

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

December 14, 1982

Carmine Restaurant, Inc.
d/b/a Il Cortile
125 Mulberry St.
New York, NY 10013

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 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
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Jerome Brickman
570 Seventh Ave.
New York, NY 10018
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
CARMINE RESTAURANT, INC.	:	DECISION
d/b/a IL CORTILE	:	
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, 1975	:	
through May 31, 1979.	:	

Petitioner, Carmine Restaurant, Inc. d/b/a Il Cortile, 125 Mulberry Street, New York, New York 10013 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, 1975 through May 31, 1979 (File No. 30923).

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 January 15, 1982 at 10:30 A.M. Petitioner appeared by Theodore Mate, CPA and Jerome Brickman, PA. The Audit Division appeared by Paul B. Coburn, Esq. (William Fox, Esq., of counsel).

ISSUES

- I. Whether a markup of purchases audit was a proper audit method where petitioner's books and records were partially incomplete.
- II. Whether the Audit Division sufficiently allowed for meals served to employees and food sold to employees at cost in determining taxable food sales.

FINDINGS OF FACT

1. On June 13, 1980, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Carmine Restaurant, Inc. d/b/a Il Cortile, reflecting

additional tax due in the amount of \$27,509.91, plus interest of \$5,651.72, for a total due of \$33,161.63. The Notice covered the period December 1, 1975 through May 31, 1979.

2. On January 25, 1979, petitioner, by signature of Carmine Esposito, president, executed a consent extending the period of limitation for assessment of sales and use taxes for the period December 1, 1975 through November 30, 1978 to December 20, 1979. On November 29, 1979, petitioner executed another consent extending the period of limitation to June 19, 1980.

3. During the period in issue, petitioner operated a restaurant which served a large selection of food as well as alcoholic beverages. Petitioner provided free meals to all its employees, including managers. These meals were selected by the chef and were comparable to meals on the menu.

4. On audit, the auditor found that petitioner had a well-maintained set of books including cash receipts, cash disbursements, general journal, general ledger, payroll book and payroll tax reports. Petitioner, however, failed to retain any guest checks, cash register tapes or other individual sales records from which taxable sales could be determined. From an examination of petitioner's books, the auditor found that the books reflected a markup of 70.29 percent on food and 135.68 percent on beverages. Based on his experience, the auditor considered these markups to be low. The auditor performed an audit by marking up resalable purchases to sales. The markup analysis used sales prices from the menu, current guest checks and current costs arrived at through consultation with the petitioner's chef. Based on these figures, the auditor computed a food markup of 110.21 percent. This markup was applied to food purchases for the

audit period to determine taxable food sales after allowing for waste, employee meals and complimentary meals. A similar method of audit of beverage sales was done; however, the petitioner agreed with this portion of the audit and, therefore, it is not at issue here.

5. When adjusting food purchases, the auditor used an employee meal allowance based on one meal per employee per day for seven days a week at a cost per meal of \$2.37. He allowed for 30 employees per day based on payroll records. He also made allowance for two meals per day at a cost of \$3.61 per meal for the owner and four managers.

6. At the hearing, petitioner's president testified that the reason for the low markup was that at the beginning of the audit period, the business was new and petitioner was trying to build up business by charging lower prices. No documentation was presented in support of this contention.

7. Petitioner's chef testified that 25 to 30 employees ate two meals per day and that the cost of each meal was closer to \$4.00 rather than the \$2.37 allowed by the auditor. The chef's testimony asserted that the types of meals served to the employees were varied and included veal, chicken and fish dinners and not merely the cheaper meals on the menu. Petitioner produced no records to show the actual number of employees served per day, the number of meals served or the cost of the meals.

8. Petitioner also disputed the auditor's failure to allow for unprepared food sales at cost to employees. Petitioner was unable to produce any documentary evidence of such sales. He testified that the sales were entered in the books as cash sales and amounted to approximately \$10.00 per week per employee.

CONCLUSIONS OF LAW

A. That section 1135 of the Tax Law requires, in part, that persons required to collect sales tax keep records of every sale and of the tax payable thereon. Such records include sales slips and receipts.

B. That section 1138(a)(1) of the Tax Law allows the Audit Division to determine the amount of tax due from "such information as may be available" including external indices such as purchases.

C. That when restaurant guest checks and cash register tapes are inadequate or unavailable to determine tax due, an audit based on purchases is permissible (Korba v. New York State Tax Commission, 84 A.D.2d 655, 656). Therefore, the Audit Division's use of a markup audit method to determine petitioner's tax liability was a proper audit method.

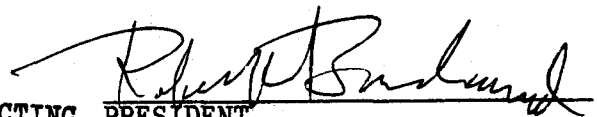
D. That petitioner did not show by substantial evidence that the Audit Division's determination of the cost and number of meals served employees and the sales at cost of food to employees was inaccurate in the absence of supporting documentation. Therefore, the auditor properly disallowed all or a portion of the items claimed.

E. That the petition of Carmine Restaurant, Inc. d/b/a Il Cortile is denied, and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 13, 1980 is sustained.

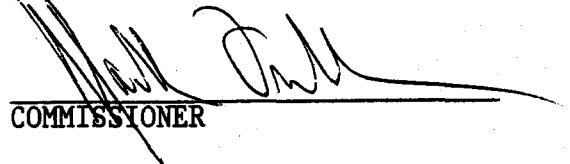
DATED: Albany, New York

DEC 14 1982

STATE TAX COMMISSION


ACTING PRESIDENT


COMMISSIONER


COMMISSIONER

ALBANY, N. Y. 12227

~~Jerome Brickman
570 Seventh Ave.
New York, NY 10018~~

Rep's copy

TAXPAYER BUREAU
JAN 03 1983
RECEIVED

RETURNED TO SENDER

~~ATTEMPTED: WITH KNIFE~~