

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOSEPH CALERI	:	DETERMINATION
D/B/A VILLA CAPRI RESTAURANT	:	
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 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 March 1, 1980 through November 30, 1983 (File No. 55757).

A hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on March 11, 1987 at 2:45 P.M., with all briefs to be submitted by July 3, 1987. Petitioner appeared by Saperston & Day, P.C. (Brian N. Lewandowski, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUE

Whether the Audit Division'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.

FINDINGS OF FACT

1. On June 29, 1984, following an audit, the Audit Division issued to petitioner, Joseph Caleri d/b/a Villa Capri Restaurant, two notices of determination and demands 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.

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

3. At hearing, the Audit Division withdrew its assertion of tax and penalty with respect to the periods ended May 31, 1980 and August 31, 1980, conceding that the notice was untimely with respect to these two periods. Consequently, the adjusted amount of tax asserted herein is \$38,864.33 plus penalty and interest.

4. 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 and is a "neighborhood" bar, open seven days per week.

5. 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 Audit Division. Petitioner contended that the bulk of his records had been destroyed in a flood.

6. The Audit Division 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 Audit 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 Audit 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 Audit Division then computed petitioner's beer and liquor markup based upon

his retail selling prices as determined above and petitioner's purchase invoices for the months of February, March and April 1983. The Audit Division used invoices for these three months because, in the Audit 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 Audit Division computed markups for beer and liquor which were applied to petitioner's purchases throughout the audit period.

(c) The Audit Division 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 Audit Division, therefore, determined the relative percentage of petitioner's beer and liquor purchases from information received from petitioner's suppliers. As a result, the Audit 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 Audit 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.

(d) The Audit Division determined petitioner's purchases of snacks from the summary sheets prepared by the accountant. Audited snack sales were then determined by marking up these purchases 100 percent. This markup figure was derived from audit experience.

7. The Audit 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.

8. At hearing, petitioner contended that the Audit 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 establish that more drinks were sold during these specials than during an average

evening. Consequently, it is 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.

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

10. Although petitioner was the sole proprietor of the bar during the period at issue, he was personally unable to devote any significant time to its operations. During this period petitioner was experiencing health problems, one of which was impaired vision. Consequently, petitioner hired a manager for the bar, Dennis Kulczyk, who was responsible for its day-to-day operation up to the time of his termination in May of 1982. Among Mr. Kulczyk's responsibilities was the preparation of sales tax returns for the bar. Although petitioner executed the returns, he relied upon Mr. Kulczyk for their preparation. Subsequent to Mr. Kulczyk's departure, petitioner's wife and his accountant prepared the bar's sales tax returns.

CONCLUSIONS OF LAW

A. That Tax Law § 1138(a) provides that "if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available" and authorizes, where necessary, an estimate of tax due "on the basis of external indices".

B. That Tax Law § 1135(a) provides that every person required to collect tax shall keep records of every sale and all amounts paid, charged or due thereon. Such records shall include a true copy of each sales slip, invoice, receipt or statement. Under the circumstances presented herein (Finding of Fact "5"), the records provided by petitioner were incomplete and inadequate for purposes of verifying taxable sales. Accordingly, the Audit Division's use of a markup percentage audit was a proper basis for determining petitioner's sales pursuant to the provisions of Tax Law § 1138(a) (Matter of Licata v. Chu, 64 NY2d 873; Matter of Murray's Wines and Liquors, Inc. v. Stae Tax Commission, 78 AD2d 947).

C. That the Audit Division's calculations of the markup on beer and liquor did not give

consideration to petitioner's two-for-one drink promotions on Tuesdays and Fridays during the audit period. In accordance with Finding of Fact "8", it is determined that two-sevenths of petitioner's evening sales were sold during these promotions. Accordingly, the Audit Division is directed to adjust its beer and liquor markup calculations to allow for two-sevenths of the drinks sold during the audit period having been sold at half price during these promotions.

D. That petitioner had the burden of proving that the amount of tax assessed was erroneous (Matter of Sol Wahba, Inc. v. State Tax Commission, 127 AD2d 877). Except for the allowances set forth in Conclusion of Law "C", petitioner has failed to sustain his burden.

E. That grounds for reasonable cause for cancellation of penalties imposed under Tax Law § 1145 include, inter alia, "serious illness of the taxpayer" (20 NYCRR 536.5[b][1]). In light of Finding of Fact "10", petitioner has established that he was seriously ill during the audit period and that this illness resulted in his inability to run his business on a day-to-day basis, and to rely upon other individuals to maintain business records and to prepare petitioner's sales tax returns. Accordingly, penalties asserted against petitioner herein pursuant to Tax Law § 1145(a)(1) are cancelled.

F. That the petition of Joseph Caleri d/b/a Villa Capri Restaurant is granted to the extent indicated in Conclusions of Law "C" and "E" and Findings of Fact "2" and "3"; the Audit Division is directed to recompute and adjust the notices of determination and demands for payment of sales and use taxes due in accordance therewith; and, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York
November 16, 1987

ADMINISTRATIVE LAW JUDGE