

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
	:	
of	:	
ALLETOR CORPORATION		DECISION
D/B/A OLIVER'S	:	DTA NO. 800878
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 November 30, 1979	:	
through May 31, 1982.	:	

Petitioner, Alletor Corporation d/b/a Oliver's, 279 Front Street, Binghamton, New York 13905 filed an exception to the determination of the Administrative Law Judge issued on September 17, 1987 with respect to its 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 November 30, 1979 through May 31, 1982 (File No. 800878). Petitioner appeared at hearing by Griffen & Smith, Esqs. (Frederick A. Griffen, Esq., of counsel). Petitioner appeared pro se on the exception. The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

Oral argument was requested and then cancelled by petitioner. Neither of the parties filed a brief on exception.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the assessment of additional sales tax due from petitioner as the result of a field audit of petitioner's business operations should be sustained.

FINDINGS OF FACT

We find the facts as stated in the Administrative Law Judge's determination and such facts are incorporated herein by this reference.

During the period at issue petitioner, Alletor Corporation d/b/a Oliver's, operated a bar and restaurant at premises located at 279 Front Street in Binghamton, New York.

In or about June 1982, the Division of Taxation initiated a field audit of petitioner's business operations. The auditor requested production of petitioner's records and, upon review of the records made available, found that petitioner had neither a cash receipts journal nor a cash disbursements journal and had only scattered purchase invoices. Petitioner had not filed corporation tax returns for any of the years 1978 through 1981. No cash register tapes were made available to the auditor and only a few scattered guest checks were available for the period under audit. Initial review of the records made available disclosed negative markups (purchases exceeding sales) for both food and beer and disclosed a markup on liquor of approximately 25 percent.

Based on his request for and review of the aforementioned records, the auditor determined that such records were incomplete and insufficient for purposes of verifying either petitioner's gross sales or its taxable sales. Hence, the auditor concluded that the records were inadequate for audit purposes, and determined that indirect audit methods would be utilized in order to verify the accuracy or establish the inaccuracy of petitioner's sales tax returns.

The auditor canvassed the various liquor, wine and beer distributors in petitioner's geographic area in order to determine the amount of purchases of such items by petitioner during the audit period. The auditor compared petitioner's purchase prices (costs) for liquor, wine and beer per replies to the canvass letters, with petitioner's selling prices for such items as stated on a bar fact sheet and bar questionnaire completed by petitioner's manager and as shown on those guest checks available, in order to determine a markup percentage for such items. The markups, as determined, were 215 percent for beer and 305 percent on liquor and wine purchases.

The auditor also determined, given the large number of food distributors in petitioner's area, that canvass letters to determine food purchases would not be utilized. Rather, the auditor used those food purchase invoices available during the audit period to determine food purchases for the entire audit period. These purchases were averaged by dividing total food purchases per invoices by

the number of months for which such invoices existed, with the resultant per month purchase amount multiplied by the 29 months in the audit period to arrive at food purchases. The auditor initially decided a markup of 125 to 150 percent on food purchases was appropriate based upon audit experience in the area with similar sized restaurants, but reduced such markup to 100 percent over cost to account for petitioner's claim that various free food giveaways, including Dine-A-Mate sales (see infra.), occurred on a regular basis during the audit period.

The aforementioned markups were applied to purchases of food, beer, wine and liquor as determined on audit to arrive at audited taxable sales. Audited taxable sales were compared to reported taxable sales (per returns) to arrive at an error rate of 1.24 percent which, when applied to tax reported and paid per petitioner's returns, resulted in a deficiency of \$10,359.54.

On September 20, 1983, the Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period September 1, 1979 through May 31, 1982 in the amount of \$10,359.54, plus interest. This assessment was issued as the result of the aforementioned field audit. Petitioner had previously executed validated consents with respect to the statute of limitations, the latest of which allowed assessment for the period September 1, 1979 through May 31, 1980 to be made at any time on or before September 20, 1983.

It is noted that in determining the beer markup percentage, the Division's calculation reflected 50 percent of petitioner's beer sales as being made at happy hour prices and 50 percent at regular prices. The same allowance in calculation of markup was allowed for liquor sales.

Petitioner timely protested the assessment and has maintained that the audit results overstate petitioner's sales, in that petitioner consistently allowed reduced prices both on its beer and liquor sales and on its food sales. Petitioner specifically alleged that a large percentage of its business was represented by Dine-A-Mate sales. The Dine-A-Mate promotional program, in general, allows that with the presentation of a Dine-A-Mate coupon and the purchase of two dinners, there is no charge for one (the lesser priced) of the dinners.

Subsequent to the audit, petitioner supplied random guest checks for three different short periods (covering in total 18 days) during the audit period. These random guest checks showed that

approximately 17 percent of petitioner's total food sales were Dine-A-Mate sales. Petitioner, however, has claimed varying percentages of food sales were due to Dine-A-Mate, with such claimed percentages being "at least 45%" and "as high as 90%".

At hearing, petitioner alleged that while guest checks were not available for the audit period, cash register tapes were maintained and may have been available at the time of the audit. These tapes were assertedly located either on top of a refrigerator at petitioner's premises or, if not at petitioner's premises, at the premises of a produce store operated by petitioner's manager. Petitioner alleges that when the produce store was closed, the records were misplaced during transit to petitioner's premises and have not been located since.

At hearing, petitioner presented a large number of Dine-A-Mate coupons as well as a large number of free drink or two-for-one or three-for-one drink coupons. These coupons for drinks were not cancelled or otherwise invalidated to show use, and no guest checks were submitted in connection with or tied to the Dine-A-Mate coupons. Petitioner submitted a summary schedule indicating, in total for the audit period, \$68,865.00 of coupon sales (meaning Dine-A-Mate and drink coupons). Petitioner claims such sales were not subject to tax and that additional sales as determined per audit (\$89,436.00) should be reduced (by the \$68,865.00 summary amount), to total additional sales of \$20,601.00.

In preparing the aforementioned summary schedules, various values were assigned to the coupons by petitioner, petitioner's manager and/or one of its other employees. The bulk of the coupons were valued at \$10.00. It is noted that the highest priced food item sold by petitioner, per information provided by petitioner, was \$8.95. Some of the coupons indicated a face value, while others did not. Petitioner urges that some reduction, in addition to that allowed by the Division on audit, should be afforded based on the large volume of Dine-A-Mate coupons and other coupons submitted in evidence by petitioner at hearing.

Finally, petitioner maintains that for the period ended February 29, 1980, sales per returns of \$32,107.00, which far exceeded sales reported for any of the other quarters by petitioner, represents the misplacement of a decimal point and that such sales should have been reported at \$3,210.70.

Assuming this claim to be correct, based on the audit methodology used, it would result in a higher amount of unreported sales and a higher error rate, and thus higher additional tax due.

OPINION

The Administrative Law Judge sustained the estimate of petitioner's tax liability by the Division. On exception, petitioner asserts that the estimated liability is incorrect.

The decision in Chartair, Inc. v. State Tax Commn. (65 AD2d 44) makes it clear that resort to external indices as a method of computing sales tax liability must be founded on a determination of the insufficiency of the taxpayer's record keeping which makes it virtually impossible to verify sales receipts and conduct an audit. There must be an actual request for the taxpayer's books and records (Matter of Christ Cella, Inc. v. State Tax Commn., 102 AD2d 352) for the entire period of the assessment (Matter of Adamides v. Chu, 134 AD2d 776, lv to appeal denied 71 NY2d 806) and the Division must make a thorough examination of such records (Matter of King Crab Restaurant, Inc. v. Chu, 134 AD2d 51 [3d Dept. 1987]) before proceeding to external indices to determine the taxpayer's sales tax liability.

If persons required to collect taxes neglect to keep the requisite records, the method devised to ascertain taxes due is sufficient if it is "reasonably calculated" to reflect the taxes due (Matter of Grant Co. v. Joseph, 2 NY2d 196, 206; see also, Matter of Meskouris Brothers, Inc., 139 AD2d 813). Here, the Division determined that petitioner's books and records were incomplete and insufficient for purposes of verifying either petitioner's gross sales or its taxable sales and thus were inadequate for audit purposes. The Division resorted to an indirect method to estimate petitioner's sales tax liability. Petitioner has introduced no evidence to indicate that the method utilized by the Division was not reasonably calculated to reflect the taxes due.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Alletor Corporation d/b/a Oliver's is denied;
2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of Alletor Corporation d/b/a Oliver's is denied and the Notice of Determination and Demand dated September 20, 1983 is sustained.

Dated: Albany, New York
November 17, 1988

/s/John P. Dugan

John P. Dugan
President

/s/Francis R. Koenig

Francis R. Koenig
Commissioner