

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
WEST GRENVILLE LIQUORS, INC.	:	DECISION
	:	DTA No. 812376
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, 1989 through November 30, 1991.	:	

Petitioner West Grenville Liquors, Inc., Attn: Frank Velleca, President, 43 Buckingham Lane, Bohemia, New York 11716, filed an exception to the determination of the Administrative Law Judge issued on October 12, 1995. Petitioner appeared pro se by its president, Frank Velleca. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Kathleen D. Church, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation filed a letter in lieu of a brief in opposition. Any reply brief by petitioner was due by December 28, 1995, which date began the six-month period for the issuance of this decision. Oral argument was not requested.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether certain notices of determination issued following an audit should be sustained.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

On June 15, 1992 and October 27, 1992, respectively, following an audit, the Division of Taxation ("Division") issued to petitioner, West Grenville Liquors, Inc., two notices of determination which assessed additional sales and use taxes due for the following periods and in the following amounts:

<u>Date</u>	<u>Assessment No.</u>	<u>Period</u>	<u>Tax Amount Assessed</u>
6/25/92	L-005781082	3/1/89 - 5/31/89	\$ 6,187.52
10/27/92	L-006625645	6/1/89 - 11/30/91	<u>38,240.59</u>

Total Tax Assessed \$44,428.11

Each of the respective notices also assessed penalty and interest.

Pursuant to a Bureau of Conciliation and Mediation Services Conciliation Order dated July 2, 1993, the assessments herein were revised as follows:

<u>Assessment No.</u>	<u>Revised Tax Amount Assessed</u>
L-005781082	\$ 5,848.33
L-006625645	<u>29,965.56</u>

Total Tax Assessed as Revised \$35,813.89

The Conciliation Order sustained the imposition of penalty and interest with respect to each assessment.

Petitioner operated a retail liquor store. At the commencement of the audit, the Division transmitted to petitioner standard appointment letters requesting that petitioner make its business records available for review and also making an appointment for such review.

During the course of the audit, the Division's auditor met with Mr. Frank Velleca, petitioner's president, and reviewed sales tax returns, Federal and State income tax returns, cash receipts journal, general ledger, cancelled checks and monthly bank statements. Petitioner did not maintain cash register tapes or sales invoices. Petitioner also did not have purchase invoices available.

The Division's review of petitioner's bank statements revealed many overdrawn checks. The Division also determined on audit that petitioner paid its rent in cash and made cash purchases of liquor. The Division concluded, therefore, that all sales receipts were not deposited and that petitioner's bank deposits thus did not accurately reflect its sales.

The Division's field audit report indicates that petitioner's cash receipts journal "did not add correctly" and that, therefore, a comparison of sales per Federal returns to sales per books could not be done.

The Division also concluded that petitioner's purchases of liquor indicated by its general ledger could not be compared to cleared checks made out to suppliers because petitioner also had cash purchases of liquor.

In light of the inadequacies in petitioner's records as noted above, the Division elected to determine petitioner's taxable sales during the audit period by using petitioner's suppliers' records. Such records indicated purchases of \$714,438.51 during the audit period. After an adjustment of 2% for loss or theft (except for the quarter ended May 31, 1989), the purchases per suppliers were marked up by 20% resulting in audited taxable sales for the audit period of \$842,217.69. This audited taxable sales figure was the basis for the total additional tax assessed herein of \$44,428.11.

The audit report indicates that a 20% markup was selected because petitioner's store was part of the "Store Wine Factory Outlet". No further elaboration was provided.

Petitioner submitted no evidence in support of its position herein. In its petition, petitioner noted its intention to prove that the suppliers' sales information was wrong; that its markup was much lower than 20%; that it had unaccounted for theft and loss; and that it had nontaxable sales.

OPINION

The Administrative Law Judge, citing Matter of Hammerman (Tax Appeals Tribunal, August 17, 1995), found that a presumption of correctness attaches to a notice of determination upon its issuance and that the burden was on petitioner to overcome this presumption (Allied New York Services v. Tully, 83 AD2d 727, 442 NYS2d 624). The Administrative Law Judge found that petitioner did not overcome this presumption since no evidence was submitted in support of its petition and, therefore, the assessments must be sustained (Matter of Tavalacci v. State Tax Commn., 77 AD2d 759, 431 NYS2d 174, 175).

On exception, petitioner continues to argue that the amount of purchases, \$714,438.51, determined by using the supplier's records, was not validated; the store did not work on a 20% markup; there were no figures for theft or loss adjustment; and there were no allowances for nontaxable exempt sales. In addition, Mr. Velleca asserts that due to his wife's illness he was unable to submit documentary evidence by the due date. Mr. Velleca also argues that "[t]he default of Frank Velleca and West Grenville Liquors should be vacated as Frank Velleca has presented reasonable excuse of default" (Exception, p. 2).

In response, the Division requests that the Administrative Law Judge's determination be affirmed. With respect to petitioner's failure to submit documents to the Administrative Law Judge by the due date, the Division argues that "nothing in [its] file reveals that Mr. Velleca requested an extension of time to file petitioner's documents" (Division's letter, p. 2).

With respect to Mr. Velleca's argument that the default should be vacated, we find nothing in the file to indicate a default. Petitioner and the Division agreed to have the matter determined on submission without a hearing. Petitioner's remaining arguments are the same arguments made before the Administrative Law Judge. Because the Administrative Law Judge adequately addressed these arguments, we affirm the determination of the Administrative Law Judge for the reasons stated in said determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of West Grenville Liquors, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of West Grenville Liquors, Inc. is denied; and

4. The notices of determination dated June 15, 1992 and October 27, 1992, as modified by the Conciliation Order dated July 2, 1993, are sustained.

DATED: Troy, New York
May 9, 1996

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

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

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner