

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition

of

**JOSEPH CALERI d/b/a
VILLA CAPRI RESTAURANT**

DECISION
DTA NO. 801486

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, 1980
through November 30, 1983.

Petitioner, Joseph Caleri d/b/a Villa Capri Restaurant ,926 Main Street, Buffalo, New York 14202, filed an exception to the determination of the Administrative Law Judge issued on September 11, 1987 with respect to his 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, 1980 through November 30, 1983 (File No. 801486). Petitioner appeared by Saperston & Day, P.C. (Brian N. Lewandowski, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

Both parties submitted briefs on exception. The petitioner requested oral argument and subsequently withdrew his request.

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

ISSUES

I. Whether the Division of Taxation's use of the markup method of audit as a basis for determining petitioner's taxable sales was proper and, if so, whether the additional taxable sales determined as a result thereof were correct.

II. Whether the Division of Taxation may raise objections to the Administrative Law Judge's determination without filing an exception.

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. These facts may be summarized as follows.

On June 24, 1984, following an audit, the Division of Taxation issued to petitioner, Joseph Caleri d/b/a Villa Capri Restaurant, two notices of determination and demand for payment of sales and use taxes due which together assessed \$50,570.83 in additional tax due plus fraud penalty and interest for the period March 1, 1980 through November 30, 1983.

The Division subsequently issued to petitioner two notices of assessment review relative to the aforementioned notices of determination and demand which withdrew the Division's assertion of fraud penalty and asserted a penalty against petitioner pursuant to section 1145(a)(1) with respect to the assessment.

At all times relevant herein, petitioner owned and operated the Villa Capri Restaurant ("the bar") located at 926 Main Street, Buffalo, New York. The Villa Capri was a "neighborhood" bar, open seven days per week.

On audit, petitioner made available his Federal tax returns, purchase invoices for certain months of the audit period, and summary sheets, prepared by petitioner's accountant, delineating the bar's purchases. Petitioner did not provide cash register tapes, sales journals or daybooks to the Division. Petitioner contended that the bulk of his records had been destroyed in a flood.

The Division of Taxation subsequently determined that petitioner's books and records were inadequate for the purpose of verifying taxable sales and therefore undertook a markup method of audit as follows:

(a) The Division computed petitioner's retail drink prices based upon price information provided by Mr. Arthur Goodrich, a bartender at the Villa Capri. During the audit period, petitioner charged day prices and night prices. Ten percent of petitioner's business occurred when the day prices were in effect, while ninety percent occurred when night prices were in effect. The Division

allowed for a special of three Old Vienna beer "splits" for \$1.00 offered by petitioner every Thursday. It was estimated that one-half of petitioner's "split" sales occurred during this special.

(b) The Division of Taxation then computed petitioner's beer and liquor markup based upon his retail selling prices as determined above and petitioner's invoices for the months of February, March and April 1983. The Division used invoices for these three months because, in the Division's judgment, the invoices were complete for that period. As stated previously, petitioner did not produce purchase invoices for much of the audit period. Using this data, the Division computed markups for beer and liquor which were applied to petitioner's purchases throughout the audit period.

(c) The Division of Taxation determined petitioner's total purchases for the audit period by means of summary sheets provided by petitioner's accountant. The accuracy of these summary sheets was verified by petitioner's suppliers. These sheets, however, did not provide a breakdown between beer and liquor purchases. The Division, therefore, determined the relative percentage of petitioner's beer and liquor purchases from information received from petitioner's suppliers. As a result, the Division found that 53.3 percent of petitioner's total beer and liquor purchases were for beer and 42.7 percent were for liquor. The Division then applied the respective beer and liquor markups to the total purchases of beer and liquor as determined above to determine total taxable sales during the audit period.

The Division incorporated a 15 percent allowance for spillage, pilferage and complimentary drinks in its calculations of petitioner's drink sales. Petitioner contended that this 15 percent allowance was insufficient because several cases of liquor had been stolen during the audit period.

At hearing, petitioner contended that the Division had failed to give proper consideration to various drink specials which he had offered throughout the audit period. Based upon the testimony given at hearing, petitioner established that he had offered a two-for-one special on all drinks sold every Tuesday and Friday evening during the audit period. Petitioner failed to prove that more drinks were sold during these specials than during an average evening. Consequently, it was determined that two-sevenths of petitioner's evening drink sales were sold on a two-for-one basis, that is, at half price, during the course of the entire audit period.

Petitioner failed to prove that he had offered other drink specials during the audit period.

OPINION

The Administrative Law Judge determined the petitioner's records were incomplete and inadequate for purposes of verifying taxable sales and due to this, the Division's use of a markup percentage audit was a proper basis for determining petitioner's sales pursuant to section 1138(a) of the Tax Law. The Administrative Law Judge modified the assessment by finding that the petitioner

offered drink specials only on Tuesdays and Fridays during the audit period. The Administrative Law Judge also abated the 1145(a)(1) penalty, finding that the petitioner established that his failure to pay was due to reasonable cause.

The petitioner has taken exception to certain of the Administrative Law Judge's findings of fact and conclusions of law. First, the petitioner asserts that he offered drink specials other than just those on Tuesdays and Fridays during the audit period and that more drinks were sold pursuant to specials than found by the Administrative Law Judge. The petitioner also excepted to the Administrative Law Judge's failure to find that the petitioner suffered losses due to theft by the bar manager during the period in issue. Finally, the petitioner has taken exception to the Administrative Law Judge's failure to reach the conclusion of law that the determination of tax by the Division was unreasonable and arbitrary.

First, petitioner challenges the Administrative Law Judge's determination of the number of drink specials offered and the percentage of drinks sold pursuant to such specials. Petitioner asserts that these factors should be given greater weight when determining the sales tax due. On these points, the petitioner had customers who patronized the bar with different frequency testify. After analyzing the testimony, it is evident that the witnesses' testimony is inconsistent both among themselves and with the petitioner's claims. Consequently, we see no reason to disturb the determination of the Administrative Law Judge with respect to the drink specials.

Next, the petitioner wants the 15% spillage rate used on audit adjusted to reflect thefts of inventory by his manager. Even if the petitioner established that inventory was stolen, the petitioner failed to demonstrate the quantity of inventory he lost through these thefts. Accordingly, the petitioner failed to establish that the 15% spillage rate should be adjusted.

Petitioner's last point is that the entire tax assessment should be set aside because the tax determined by the Division was unreasonable and arbitrary. Once the Division determines that additional tax is due, the burden is on the taxpayer to demonstrate by clear and convincing evidence that the assessment was erroneous. (In the Matter of Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858, 859 [1981].)

According to the petitioner, the audit was unreasonable because it did not make sufficient allowance for drink specials, theft and construction conditions outside the bar. As set forth above, the petitioner failed to prove that any adjustment should be made to the audit for such factors. The mere allegation of such factors does not demonstrate by clear and convincing evidence that the entire audit was arbitrary. Therefore, the Administrative Law Judge's conclusion sustaining the audit must be upheld.

The final issue in this case is raised by the Division of Taxation. The Division has sought to object to a portion of the Administrative Law Judge's determination, although the Division did not file an exception within the 30 day time period required by the Rules of Practice and Procedure (20 NYCRR 3000.11[a]), nor did the Division file a request for an extension to file an exception within such time period. Instead, 143 days after the Administrative Law Judge's determination was issued, the Division filed a brief with the Tax Appeals Tribunal replying to petitioner's brief and attempted to raise for the Tribunal's review an aspect of the Administrative Law Judge's determination not excepted to by the petitioner. The Division seeks to challenge the Administrative Law Judge's abatement of the penalty asserted pursuant to section 1145(a)(1) of the Tax Law. The Division has denoted this portion of its brief a "cross-exception".

The Rules of Practice and Procedure do not provide for a cross-exception or for any exception outside the 30 day time period, unless an extension of this period has been requested. Accordingly, we hold that by failing to file an exception within the 30 day period, or requesting an extension, the Division waived its right to require the Tribunal to review any portion of the Administrative Law Judge's determination. While we agree with the Division of Taxation that the Tribunal has the power to review any aspect of the Administrative Law Judge's determination (Tax Law section 2006.7; 20 NYCRR 3000.11[e]), we see no reason why the Tribunal should exercise this discretion in this instance.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the petitioner, Joseph Caleri d/b/a Villa Capri Restaurant, is in all respects denied;

2. The determination of the Administrative Law Judge is in all respects affirmed; and

3. The petition of Joseph Caleri d/b/a Villa Capri Restaurant is granted to the extent indicated in conclusion of law "F" of the determination of the Administrative Law Judge; the Division of Taxation is directed to accordingly modify the notices of determination and demand issued on June 24, 1984; and, except as so granted, the petition is in all other respects denied.

Dated: Albany, New York
August 11, 1988

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner