

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition

of

**GAETANO VENDRA
D/B/A PETE'S PIZZERIA**

DECISION
DTA NO. 802191

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, 1981 through August 31,
1984.

Petitioner, Gaetano Vendra d/b/a Pete's Pizzeria, 1758 Hylan Boulevard, Staten Island, New York 10305, filed an exception to the determination of the Administrative Law Judge issued on May 12, 1988 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 December 1, 1981 through August 31, 1984 (File No. 802191). Petitioner appeared by Jerome J. Feldman, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Angelo A. Scopellito, Esq., of counsel).

Petitioner did not file a brief on exception. The Division submitted a letter in support of its position. Oral argument, at petitioner's request, was heard on September 6, 1988.

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

ISSUE

Whether the Division of Taxation, utilizing an observation test, properly determined petitioner's additional sales tax due.

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 except that we modify finding of fact "6" as stated below.

Petitioner, Gaetano Vendra d/b/a Pete's Pizzeria, operated a pizza/fast food store at 1758 Hylan Boulevard in Staten Island, New York. The store made retail sales of various foods,

including pizza (whole and by the slice), calzone, sausage rolls, heroes, ices or ice cream and soft drinks.

On May 20, 1985, as a result of a field audit, the Division of Taxation issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner for the period December 1, 1981 through August 31, 1984 (the "audit period"), stating sales taxes due in the sum of \$25,513.95, penalty of \$5,845.25 and interest of \$7,771.23, for a total amount due of \$39,130.43.

Petitioner executed a consent extending the period of limitation for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law which provided that the Division could determine sales and use taxes due for the taxable period December 1, 1981 through May 31, 1982 at any time on or before September 20, 1985. Said consent was executed by Mr. Vendra on March 15, 1985 and received by the New York District Office, Sales Tax Section, on March 18, 1985.

The Division began its field audit of petitioner in or around October of 1984. The auditor assigned to the case sent an appointment letter, containing a request for the records of the business for the audit period, and a power of attorney form to petitioner's accountant on October 19, 1984. On or about November 28, 1984, the accountant for petitioner left what records there were at the auditor's office. These records included petitioner's Federal tax returns, sales tax returns and some cash disbursements records. However, journals, ledgers, sales invoices, purchase invoices and cash register tapes were not produced. Upon examination of the Federal returns filed for the years 1982 and 1983 and the New York State sales tax returns filed for the same period, it was noted that there was a discrepancy of \$40,575.00 between the amount of gross sales declared on the Federal income tax returns and the gross sales per sales tax returns, with the Federal returns indicating a much higher gross sales figure. In order to better determine petitioner's sales tax liability, the auditor asked permission to perform an observation of the premises on February 14, 1985. Permission for such an observation was granted by petitioner and two auditors recorded all sales made by petitioner at his store between 12:00 P.M. and 10:00 P.M.

Total sales of pizza (whole and by the slice), calzone, sausage rolls, heroes, dinners, ices or

ice cream and soft drinks totalled \$412.80. This figure was used for the five days between Sunday and Thursday and marked up 50 percent for Fridays and Saturdays based upon the auditor's experience of heavier traffic at similar restaurants during weekend periods. Therefore, Fridays and Saturdays were estimated to have \$619.20 in sales. These prices included sales tax charged. Based upon these figures, the weekly sales figure was \$3,302.40. When calculated on a quarterly basis, this figure was multiplied by 13, representing 13 weeks in the quarter, or \$42,931.20. For the entire 11 quarters of the audit period, sales including sales tax totalled \$472,243.20. This figure was divided by 1.0825 to subtract sales tax included in this figure, arriving at \$436,252.37 in taxable sales for the audit period. Petitioner reported \$126,992.00 in taxable sales on its sales tax returns filed during the audit period, leaving additional audited taxable sales of \$309,260.00 which indicated an error rate of 243.5272 percent. This error rate was applied to taxable sales reported for each of the quarters in the audit period, yielding additional tax due of \$25,513.95. Penalty was recommended because of the large discrepancy between the audit findings and the tax reported on the sales tax returns during the audit period.

We modify finding of fact "6" to read as follows:

The store operated by petitioner was open at least from noon until 10:00 P.M. seven days per week. Because petitioner presented inadequate records, it is unclear as to how many Sundays out of a 52 week year petitioner opened the pizzeria for business. Petitioner did submit a sworn affidavit on June 12, 1987 attesting to the assertion that he was open no more than seven Sundays a year during the period of December 1, 1981 through August 31, 1984. However, during the audit period there were no records provided to the auditors which served either to support or to refute petitioner's assertion.

During the audit period, Fred Vasaturo & Son, Inc., a food distributor, sold flour and other products to petitioner. Further, said distributor stated, in the form of an affidavit, that it sold four to five 50-pound bags of flour to petitioner each week and submitted six invoices, each indicating the sale of five bags per week during six months of the audit period.

OPINION

The Administrative Law Judge determined that because petitioner did not have at the time of

the audit a general ledger, purchase invoices, sales journals, sales invoices, purchase journals or cash register tapes, and that in addition, because petitioner provided no evidence to refute the findings of the Division of Taxation and thus did not sustain his burden of proof, petitioner was liable for both the deficiency levied by the Division and the penalty so imposed.

On exception petitioner asserts that although adequate records were not provided, it was unreasonable for the Division to use an observation test in lieu of other accepted audit techniques utilized by the Division. Petitioner argued that a more reasonable and accurate method would have been to estimate his sales tax liability from the number of pizzas made from the flour purchased. A markup audit would have required the auditor to rely on the figures provided by the distributor as to the amount of flour sold each week to petitioner's pizzeria. Petitioner also claims that February 14, 1985 was an unreasonable day to use for the observation test, in that Valentine's Day is invariably busy and not representative of an average business day. Petitioner has not excepted to the imposition of the penalty.

We affirm the determination of the Administrative Law Judge.

We will first address petitioner's assertion that it was unreasonable for the Division to utilize the observation method in determining his sales tax liability. As the Administrative Law Judge properly noted, when a taxpayer fails to keep records of sales required by Tax Law section 1135, the Division may resort to external indices in accordance with Tax Law section 1138(a) in order to verify the accuracy of the reported taxable sales (Matter of Licata v. Chu, 64 NY2d 873). We also affirm the Administrative Law Judge's conclusion that where it is petitioner's own failure to maintain proper records, accuracy of the method used in determining the amount of sales tax liability is not required (Markowitz v. State Tax Commn., 54 AD2d 1023, affd 44 NY2d 684).

Petitioner does not dispute the Division's right to use external indices for this purpose. Instead, petitioner maintains that the particular method chosen by the Division was unreasonable and that the implementation of an alternative method, the markup technique, would have resulted in a more accurate assessment. While the observation method is not a precise procedure for

estimating sales tax liability, the markup technique requires the existence of adequate purchase invoices. It is clear that petitioner's records were so inadequate, in that he had no purchase invoices, that the Division's use of the observation method in this particular circumstance was entirely proper (Matter of Meskouris Brothers, Inc. v. Chu, 139 AD2d 813; Matter of Vebol Edibles, Inc. d/b/a Hickory House, Tax Appeals Tribunal, January 12, 1989).

In addition, the record indicates that the auditor received permission from petitioner to perform an observation test, and to conduct that observation on February 14, 1985. The petitioner, therefore, is hard pressed to claim that either the method invoked by the Division or the day chosen was unreasonable.

Petitioner bears the burden of proving that the Division was erroneous in assessing the amount of the tax deficiency (Matter of Surface Line Operators Fraternal Organization v. Tully, 85 AD2d 358, 359). In attempting to bear this burden, petitioner relied on an affidavit sworn to by Fred Vasaturo, a food distributor who claims to have supplied four to five 50-pound bags of flour to petitioner each week during the six months of the audit period. Petitioner claimed that the Division should have used this figure as the basis for a markup test, and that ignoring the relevancy of the affidavit was proof of erroneous decision making on the part of the auditors.

We cannot agree with such a rationale. As discussed above, due to petitioner's inadequate records, use of a markup test was virtually impossible. Petitioner's lack of adequate records also makes it impossible to establish that Fred Vasaturo was the only distributor to sell flour to petitioner's business. Fred Vasaturo could have been one of many such distributors. Therefore, petitioner failed to meet the burden of proving that the amount of the assessment was erroneous.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Gaetano Vendra d/b/a Pete's Pizzeria is denied;
2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of Gaetano Vendra d/b/a Pete's Pizzeria is denied and the Notice of Determination dated May 20, 1985 is sustained.

Dated: Albany, New York
February 9, 1989

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

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