

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Larry (Orlando) Rossi :
d/b/a Regina Restaurant : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Sales & Use Tax :
under Article 28 & 29 of the Tax Law
for the Period 9/1/74 - 8/31/77. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 17th day of October, 1980, he served the within notice of Decision by mail upon Larry (Orlando) Rossi, d/b/a Regina Restaurant, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Larry (Orlando) Rossi
d/b/a Regina Restaurant
2679 Atlantic Ave.
Brooklyn, NY 11207

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
17th day of October, 1980.

Eubach A. Bank

J. Vredenburg

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
LARRY ROSSI	:	DECISION
D/B/A REGINA RESTAURANT	:	
	:	
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 September 1, 1974 through	:	
August 31, 1977.	:	

Petitioner, Larry Rossi d/b/a Regina Restaurant, 2679 Atlantic Avenue, Brooklyn, New York 11207, 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 September 1, 1974 through August 31, 1977 (File No. 21342).

A small claims hearing was held before Judy M. Clark, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 17, 1980 at 2:45 P.M. Petitioner appeared pro se. The Audit Division appeared by Ralph J. Vecchio, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether the markups applied to petitioner's purchases and the resultant additional sales taxes due were proper and correct.

FINDINGS OF FACT

1. On December 12, 1977, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Larry Rossi d/b/a Regina Restaurant for the period September 1, 1974 through August 31, 1977 in the amount of \$3,720.56 tax, plus penalties and interest.

2. The Notice was issued as a result of a field audit on which the Audit Division found petitioner's records to be incomplete. Petitioner's records

consisted of worksheets prepared by his accountant which contained only purchase figures for 1974 and 1975 and only sales figures for 1976 and 1977. No purchase invoices were available for a markup test, since petitioner made all of his purchases by cash from a local grocery store. No cash register tapes were available to verify the exact amount of sales or sales tax. Because of the inadequate records, the Audit Division performed a markup on the applicant's purchases.

3. Petitioner's sales for the period September 1, 1974 through November 30, 1975 were determined by his accountant using estimated markups which varied as follows:

Food	100% - 150%
Beverages	35% - 100%
Coffee	200% - 327%

4. On audit, the Audit Division obtained purchases from the petitioner's worksheets for the period September 1, 1974 through December 31, 1975. Purchases for 1976 were obtained from petitioner's Federal tax return and the monthly average for 1976 was used to determine purchases made in 1977. The total purchases were categorized based on petitioner's worksheets for 1975. Allowances were made for personal consumption and spoilage. The Audit Division estimated markup percentages and applied them to the appropriate purchases as follows:

Food	- 125 percent
Beverages	- 40 percent
Coffee	- 250 percent

The Audit Division determined additional taxable sales in the amount of \$42,448.00 and tax due of \$3,720.56. Sales tax reported but not paid for the period June 1 through August 31, 1977 was included in the tax due.

5. Petitioner contended that the markups applied to his purchases did not accurately reflect his sales. In support of his petition, he enumerated some of the costs and selling prices; however, no evidence was submitted to

substantiate costs and selling prices or to show that the percentages used by the Audit Division were too high.

6. Petitioner contended that numerous break ins took place but failed to show what effect the purported damages or thefts had on the audit results.

7. Petitioner did not show that reasonable cause existed for not paying over the additional tax found due.

CONCLUSIONS OF LAW

A. That the audit performed by the Audit Division was proper and in accordance with the provisions of section 1138(a) of the Tax Law for the use of external indices when sufficient information is not available; that the markups used on audit were reasonable and proper in the absence of substantiating records.

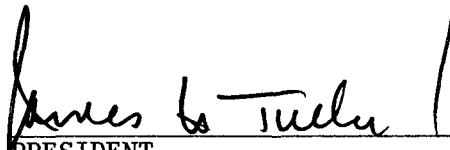
B. That the penalties and interest assessed are sustained.

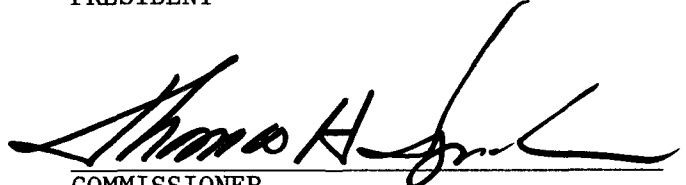
C. That the petition of Larry Rossi d/b/a Regina Restaurant is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 12, 1977 is sustained.


DATED: Albany, New York

OCT 17 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER