The Audit Division appeared by John P. Dugan, Esq. (Michael B. Infantino, Esq,, of counsel).

ISSUE

Whether petitioner substantiated its claimed nontaxable sales.

FINDINGS OF FACT

1. On February 6, 1985, as the result of a field audit, the Audit Division issued to petitioner, John Natalie, d/b/a Natalie's Famous Pizza, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period June 1, 1981 through May 31, 1984, asserting sales and use taxes due in the amount of $17,760.46 plus penalty and interest.

2. On September 18, 1984, petitioner's accountant, holding petitioner's power of attorney, executed a consent extending the period of limitation for assessment of sales and use taxes for the period June 1, 1981 through August 31, 1981 to December 20, 1984.

3. On December 17, 1984, petitioner's accountant executed a second consent extending the period of limitation for assessment of sales and use taxes for the period June 1, 1981 through November 30, 1981 to March 20, 1985.

4. Petitioner operated a takeout food business, selling pizza, chicken wings, submarine sandwiches and beverages. On audit, the auditor was presentsd with State sales tax returns, State and Federal income tax returns and purchase invoices for September, October and November 1983. A comparison of petitioner's Federal Schedule C and his State sales tax returns disclosed a substantial discrepancy (over $200,000.00) between gross sales reported on the Federal and State returns. Furthermore, petitioner had no record of individual sales, such as cash register tapes or guest checks, to verify reported sales. The auditor performed a markup test for the period September 1, 1983 through November 31, 1983 and computed a markup figure of 200 percent. This markup was the same as that reported on petitioner's 1983 Federal Schedule C. The auditor then applied the 200 percent markup figure to the cost of goods sold for the entire audit period as reported on petitioner's Schedules C for 1981 and 1982. This resulted in total audited sales for the audit period of $351,978.00 with tax due on this amount of $24,638.46. After the tax reported and paid by petitioner was subtracted from this amount, petitioner's remaining tax liability was found to be $17,760.46.

5. The auditor considered all of petitioner's sales to be taxable because of the nature of the business and because he saw no indication of nontaxable sales in a brief visit to the pizzeria.

6. After a Tax Appeals Bureau conference, the Audit Division agreed that petitioner's gross sales, as reported on his Schedules C, would be accepted as total taxable sales for state sales tax purposes. This resulted in a reduced tax liability of $15,148.83 plus penalty and interest.

7. Petitioner asserts that the difference between his gross sales and reported taxable sales is attributable to: (1) sales of nontaxable items, such as bread, cold cuts and uncooked pizza dough, (2) sales for resale and (3) sales to tax exempt organizations. To substantiate his claims, petitioner submitted the following documents:

     (a) A packet of exempt organization certificates from various schools, churches and charitable organizations in the Rochester area;

     (b) testimonials in which three orgainizations estimated their purchases from petitioner during the three month test period as follows:

Hellenic Men's Club	-	$ 20.00 - $30.00 per day
Seabreeze Volunteer Fire Assoc.	-	129.00
Parkview Bowl	-	75.00 - 100.00 per week;

     (c) a packet of testimonials from approximately 12 customers, each one stating that bread, dough or cold cuts had been purchased from petitioner during the audit period and estimating the approximate amount of such purchases.

8. Petitioner estimated that his total nontaxable sales equalled 27 percent of his gross receipts.

CONCLUSIONS OF LAW

A. That section 1105(d)(i) of the Tax Law imposes a tax upon the receipts of every sale of food or drink when sold by a restaurant €or consumption on or off the premises. An exclusion is provided for food or drink sold in an

unheated state when the items sold are of a type commonly sold by food stores for off premises consumption (Tax Law §1105[d][i][2]). In addition, sales to certain exempt organizations are not subject to the sales tax (Tax Law §1116). However, there is a presumption in the Tax Law that all receipts from a restaurant's sale of food or drink are subject to tax until the contrary is established by the person required to collect the tax (Tax Law §1132[c]).

B.   That without verifiable records of actual sales, the exemption certificates and testimonials from petitioner's customers are insufficient to overcome the presumption of taxability.

C.   That in accordance with Finding of Fact "6", petitioner's tax liability is reduced to *$15,148.83* plus penalty and interest.
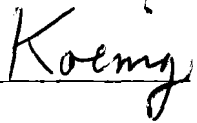
D.   That the petition of John Natalie d/b/a Natalie's Famous Pizza is granted to the extent indicated in Conclusion of Law "C"; that the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on February *6, 1985* will be modified accordingly; and that in all other respects the petition is denied.

DATED: Albany, New York

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STATE TAX COMMISSION

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PRESIDENT

Koenig

COMMISSIONER

COMMISSIONER