

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Ramon Gonzalez : AFFIDAVIT OF MAILING  
d/b/a DeKalb Wine & Liquor :  
:   
for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Sales & Use Tax :  
under Article(s) 28 & 29 of the Tax Law for the :  
Period 3/1/81 - 2/29/84. :

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State of New York :

ss.:

County of Albany :

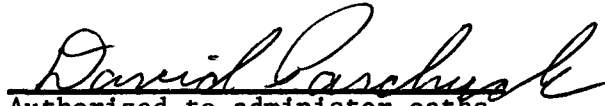
David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 12th day of November, 1986, he/she served the within notice of Decision by certified mail upon Ramon Gonzalez, d/b/a DeKalb Wine & Liquor the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ramon Gonzalez  
d/b/a DeKalb Wine & Liquor  
905 DeKalb Avenue  
Brooklyn, New York 11221

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
12th day of November, 1986.

  
Authorized to administer oaths  
pursuant to Tax Law section 174



STATE OF NEW YORK

STATE TAX COMMISSION

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State of New York :  
ss.:  
County of Albany :


David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 12th day of November, 1986, he served the within notice of Decision by certified mail upon Raymond M. Suarez, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

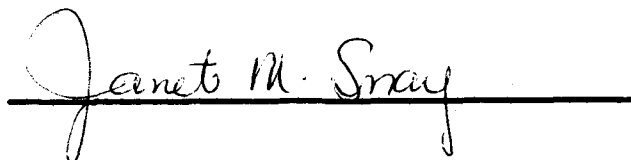
Raymond M. Suarez  
5 Debevoise St.  
Brooklyn, NY 11206

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this  
12th day of November, 1986.

  
Authorized to administer oaths  
pursuant to Tax Law section 174



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

November 12, 1986

Ramon Gonzalez  
d/b/a DeKalb Wine & Liquor  
905 DeKalb Avenue  
Brooklyn, New York 11221

Dear Mr. Gonzalez:

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  
Audit Evaluation Bureau  
Assessment Review Unit  
Building #9, State Campus  
Albany, New York 12227  
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:  
Raymond M. Suarez  
5 Debevoise St.  
Brooklyn, NY 11206

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
RAMON GONZALEZ	:	DECISION
D/B/A DeKALB WINE & LIQUOR	:	
	:	
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 March 1, 1981	:	
through February 29, 1984.	:	

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Petitioner, Ramon Gonzalez d/b/a DeKalb Wine & Liquor, 905 DeKalb Avenue, Brooklyn, New York 11221, 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 March 1, 1981 through February 29, 1984 (File No. 55920).

A hearing was commenced before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 4, 1986 at 1:30 P.M. and continued to conclusion on June 18, 1986 at 9:15 A.M. Petitioner appeared by Raymond M. Suarez, Esq. (Alfred Torres, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Mark F. Volk, Esq., of counsel).

ISSUES

I. Whether, in the conduct of a field audit, the Audit Division properly determined petitioner's markups on wine and liquor based upon a two-month test of purchase invoices which did not include purchases from petitioner's major supplier.

II. Whether penalties and interest in excess of the minimum statutory rate should be waived.

FINDINGS OF FACT

1. During the period at issue, Ramon Gonzalez owned and operated a retail liquor store at 905 DeKalb Avenue in Brooklyn, New York doing business as DeKalb Wine & Liquor. Petitioner's major supplier of wine and liquor (supplying approximately 80 percent) was Charmer Industries.

2. On June 20, 1984, the Audit Division, as the result of a field audit, issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due assessing a sales tax due of \$24,453.46, plus penalty of \$4,948.81 and interest of \$5,679.65, for a total amount due of \$35,081.92 for the period March 1, 1981 through February 29, 1984. Ramon Gonzalez timely filed a petition for redetermination of the above assessment.

3. On audit, the petitioner made available to the auditor copies of sales tax returns, copies of Federal and State income tax returns, sales worksheets, purchase worksheets, purchase invoices (test period), cancelled checks and monthly bank statements. The auditor requested but was not provided with cash register tapes, general ledger, cash receipts journal and check disbursements journal.

4. For sales tax reporting purposes, the petitioner utilized the amount credited to his checking account. Since this was a completely cash business, the auditor deemed this method of reporting unacceptable and therefore concluded that petitioner's books and records were inadequate.

5. The auditor first compared average monthly purchases per invoices of \$19,064.53 to average monthly purchases per books of \$18,414.17 and computed a difference of \$650.36, or a margin of error of 3.532 percent. Purchases per invoices for the months of March, April and May 1983 were analyzed. During this three-month period, petitioner's purchases totalled \$57,193.58 of which

\$46,915.08 were from Charmer Industries. The results of the purchase analysis revealed liquor purchases of 83.87 percent and wine purchases of 16.13 percent. Next, purchase markup tests were performed utilizing April and May 1984 purchase invoices and current selling prices, resulting in a liquor markup of 27.82 percent and a wine markup of 68.93 percent. It should be noted that liquor and wine purchases for the two-month test period totalled only \$2,932.25 (\$1,930.14 + \$1,002.11) and did not include any purchases from Charmer Industries which supplied approximately 80 percent of petitioner's merchandise during the period at issue. The auditor then computed a margin of error on reported taxable sales as follows:

	<u>Liquor</u>	<u>Wine</u>	<u>Total</u>
Purchases per records			\$ 743,622
Percentage of error - invoices over records			3.532%
Audited purchases			\$ 769,887
Percentage of purchases	83.87%	16.13%	
Applicable purchases	\$645,704	\$124,183	\$ 769,887
Markup percentage	27.82%	68.93%	
Markup amount	\$179,635	\$ 85,599	\$ 265,234
Audited taxable sales	\$825,339	\$209,782	\$1,035,121
Reported taxable sales			\$ 736,931
Additional taxable sales			\$ 298,190
Percentage increase in taxable sales			40.464%

The margin of error of 40.464 percent was applied to reported taxable sales to compute the additional sales tax due of \$24,453.46. It is notable that petitioner's purchases per books (\$743,622) exceed his reported taxable sales (\$736,931).

6. Petitioner contests the above computation of additional sales tax primarily on the ground that the markup test failed to consider purchases from Charmer Industries. The petitioner submitted an analysis of purchases from Charmer Industries during February and March 1986 using June 1986 selling prices. Except for shrinkage, the analysis revealed the following:

	<u>Liquor</u>	<u>Wine</u>
Selling price	\$24,877.08	\$3,187.06
Cost	20,531.43	2,017.99
Profit	<u>\$ 4,345.65</u>	<u>\$1,169.07</u>
Markup on cost	21.17%	57.93%

7. At the hearing, the petitioner claimed a loss for breakage and pilferage. However, he failed to offer evidence to establish such loss.

8. Petitioner failed to present evidence that the failure to pay the taxes at issue was due to reasonable cause and not due to willful neglect.

#### CONCLUSIONS OF LAW

A. That the books and records of Ramon Gonzalez d/b/a DeKalb Wine & Liquor were incomplete and inadequate and, therefore, the Audit Division properly determined additional taxes due from such information as was available in accordance with section 1138(a)(1) of the Tax Law (Matter of George Korba v. State Tax Commission, 84 A.D.2d 655).

B. That, however, the markups on liquor and wine as computed by the Audit Division did not properly reflect petitioner's business during the period at issue in that the Audit Division failed to consider purchases from petitioner's major supplier. Therefore, the Audit Division is hereby directed to combine its two-month markup test with petitioner's analysis of purchases from Charmer Industries (see Findings of Fact "5" and "6") and recompute petitioner's markups.

C. That since petitioner did not explain or show that reasonable cause existed for the understatement of his tax liability, penalty and maximum interest are due on the additional sales tax determined.


D. That the petition of Ramon Gonzalez d/b/a DeKalb Wine & Liquor is granted to the extent indicated in Conclusion of Law "B"; the Audit Division is

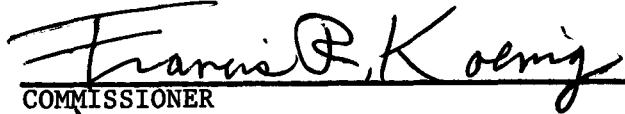
hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 20, 1984; and that except as so granted, the petition is denied.


DATED: Albany, New York

STATE TAX COMMISSION

NOV 12 1986

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER



P 319 372 977

**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1985-480-794

PS Form 3800, June 1985

Sent to <b>Ramon Gonzalez</b>	
Street and No. <b>905 Dekalb Ave.</b>	
P.O., State and ZIP Code <b>Brooklyn, N.Y. 11221</b>	
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	

P 319 372 978

**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1985-480-794

PS Form 3800, June 1985

Sent to <b>Raymond M. Suarez</b>	
Street and No. <b>S Debevoise St</b>	
P.O., State and ZIP Code <b>Brooklyn, N.Y. 11206</b>	
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	