

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

May 6, 1983

Old Dutch Farms, Inc.
c/o Raymond LeVasseur
147 Deer Creek
Deerfield Beach, FL

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
Dominic A. Villoni
Dorsa and Villoni
104-14 Roosevelt Ave.
Corona, NY 11368
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

OLD DUTCH FARMS, INC.

DECISION

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, 1976 :
through November 6, 1979. :

Petitioner, Old Dutch Farms, Inc., c/o Raymond LeVasseur, 147 Deer Creek, Deerfield Beach, Florida, 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, 1976 through November 6, 1979 (File No. 31411).

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 June 18, 1982 at 9:00 A.M. Petitioner appeared by Dominic A. Villoni, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Anna Colello, Esq., of counsel).

ISSUES

I. Whether petitioner's books and sales records were adequate for the determination of any additional tax liability and therefore should solely have been used for the determination of an exact amount of tax for the entire audit period.

II. Whether the results of a field audit performed by the Audit Division, whereby petitioner's purchases which were taxable when resold were used to determine taxable sales, properly reflected petitioner's sales tax liability.

III. Whether a 2 percent allowance for pilferage made by the Audit Division on audit sufficiently reflected such losses.

FINDINGS OF FACT

1. Petitioner operated two retail grocery/dairy stores during the period at issue. The store located at 2876 Gerritsen Avenue, Brooklyn, New York, was sold on November 6, 1979. The store located at 1881 Flatbush Avenue, Brooklyn, New York, remained operative until the expiration of its lease agreement sometime after the period in issue. Petitioner filed consolidated sales and use tax returns for both locations.

2. On January 11, 1980, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Old Dutch Farms, Inc. covering the period December 1, 1976 through November 6, 1979. The Notice asserted additional tax estimated at \$72,861.76 plus penalty and interest. The amount of tax was estimated due to the fact that the time limitation under section 1141(c) of the Tax Law was about to expire and field audit results were not yet completed.

3. On audit, the Audit Division reviewed purchases made during the months of August, 1978 and February, 1979 for both locations in order to determine the percentage of purchases which were taxable when resold. The analysis disclosed the following percentages of total purchases which were taxable on resale:

Beer	6.8984%
Soda	6.1078%
Sundry	2.5724%
Cigarettes	2.7834%

The Audit Division then performed a markup analysis using current purchase invoices ranging from January through March 4, 1980 and selling prices obtained from the Flatbush Avenue store on March 11, 1980, since the other location had previously been sold. The Audit Division determined the following markup percentages on the purchases which were taxable on resale:

Beer	25.595%
Soda	38.201%
Sundry	37.644%
Cigarettes	15.238%

The Audit Division allowed 2 percent of total purchases as being pilfered and applied the taxable purchase percentages and appropriate markups to the balance. The Audit Division determined taxable sales for the audit period of \$742,176.07 for both locations. Petitioner reported taxable sales of \$527,435.00 on sales and use tax returns filed. The Audit Division thereby held the difference of \$214,741.07 as additional taxable sales subject to sales tax of \$17,179.30. The Audit Division recommended that the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on January 11, 1980 be reduced to reflect the audit findings along with minimum statutory interest.

4. As a result of a conference held with petitioner, the Audit Division expanded its analysis of purchases to one year covering the period April, 1978 through March, 1979 and redetermined the overall percentage of taxable purchases to 17.123 percent. The Audit Division applied 17.123 percent to gross sales reported by petitioner on sales and use tax returns filed and redetermined¹ taxable sales of \$695,536.95 and tax due thereon of \$55,642.96. Petitioner reported and paid tax of \$42,194.80 on sales and use tax returns filed. The Audit Division thereby redetermined additional sales tax due of \$13,448.16. The Audit Division conceded that this is the amount of tax due at issue.

5. Petitioner had cash register tapes available for audit; however, they were not conclusive for audit purposes in that they did not specify which particular items were sold or whether the sales tax was properly charged thereon.

¹ The Audit Division's redetermination of additional taxable sales and additional tax due thereon no longer reflects any markup percentages applied to purchases. The redetermination was made by simply obtaining a percentage of purchases taxable when resold based on total purchases and applying the resultant percentage to gross sales to arrive at audited taxable sales.

6. Petitioner contended that since it had good sales records available for audit, they should have been used in the verification of its taxable sales. Petitioner submitted a sample of its recording of sales in a sales journal to show the adequacy of records kept. The amount of sales was called in daily to a bookkeeper in the central office by the individual store managers and funds from the individual operations were deposited into a corporate bank account by the store managers. The sales and use tax returns were filed from information compiled by the bookkeeper in the central office. Petitioner therefore argued that all sales tax was properly reported.

7. Petitioner argued that the audit results were not reflective of its business operation in that the Gerritsen Avenue location sold far more beer than the Flatbush Avenue store and that it was sold at a smaller markup. Petitioner therefore maintained that the markups used on audit from the Flatbush Avenue store were incorrectly applied to purchases made by the Gerritsen Avenue store.

8. Petitioner further argued that the 2 percent pilferage allowance made on audit was not sufficient in that the losses incurred were closer to 6 or 7 percent.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides that if a return when filed is incorrect or insufficient, the amount of tax due shall be determined from such information as may be available. If necessary, the tax may be estimated on the basis of external indices such as purchases.

B. That although there is statutory authority for use of a test period to determine the amount of tax due, resort to such method of computing tax liability must be founded upon an insufficiency of recordkeeping which makes it virtually

impossible to verify such liability and conduct a complete audit (Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44, 411 N.Y.S.2d 41).

That petitioner did maintain books and records which were available to the Audit Division. These records, however, were insufficient for the verification of its taxable sales and the proper collection of sales tax thereon. The Audit Division was therefore not required to accept these records as presented and thus not prevented from the use of external indices for verification of the taxable sales.

C. That the Audit Division's final redetermination of additional tax due pursuant to Finding of Fact "4", based on a percentage of purchases which were taxable when resold and determined from a one year analysis of both business locations, was proper. This percentage was applied to the gross sales reported by petitioner for both locations to determine taxable sales.

That petitioner failed to show that the aggregate markups on nontaxable items sold were higher than the aggregate markups on taxable items sold to disprove the audit results. Moreover, petitioner offered no substantiation of any selling prices from the Gerritsen Avenue store.

D. That based on the final audit computations accepting the gross sales reported by petitioner, the issue of the sufficiency of a 2 percent pilferage allowance is moot.

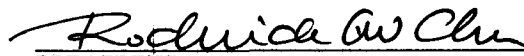
E. That the Audit Division is directed to reduce the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued January 11, 1980 to

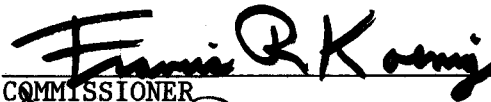
its findings pursuant to Finding of Fact "4"; and that except as so granted, the petition of Old Dutch Farms, Inc. is in all other respects denied.

DATED: Albany, New York

MAY 06 1983

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

TA 26 (9-79)

STATE OF NEW YORK

State Tax Commission

TAX BUREAU
PUS 12227

5-10

5-19

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Detached
PS Form
Oct. 1979

Do not remove from this envelope.

Old Dutch Farms, Inc.
c/o Raymond LeVasseur
147 Deer Creek
Deerfield Beach, FL

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