

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
THOMAS CHAIPIS	:	DETERMINATION
D/B/A MAGOO'S CAFE	:	
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, 1979	:	
through November 30, 1982.	:	
	:	

Petitioner, Thomas Chaipis d/b/a Magoo's Cafe, 21 Sixth Avenue, New York, New York 10013, 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 December 1, 1979 through November 30, 1982 (DTA No. 800913).

A hearing was commenced before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 21, 1986 at 9:15 A.M., was continued before the same Hearing Officer at the same location on February 24, 1987 at 9:15 A.M., and was continued to conclusion before the same Hearing Officer at the same location on July 21, 1987 at 1:15 P.M., with all briefs to be submitted by October 15, 1987. Petitioner appeared by Marvin Lieberman & Co. (Marvin Lieberman, CPA). The Audit Division appeared by John P. Dugan, Esq. (Michael Gitter, Esq., of counsel).

ISSUE

Whether the results of an Audit Division field audit of petitioner's business operations properly resulted in the assessment of additional sales and use taxes against petitioner.

FINDINGS OF FACT

1. Petitioner, Thomas Chaipis, operates as a sole proprietorship known as Magoo's Cafe, a bar and restaurant located at 21 Sixth Avenue in New York City. Petitioner's business is open from 11:00 A.M. to 3:30 A.M., seven days per week.

2. In or about October of 1982, the Audit Division commenced an audit of petitioner's business operations. By a letter dated October 5, 1982, the Audit Division had advised petitioner of an audit appointment date of October 25, 1982, and also advised petitioner of the various records petitioner would be required to make available for field examination.

3. On October 25, 1982, a visit to petitioner's premises was made by the auditor. The auditor was not allowed into the bar/restaurant area. However, petitioner's manager did provide the auditor with a menu. Of the records requested for audit, petitioner had available sales tax returns and related worksheets, Federal income tax returns, a cash receipts journal and a cash disbursements journal. Neither cash register tapes nor guest checks were available for the audit period. There were no purchase invoices for food nor any general ledger available. However, some purchase invoices were available reflecting beer, wine and liquor purchases.

4. Based on the lack of source documents, including guest checks and cash register tapes, the auditor determined that petitioner's records were inadequate for purposes of conducting an audit and determined to use indirect audit methodologies as a means of testing the accuracy of petitioner's returns as filed. The auditor requested that petitioner keep cash register tapes on the dates of March 4, March 8 and March 9, 1984. In addition, the auditor chose January of 1983 as a test period for liquor, wine and beer sales. The auditor, utilizing purchase invoices from January 1983 for wine, liquor and beer, and the prices of such items as sold by petitioner at the bar and at the tables, determined markups as follows:

	Markup At <u>Table</u>	Markup At <u>Bar</u>
Beer	239%	213.56%
Wine	361%	327.9 %
Liquor	361%	327.9 %

The above-determined markup percentages were applied against liquor and wine purchases of \$125,095.28, resulting in audited taxable sales of \$556,173.61, and against beer purchases of \$63,649.01, resulting in audited taxable sales of \$207,728.12.

5. As noted, no invoices were available with respect to purchases of food. The auditor

reviewed a publication known as "National Trend of Business in the Restaurant Industry", in which food markups for the Northeast region were noted at a low of 144 percent and a high of 170 percent. After considering these markups, as well as prior audit experience, the auditor applied a markup of 125 percent to petitioner's food purchases of \$322,267.49 (per petitioner's books), and arrived at audited taxable sales of food in the amount of \$725,101.85.

6. Audited taxable sales resulting from the above markup methodology totalled \$1,489,003.58 which, when compared to petitioner's reported taxable sales of \$874,303.00, resulted in a difference of \$614,700.58. Such amount was deemed unreported taxable sales, and tax due was calculated thereon at \$49,740.62. Petitioner's recurring purchase expenses were also tested, specifically for protection and for repair and maintenance items for the months of January, April and June of 1981, and a use tax of \$571.91 was found to be due. Accordingly, the total of sales tax and use tax determined initially upon audit was \$50,312.53, and a Statement of Proposed Audit Findings was issued to petitioner for such amount on June 27, 1983.

7. Subsequent to the audit, petitioner's representative and the auditor met, at which time petitioner requested and the Audit Division agreed to do an additional observation of petitioner's business operation. Petitioner indicated that guest checks and invoices, pertaining to sales and to food purchases, respectively, were and would be made available by petitioner. As part of its second observation of petitioner's business, conducted on October 4, 1983, the Audit Division observed and agreed to petitioner's assertion that petitioner utilized one and one-quarter ounces of liquor in preparing drinks as opposed to the one ounce per drink figure the Audit Division had initially utilized. Accordingly, the Audit Division revised the proposed assessment of additional sales taxes based on liquor sales, and reduced the amount of tax determined to be due from \$50,312.53 to \$41,895.47. No additional records were made available including, specifically, guest checks or food purchase invoices.

8. On November 30, 1983, the Audit Division issued to petitioner Thomas Chaipis d/b/a Magoo's Cafe a Notice of Determination and Demand for Payment of Sales and Use Taxes Due assessing additional sales and use taxes due for the period December 1, 1979 through

November 30, 1982 in the amount of \$41,895.47, plus interest. This assessment was issued upon the basis of the above-described field audit results.

9. Petitioner's business is located in a mixed commercial and residential area, and the clientele patronizing the business was described as "not a wealthy clientele". No additional records, including guest checks or cash register tapes, were produced either before or in the course of the hearing in support of petitioner's claim that there were no such additional taxable sales as determined upon audit.

CONCLUSIONS OF LAW

A. That Tax Law § 1138(a) provides that where a return required to be filed is incorrect or insufficient, the Audit Division may determine the amount of tax due from such evidence as may be available including, where necessary, external indices. It is well settled that where a taxpayer does not maintain and make available such records as will allow verification of the accuracy of returns filed and tax due, the Audit Division may resort to indirect audit methodologies in carrying out its audit function.

B. That petitioner did not maintain such records, including source documents, as would enable the Audit Division to establish an audit trail and thereby verify the accuracy of petitioner's returns as filed. Accordingly, the Audit Division was properly entitled to resort to indirect audit methodologies in determining the amount of tax due. The methods used by the Audit Division in this case, given the records available for audit, were reasonable and the amount of tax determined to be due as the result of applying such methods was proper.

C. That petitioner, in turn, has not provided such evidence as would refute or show error in the Audit Division's determination and assessment. Accordingly, the assessment, as issued, is sustained.

D. That the petition of Thomas Chaipis d/b/a Magoos Cafe is hereby denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated November 30, 1983 is sustained.

DATED: Albany, New York
October 22, 1987

ADMINISTRATIVE LAW JUDGE