

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

October 30, 1981

Harry Skiadis & George Skiadis, Co-partners
d/b/a J & G Food Shop
300 Broadway
New Hyde Park, NY

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1138 & 1243 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Anthony N. Del Rosso
1055 Franklin Ave.
Garden City, NY 11530
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
HARRY SKIADIS AND GEORGE SKIADIS	:	DECISION
CO-PARTNERS, D/B/A J & G FOOD SHOP	:	
	:	
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 March 1, 1969	:	
through February 28, 1974.	:	

Petitioners, Harry Skiadis and George Skiadis, Co-Partners, d/b/a J & G Food Shop, 300 Broadway, New Hyde Park, New York, 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 March 1, 1969 through February 28, 1974 (File No. 10170).

A formal hearing was held before Archibald F. Robertson, Jr., Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 10, 1978, January 11, 1978 and March 9, 1978 beginning at 9:30 A.M., 9:30 A.M. and 10:10 A.M. respectively. Petitioner appeared by Anthony N. Del Rosso, Esq. The Audit Division appeared by Peter Crotty, Esq. (Irwin Levy, Irving Atkins and Samuel Freund, Esqs., of counsel).

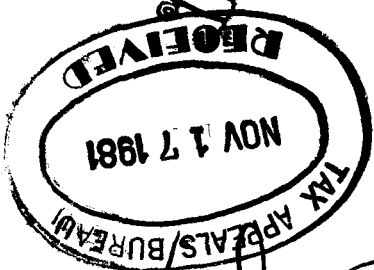
ISSUE

Whether an audit of petitioners' books and records and the markup test performed thereon by the Audit Division properly reflected petitioners' additional sales tax liability for the period March 1, 1969 through February 28, 1974.

TA 26 (9-79)
STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N. Y. 12227

CERTIFIED
MAIL

RETURNED TO
SENDER
NOV 10 1981
ANTHONY N. DEL ROSO
1055 FRANKLIN AVE.
GARDEN CITY, NY 11530



Handwritten: R.E.P.'s

FINDINGS OF FACT

1. Petitioners, Harry Skiadis and George Skiadis, co-partners in J & G Food Shop timely filed New York State sales and use tax returns for the period March 1, 1969 through February 28, 1974.

2. On February 5, 1975, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due. This Notice was issued for the period March 1, 1969 through February 28, 1974 in the amount of \$37,418.60 plus penalties and interest. On July 25, 1975 the Audit Division revised the above Notice to taxes due of \$35,440.53 plus penalties and interest.

Petitioners executed consents extending the time within which to issue an assessment for sales and use taxes for the period at issue to June 20, 1975.

3. Petitioners, as co-partners, owned and operated a small New York luncheonette business known as J & G Food Shop throughout the tax period in issue.

4. An audit of petitioners' business for the period March 1, 1969 through February 29, 1972 revealed that petitioners' books and records were inadequate for purposes of computing sales tax due in that they contained no cash register receipts or guest sales checks. As a result, the Audit Division based its audit on external indices of sales, including petitioners' purchase invoices, sales records, soft drink glass sizes and cash register tapes from a non-continuous six-day period in August and September of 1972.

5. The procedures utilized in the audit of petitioners' business were as follows:

A. For the period March 1, 1969 to June 30, 1971 petitioners' food purchase invoices and records were examined. The total of food purchases was

\$283,168.48. These purchases were marked up 100 percent to arrive at a figure for gross food sales of \$566,336.96 for this period.

B. Effective July 1, 1971, the State of New York enacted the "Hot Dog Tax", which made all food sales taxable. Prior to that enactment, food sales of less than one dollar were not taxable. Accordingly, in order to reflect the fact that a portion of the total sales, as calculated in Finding of Fact "5A" above, were not taxable, the Audit Division conducted a test to determine typical weekly sales. Since no register tapes or guest checks were available for the period March 1, 1969 through June 30, 1971, the cash register tapes from six non-consecutive weekdays in August and September of 1972 were used. From these tapes the percentage of sales of one dollar or more was calculated to be 79.41 percent. This figure was applied to the entire pre-"Hot Dog Tax" period and the appropriate taxable portion of sales for that period was determined. Petitioner, for that same period, had calculated and paid taxes on the basis of a taxable percentage of 35 percent of total sales.

C. For the period July 1, 1971 through February 29, 1972 gross food sales totaling \$180,477.28 were determined by the same procedures described in Finding of Fact "5A". These sales were held 100 percent taxable since they were made after the imposition of the "Hot Dog Tax".

D. For the period March 1, 1972 through February 28, 1974 additional taxable sales were calculated as follows:

The ratio of additional taxable sales to taxable sales reported for the period July 1, 1971 through February 29, 1972 was determined to be 44.35 percent. This "error" ratio was applied to the \$570,648.00 in taxable sales reported by petitioner for this period to arrive at additional taxable sales of \$253,028.34.

6. At the hearing, petitioners contended that the markup test and audit procedures were inaccurate for the following reasons:

A. In using the six-day test period in 1972 to arrive at a percentage of taxable sales for the pre-"Hot Dog Tax" period, the Audit Division failed to take into account the effect of inflation on menu prices. This failure to account for inflation resulted in an erroneous calculation of the percentage of sales which were one dollar or more for this period.

B. In using cash register tapes as evidence of sales during the six-day test period, the Audit Division failed to make allowance for the percentage of those sales which were an aggregate of more than one person's bill and which if separated out would have increased the percentage of sales which were less than one dollar.

C. That after arriving at a figure for total food purchases by petitioners, the Audit Division failed to reduce this figure to reflect the portion of food purchases made unsaleable by spoilage and spillage.

D. Petitioners further contended that a portion of the purchases used in the markup were actually non-food items mistakenly recorded as food purchases.

7. Meals provided by petitioners to their employees were treated by the Audit Division as taxable sales. Petitioners' cost of these meals for the period March 1, 1969 through February 29, 1972 was \$2,250.69 and this amount had been carried on petitioners' books as part of the employees' salaries.

8. The price per ounce at which soda was sold by petitioners was calculated on the assumption that petitioners used 8 and 12 ounce sized glasses. No basis for this determination was given in the audit report. At the hearing there was testimony indicating that the actual size of the glasses was 10 and 16 ounces.

In particular, petitioners contended that their supplier of glasses was RC Cola Co., and that they only provided 10 and 16 ounce glasses.

9. For the period March 1, 1972 through February 28, 1974 it was not shown that petitioners' books and records were inadequate for purposes of computing the sales tax due.

10. Petitioners' failure to report the amounts of sales tax herein at issue was not shown to be due to reasonable cause.

CONCLUSIONS OF LAW

A. That section 1138 of the Tax Law provides for the use of a test period to determine sales tax liability. The use of such a method, however, "must be founded upon an insufficiency of record keeping which makes it virtually impossible to verify taxable sales receipts and conduct a complete audit"

Chartair v. State Tax Commission, 65 A.D.2d 44, 411 N.Y.S.2d 41.

B. That the use of a markup test in arriving at the assessment against petitioner for the period March 1, 1969 through February 29, 1972 was founded upon such an insufficiency of record keeping and was therefore proper.

C. That the use of a markup test for the period March 1, 1972 through February 28, 1974 was improper in that there was no showing that petitioners' records, for this period, were inadequate.

D. That although petitioners attempted to show, through the contentions stated in Finding of Fact "6", that the various markup percentages were inaccurate, they have not demonstrated that these figures were unreasonable. Exactness is not required where it is the taxpayers' own failure to maintain proper records which prevents an exact determination of sales tax liability Matter of Markowitz v. State Tax Commission, 54 A.D.2d 1023, aff'd. 44 N.Y.2d 684.

E. That under 20 NCYRR 527.8(j)(1)(i) meals provided by petitioners to their employees are not subject to sales tax since the value of such meals were treated as part of employees' salaries. The cost of that portion of food purchases which were used for employee meals must therefore be excluded from the total purchases which were the subject of the markup test.

F. That testimony at the hearing that the only glasses provided to petitioners were 10 and 16 ounces in size is sufficient to overcome the Audit Division's bare notation to the contrary. Therefore, the sales tax assessment for beverages sold must be reduced pro rata.

G. That the audit of petitioners' business, J & G Food Shop, for the period March 1, 1969 through February 29, 1972 was conducted in a proper manner with the exception of those matters described in Conclusions of Law "E" and "F". The audit procedures used for the period March 1, 1972 through February 28, 1974 were improper. Accordingly, the petition for redetermination of deficiency in sales taxes assessed is granted as to Conclusions of Law "E" and "F". That portion of the audit covering the period March 1, 1972 through February 28, 1974 is cancelled. The petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

OCT 30 1981


PRESIDENT


COMMISSIONER


COMMISSIONER