

STATE TAX COMMISSION

James W. Harrison
Authorized to administer oaths
pursuant to Tax Law section 174

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

November 9, 1984

Tino's Pizza, Inc.
28 W. Chippewa St.
Buffalo, NY 14202

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
Lawrence C. Ceglia
4211 Seneca St.
W. Seneca, NY 14224
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
TINO'S PIZZA, 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 September 1, 1978	:	
through February 28, 1981.	:	

Petitioner, Tino's Pizza, Inc., c/o Lawrence Ceglia, 4211 Seneca Street, West Seneca, New York 14224, 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 September 1, 1978 through February 28, 1981 (File No. 37356).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on December 7, 1983 at 1:15 P.M., with all briefs to be submitted by March 30, 1984. Petitioner appeared by Lawrence Ceglia, P.A. The Audit Division appeared by John P. Dugan, Esq. (Deborah Dwyer, 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, Tino's Pizza, Inc., sold pizza and submarine sandwiches for on-premise and off-premise consumption. Seating in the restaurant was limited to four stools at a counter and three booths. The physical size was approximately 12 feet by 20 feet. The restaurant was located at 28 West

Chippewa Street, Buffalo, New York, until December 31, 1980 at which time the business was discontinued. Petitioner reopened at another location in April, 1981.

2. On December 17, 1981, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period September 1, 1978 through February 28, 1981 for taxes due of \$20,351.07, plus penalty and interest of \$9,291.62, for a total of \$29,642.69. The taxes due on said notice were estimated because petitioner did not provide the Audit Division with books and records to conduct an audit.

3. During the period at issue, petitioner reported sales of \$570,091.00. The Audit Division increased such sales by fifty percent to arrive at estimated sales of \$855,134.00 and tax due thereon of \$59,859.38. Petitioner paid \$39,508.31 for the same period, leaving a difference of \$20,351.07 which was the amount assessed on the above notice.

The basis for the increase was the experience of the auditor and the auditor's supervisor with audits of other pizza businesses. They were of the opinion that, giving consideration to the location and size of the restaurant, the type of business and the hours of operation, the sales were underreported.

4. The Audit Division initially contacted petitioner by letter making an appointment for October 8, 1981 to conduct an audit. At that time, petitioner's accountant, Lawrence Ceglia, advised the auditor that the books and records had been destroyed by a fire. Between October 8, 1981 and December 17, 1981, the auditor made several attempts to contact Lewis Berrafato, president of petitioner, to obtain available records. When no records were forthcoming, the assessment was issued using the estimated amounts.

5. At a pre-hearing conference, petitioner furnished the Audit Division with a list of ten food suppliers it purchased from in 1980. This information was requested so that the Audit Division could reconstruct sales based on the purchases of product ingredients. The Audit Division sent inquiries to the suppliers requesting the types of items purchased by petitioner for 1980 and the quantity and dollar amount of such purchases. The Audit Division received six replies. Two suppliers indicated that they were out of business and could not provide the information. Three others showed the amount purchased and no other information. The four suppliers that did not respond to the letter were contacted by telephone. However, the information was still not furnished. The Audit Division could not reconstruct sales with the incomplete purchase information. As an alternative, the auditor obtained purchases as shown on petitioner's corporation income tax returns and applied a 300 percent markup (the markup was taken from the Audit Division guidelines for pizza businesses) to estimate sales. This resulted in sales that were one-third greater than the sales used as a basis for the assessment. Therefore, no revisions to the notice resulted from the conference.

6. Petitioner's books and records were left on the premises when it vacated the building on Chippewa Street in December, 1980. When Mr. Berrafato returned to retrieve the records, he discovered that they had been either destroyed by fire or stolen.

7. Subsequent to the hearing, petitioner submitted unaudited monthly income statements for the entire period under review, except for the month of October, 1979. The income statements were prepared from the books and records which are no longer available. The sales tax returns filed were based on the

income statements. Petitioner conceded that there was an error in the sales reported on the sales tax returns filed for 1980. The sales were understated by \$20,259.00. Except for such error, petitioner argued that the income statements reflect its actual sales for the audit period.

8. Petitioner argued that the auditor did not consider the deteriorated neighborhood in which the business was located: other businesses had moved out; buildings were boarded and some demolished; crime and prostitution were rampant; and, for such reasons, traffic through the area was diminished.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides that the amount of tax due shall be determined from such information as may be available but "[i]f necessary, the tax may be estimated on the basis of external indices". When books and records are unreliable or incomplete, as here, the use of external indices is permissible (Matter of Korba v. N.Y.S. Tax Commission, 84 A.D.2d 655, mot. for lv. to app. den., 56 N.Y.2d 502).

In the absence of any books and records, and since attempts to obtain purchase information were unsuccessful, the estimate procedures adopted using the auditor's and office experience with similar businesses were reasonable.

If the audit method was reasonable, the burden then rests upon the taxpayer to demonstrate by clear and convincing evidence that the method of audit or the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 A.D.2d 858).

B. That petitioner failed to overcome its burden of showing error. The unaudited income statements showing total sales with no other verifiable record of individual sales receipts are of no value for audit purposes (Matter of Skiadas v. State Tax Commission, 95 A.D.2d 971).


C. That the petition of Tino's Pizza, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 17, 1981 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

NOV 09 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>Lawrence C. Ceglia</i>	
Street and No. <i>4211 Seneca St.</i>	
P.O. State and ZIP Code <i>W. Seneca, NY 14224</i>	
Postage	\$
Certified Fee	
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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	

P 693 168 889

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NO INSURANCE COVERAGE PROVIDED
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(See Reverse)

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PS Form 3800, Feb. 1982

Sent to <i>Tino's Pizza, Inc.</i>	
Street and No. <i>28 W. Chippewa St.</i>	
P.O. State and ZIP Code <i>Buffalo, NY 14202</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	