

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
GAETANO VENDRA : DETERMINATION
D/B/A PETE'S PIZZERIA :
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 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, 1981 through August 31, 1984 (File No. 802191).

A hearing was commenced before Joseph W. Pinto, Jr., Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 12, 1987 at 10:30 A.M. and concluded before the same Hearing Officer at the same offices on July 29, 1987 at 9:15 A.M. Petitioner appeared by Jerome J. Feldman, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUE

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

FINDINGS OF FACT

1. 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.

2. On May 20, 1985, as a result of a field audit, the Audit Division 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.

3. 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 Audit 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.

4. The Audit 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.

5. 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.

6. The store operated by petitioner was open at least from noon until 10:00 P.M. seven days per week.

7. 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.

SUMMARY OF PETITIONER'S POSITION

8. Petitioner claims that the Audit Division should have used the distributor's figures and calculated the number of pizzas made from the flour purchased to better estimate petitioner's sales tax liability. Petitioner also contends that the observation test and numbers derived therefrom by the Audit Division were arbitrary.

CONCLUSIONS OF LAW

A. In the instant situation, petitioner's failure to maintain records of sales, as required by Tax Law § 1135, made it virtually impossible for the Audit Division to verify the accuracy of its reported taxable sales. Under the circumstances, the Audit Division's resort to external indices to estimate the sales tax due was proper in accordance with Tax Law § 1138(a), and the audit methodology was reasonable under the circumstances, since petitioner's records were unreliable and incomplete (Matter of Urban Liquors, Inc. v. State Tax Commn., 90 AD2d 576).

B. Further, exactness in determining the amount of sales tax liability is not required where it is petitioner's own failure to maintain proper records which necessitates the use of external indices (Markowitz v. State Tax Commn., 54 AD2d 1023, affd 44 NY2d 684).

C. Petitioner did not have available cash register tapes, sales journals, purchase journals, sales invoices, purchase invoices or a general ledger from which the Audit Division could verify amounts entered on petitioner's sales tax returns. Accordingly, the Audit Division's use of an observation test to determine petitioner's tax liability was proper (Matter of 265 City Island Seafood Market, Inc., State Tax Commission, May 6, 1983; Matter of Annex Outlet, Ltd., State Tax Commission, August 14, 1987). Moreover, petitioner produced no evidence, either in the form of testimony or documentation, to

refute the audit findings and, therefore, he has not met his burden of proving wherein the audit was erroneous.

D. Tax Law § 1145(a)(1), in effect during the period in issue, states, in pertinent part, as follows:

"Any person failing to file a return or pay over any tax to the tax commission within the time required by this article shall be subject to a penalty of five percent of the amount of tax due if such failure is for not more than one month, with an additional one percent for each additional month or fraction thereof during which such failure continues, not exceeding twenty-five percent in the aggregate...."

Petitioner herein is subject to penalty for failing to pay over the tax determined to be due in accordance with the audit performed by the Audit Division.

E. The petition of Gaetano Vendra d/b/a Pete's Pizzeria is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated May 20, 1985 is sustained, together with applicable penalty and interest.

DATED: Albany, New York
May 12, 1988

_____/s/_____
ADMINISTRATIVE LAW JUDGE