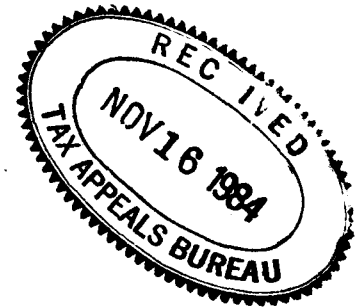


STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

July 18, 1984



HMSM Supermarkets, Inc.
c/o Meyers & Silverman
66-36 Yellowstone Blvd., Apt. 19E
Forest Hills, NY 11375

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
Robert Meyers
Meyers & Silverman
66-36 Yellowstone Blvd., Apt. 19E
Forest Hills, NY 11375
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
HMSM SUPERMARKETS, INC.	:	DECISION
and MURRAY ZUCKERMAN, as President	:	
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 November 30, 1978.	:	

Petitioners, HMSM Supermarkets, Inc. and Murray Zuckerman, as president, c/o Meyers & Silverman, 66-36 Yellowstone Boulevard, Apt. 19E, Forest Hills, New York 11375, 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 November 30, 1978 (File No. 31803/32019).

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 May 9, 1983 at 1:15 P.M., with all evidence submitted by October 24, 1983. Petitioner appeared by Robert Meyers, P.A. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUES

I. Whether a field audit conducted on the books and records of corporate petitioner properly reflected the taxable sales made and additional sales tax determined due thereon.

II. Whether purchases of fixed assets were properly held subject to sales tax where corporate petitioner did not show payment of tax.

III. Whether sales of prepared food and drink were properly determined and held subject to sales tax on audit.

FINDINGS OF FACT

1. On August 12, 1980, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against HMSM Supermarkets, Inc. ("the Corporation") covering the period December 1, 1975 through November 30, 1978. The Notice was issued as a result of a field audit and asserted additional tax due of \$30,723.76, plus interest of \$7,712.45, for a total due of \$38,436.21.

A Notice of Determination and Demand for Payment of Sales and Use Taxes Due was also issued against Murray Zuckerman, as president of the corporation; however, his personal liability as officer is not at issue herein.

2. The Corporation executed three consents to extend the period of limitation for the issuance of an assessment for the period December 1, 1975 through November 30, 1978, the final one extending the period to August 31, 1980.

3. On audit, in order to verify taxable sales reported, the Audit Division reviewed purchases made by the Corporation for the period July, 1977 and January, 1979 and classified them into the following categories which would be taxable upon resale:

	<u>% of Total</u>
Grocery	18.50%
Soda	4.03%
Beer	1.04%
Sundry	.44%
Cigarettes	1.04%
Total	<u>25.05%</u>

A markup test was then performed on July 12, 1979 using current purchase invoices and shelf prices. The Audit Division determined the following markups on the above purchases:

	<u>Markup %</u>
Grocery	32.12% ¹
Soda	11.75%
Beer	23.12% ²
Sundry	45.00% ²
Cigarettes	12.00% ²

Using the aforesaid percentages of purchases and markups, the Audit Division determined taxable sales of \$1,045,305.00 for the audit period.

The Corporation leased out the deli section of the store from November, 1977 to the end of the audit period. The Audit Division determined taxable deli sales for the period December 1, 1975 through October 31, 1977 to be 10 percent of the Corporation's deli purchases with a markup of 30 percent thereon. The Audit Division thereby determined petitioner's taxable deli sales to be \$11,365.00.

Taxable sales for the audit period were determined to be \$1,056,670.00. The Corporation reported taxable sales of \$723,018.00 on sales and use tax returns filed. The Audit Division thereby determined additional taxable sales of \$333,652.00 and sales tax due thereon of \$26,694.00.

The Corporation was unable to substantiate that sales tax was paid on \$50,372.00 in fixed asset purchases during the audit period. The Audit Division therefore held these purchases subject to tax of \$4,029.76. The Audit Division thereby determined the total sales and use tax deficiency of \$30,723.76.

4. At a pre-hearing conference held, the Audit Division reduced the Corporation's additional tax liability to \$22,219.52. This resulted from deletion of three months of purchases for the period December, 1978 through

¹ The Audit Division increased this markup by 15% from 27.93% due to the fact that selling prices on the day of the markup analysis were not representative of normal selling prices.

² Estimated.

February, 1979 which were erroneously included in the audit results and an allowance of one percent of purchases which were pilfered and therefore not sold.

5. In support of its petition, the Corporation analyzed its grocery purchases for the period March, 1979 and August, 1979. The result of this review was summarized and showed that the taxable percentage of grocery purchases was 18.2 percent as compared to the Audit Division's calculation of 18.5 percent of total purchases. The Audit Division's findings of taxable grocery purchases was 19.8 percent when purchases of soda, beer, sundry and cigarette purchases were deleted from the denominator. The Corporation, however, failed to submit the source documents used in the analysis for verification.

6. In further support of its petition, the Corporation submitted summaries of weekly specials offered by Pioneer Food Cooperative, the corporation's major supplier of merchandise. The summaries support the Corporation's argument that its selling prices of groceries changed from day to day, as they did on the day of the markup analysis conducted by the Audit Division.

7. The Corporation submitted service contracts and sales invoices to show the payment of sales tax on fixed assets held subject to tax on audit. A summary of these, which are pertinent to the audit results, is as follows:

Total held subject to tax:		\$50,372.00
Substantiated Tax Paid	\$23,038.00	
Capital Improvements	8,290.00	
Outside Audit Period	<u>3,215.00</u>	
Total Substantiated		<u>34,543.00</u>
Net Assets Subject to Tax		\$15,829.00
Purchase of Motor Vehicle	\$ 8,680.00	
5% New Jersey Tax Paid	<u>434.00³</u>	<u>9,114.00</u>
Subject to tax at 8%		\$ 6,715.00
Subject to additional tax at 3%		\$ 8,680.00

³ Under the provisions of Tax Law §1118(7), reciprocal credit is allowed for the sales tax paid to New Jersey.

8. Petitioners contended that the deli department was leased out to Mr. Kenneth Kramer from the beginning of the audit period to October 31, 1977 and, therefore, it should not be held liable for the sales tax determined due on those taxable sales. The Corporation rang up deli sales during this period and remitted the receipts to the lessee weekly, less rent and charges for electricity.

9. The Corporation's records were insufficient for the determination of an exact amount of taxable sales receipts or the determination of an exact amount of tax due.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides for the use of external indices such as purchases to verify taxable sales receipts when returns filed are incorrect or insufficient. The audit method employed by the Audit Division was therefore proper in the absence of sales records disclosing the actual amount of taxable sales receipts. (Chartair, Inc. v. State Tax Commission, 65 A.D.2d 44, 411 N.Y.S.2d 41.)

B. That in the application of markup percentages to the purchases which were taxable upon resale, the Audit Division failed to consider that promotional specials were offered weekly as evidenced by summaries from Pioneer Food Cooperative. That the markup on the Corporation's taxable grocery purchases is hereby reduced to 27.93 percent as originally found in the markup analysis (Finding of Fact "3", see footnote).

C. That corporate petitioner's purchases of fixed assets held subject to use tax on audit is reduced by \$34,543.00 pursuant to Finding of Fact "7". Furthermore, of the balance remaining, \$8,680.00 is subject only to an additional 3 percent tax.

D. That corporate petitioner was a vendor of the sales made through the deli operation for the period December 1, 1975 through October 31, 1977 within the meaning of Tax Law §1101(b)(8) and 20 NYCRR 526.10(g)(3). That the petitioners failed to show that the taxable sales were less than those determined by the Audit Division based on the purchases recorded in its books and records.

E. That the petition of HMSM Supermarkets, Inc. and Murray Zuckerman, as president, is granted to the extent indicated in Finding of Fact "4" and in Conclusions of Law "B" and "C" above; that the Audit Division is directed to accordingly modify the Notices of Determination and Demand for Payment of Sales and Use Taxes Due issued August 12, 1980; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

JUL 18 1984


PRESIDENT


COMMISSIONER


COMMISSIONER