

STATE TAX COMMISSION

James A. Hayward
Authorized to administer oaths
pursuant to Tax Law section 174

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

September 21, 1984

Grecian Square, Inc.
33-04 Ditmars Blvd.
Astoria, NY 11105

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, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law 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
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
James Vittas
29 Broadway
New York, NY 10006
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
GRECIAN SQUARE, 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 June 1, 1977	:	
through August 31, 1980.	:	

Petitioner, Grecian Square, Inc., 33-04 Ditmars Avenue, Astoria, New York 11105, 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, 1977 through August 31, 1980 (File No. 35701).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 24, 1984 at 9:15 A.M. Petitioner appeared by James Vittas. The Audit Division appeared by John P. Dugan, Esq. (Herbert Kamrass, Esq., of counsel).

ISSUE

Whether the Audit Division properly estimated petitioner's tax liability on the basis of external indices.

FINDINGS OF FACT

1. Petitioner, Grecian Square, Inc., operated a neighborhood bar located at 33-04 Ditmars Boulevard, Astoria, New York.

2. On September 17, 1980, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner

covering the period June 1, 1977 through August 31, 1977 for taxes due of \$1,642.40, plus penalty and interest of \$1,001.86, for a total of \$2,644.26.

On May 28, 1981, a second notice was issued for the period September 1, 1977 through August 31, 1980 which assessed additional taxes of \$22,551.84, plus penalty and interest of \$11,276.09, for a total of \$33,827.93.

Said notices were issued as a result of petitioner's failure to submit books and records for audit as required by section 1142 of the Tax Law.

3. Petitioner executed a consent extending the period of limitation for assessment of sales and use taxes for the period June 1, 1977 through May 31, 1980 to June 20, 1981.

4. At the initial field visit to petitioner's premises, the Audit Division was advised by Mr. James Vittas, petitioner's accountant, that books and records were only available for 1980. Mr. Vittas indicated that records for prior years were discarded by a porter when cleaning the basement.

The Audit Division requested purchase invoices for the period March 1, 1980 through August 31, 1980 so that it could perform a markup test. Purchases for this period amounted to \$4,940.74, of which \$1,542.38 were cash purchases. Petitioner could produce only three invoices. The auditor decided that a markup test would serve no purpose since there was no purchase information available prior to 1980 and invoices available for 1980 were incomplete.

Petitioner's accountant reconstructed cash disbursements for the period June 1, 1977 through December 31, 1979 from check stubs or bank statements. Purchases made by check for this period totalled \$12,881.00. The auditor combined this total with the purchases determined for January through August, 1980 (\$7,207.00) to arrive at total purchases of \$20,088.00. The auditor was of the opinion that purchases were incomplete because it did not seem feasible

that such purchases could generate reported sales of \$104,231.00 in petitioner's operation. As a result, the Audit Division sent inquiries to sixty-two (62) liquor, wine and beer wholesalers in the New York area in an attempt to verify actual purchases made by petitioner. Approximately 25 responses were received but only three indicated purchases by petitioner.

The Audit Division then reviewed bank deposits for the period June 1, 1977 through November 30, 1977. The deposits totalled \$81,992.00, of which \$6,020.00 represented sales tax, leaving sales of \$75,972.00. Petitioner reported sales of \$64,997.00 for a difference of \$10,975.00. (The discrepancy would actually be greater because the receipts used to make cash purchases were not reflected in deposits.)

The Audit Division determined it was necessary to estimate petitioner's sales because of the inadequate and incomplete records furnished by petitioner. The Audit Division increased reported sales by 200 percent to arrive at additional taxable sales of \$302,428.00 and taxes due thereon of \$24,194.24. (Petitioner did not file sales tax returns for the periods ended November 30, 1977, February 28, 1978 and May 31, 1978 and, therefore, sales were based on an average of reported sales for subsequent periods.) The estimate was based on the auditor's experience with audits of similar businesses.

5. Petitioner estimated its sales using the reconstructed cash disbursements as follows:

	<u>6/1/77-12/31/77</u>	<u>1978</u>	<u>1979</u>
cash in bank	\$36,774.42	\$22,485.63	\$42,574.82
less: exchanges	14,290.16	2,700.00	500.00
	<u>\$22,484.26</u>	<u>\$19,785.63</u>	<u>\$42,074.82</u>
cash payroll	7,410.00	16,042.00	20,250.00
cash purchases	1,000.00	5,100.00	3,000.00
sales	<u>\$30,894.26</u>	<u>\$40,927.63</u>	<u>\$65,324.82</u>
less: rent			9,600.00
			<u>\$55,724.82</u>

6. Petitioner argued that the cash disbursements were adequate books and records from which the Audit Division could determine its liability. Petitioner argued further that the purchases and the reconstructed sales from the cash disbursements show markup percentages ranging from approximately 400 to 500 percent, which are more than adequate for its business operation. On that basis, petitioner concluded that the 200 percent increase to reported sales was arbitrary, unreasonable and not justified.

7. Petitioner did not have any sales records available for periods prior to 1980. The sales records for 1980 were insufficient in that cash register tapes, or any other verifiable record of individual sales receipts, were not maintained by petitioner.

CONCLUSIONS OF LAW

A. That petitioner failed to maintain and provide the Audit Division with books and records for the period June 1, 1977 through December 31, 1979 as required by sections 1135 and 1142 of the Tax Law. Moreover, the available records for January 1, 1980 through August 31, 1980 were inadequate for verifying taxable sales.

Section 1138(a) of the Tax Law authorizes the Audit Division to determine the amount of tax due from such information as may be available and, if necessary, the tax may be estimated on the basis of external indices (Matter of Sakran v. State Tax Commission, 73 A.D.2d 989).

B. That the reconstructed cash disbursements (Finding of Fact "5") do not constitute adequate books and records to conduct an audit. When books and records are unreliable and incomplete, as here, a "test period" audit using external indices is permissible (Matter of Hanratty's/732 Amsterdam Tavern, Inc. v. N.Y.S. Tax Commission, 88 A.D.2d 1028, mot for lv. to app. den., 57 N.Y.2d

608, mot. to dismiss app. granted, 57 N.Y.2d 954). Moreover, when a taxpayer's recordkeeping is faulty, exactness is not required of the examiner's audit (Matter of Meyer v. State Tax Commission, 61 A.D.2d 223, mot. for lv. to app. den., 44 N.Y.2d 645).


C. That the Audit Division was unsuccessful in obtaining the amount of purchases made by petitioner through independent verification. Therefore, as an alternative, the Audit Division estimated the taxes due based on audits of similar businesses. Under the circumstances, such a method was reasonable and petitioner failed to overcome its burden to demonstrate by clear and convincing evidence that the method of audit or the amount of tax assessed was erroneous (Matter of Urban Liquors, Inc. v. State Tax Commission, 90 A.D.2d 576).


D. That the petition of Grecian Square, Inc. is denied and the notices of determination and demand for payment of sales and use taxes due issued September 17, 1980 and May 28, 1981 are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

SEP 21 1984


PRESIDENT


COMMISSIONER


COMMISSIONER

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RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517 PS Form 3800, Feb. 1982	Sent to <i>Gregorian Square, ILL.</i>	
	Street and No. <i>33-04 Ditmars Blvd.</i>	
	P.O., State and ZIP Code <i>ASTORIA, NY 11105</i>	
	Postage	\$
	Certified Fee	
	Special Delivery Fee	
	Restricted Delivery Fee	
	Return Receipt Showing to whom and Date Delivered	
	Return receipt showing to whom, Date, and Address of Delivery	
	TOTAL Postage and Fees	\$
Postmark or Date		

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RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517 PS Form 3800, Feb. 1982	Sent to <i>James Vittas</i>	
	Street and No. <i>29 Broadway</i>	
	P.O., State and ZIP Code <i>NY, NY 10006</i>	
	Postage	\$
	Certified Fee	
	Special Delivery Fee	
	Restricted Delivery Fee	
	Return Receipt Showing to whom and Date Delivered	
	Return receipt showing to whom, Date, and Address of Delivery	
	TOTAL Postage and Fees	\$
Postmark or Date		