

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
VINCENT BASILEO : DETERMINATION
D/B/A MIMMO'S RESTAURANT & 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 June 1, 1983 :
through August 31, 1986. :

Petitioner, Vincent Basileo d/b/a Mimmo's Restaurant and Pizzeria, 75 Maple Street, Farmingdale, New York 11735, 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 June 1, 1983 through August 31, 1986 (File No. 805855).

A hearing was held before Nigel G. Wright, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on January 24, 1990. Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether the sales tax liability of a restaurant, which concededly had poor books and records, can be determined from reports of the sales of other restaurants which are not identified to the taxpayer and therefore are not subject to cross examination.

FINDINGS OF FACT

1.(a) Petitioner, Vincent Basileo d/b/a Mimmo's Restaurant & Pizzeria, operated a pizzeria and restaurant at 118 West Main Street, Bayshore, Suffolk County. The business began in 1980 as a pizza place which also sold hero sandwiches and soda. Petitioner obtained a liquor license in 1984 or 1985 when he attempted to expand his offerings so as to become more of a restaurant. The establishment seated 25 people. Petitioner's wife was the chef.

(b) While the restaurant was on a main street, it had no parking and was on the wrong side of the street to get business from travelers heading towards the Fire Island ferry. It was one-half mile from the ferry and two newer restaurants had opened very near the ferry, thus limiting petitioner's business which eventually declined. Petitioner fell behind in his utility bills and his purchases were "collect on delivery". The restaurant went out of business in the fall of 1986 when petitioner sold the building. The building does not now include a restaurant.

2.(a) The auditor requested that petitioner furnish guest checks and purchase invoices for June 1, 1983 to August 31, 1986. He also requested heating, utility and telephone bills for the same period.

(b) In response the accountant, Pat Petro, C.P.A., of New Hyde Park, stated that petitioner did not keep guest checks since "all his sales are taxable, the guest checks are not important." He furnished figures for purchases for the audit period. These totalled \$26,937.50 for food, \$3,432.14 for wine, \$1,584.02 for soda and \$2,085.87 for beer. Mr. Petro advised petitioner to obtain the heating, utility and telephone bills from the companies involved. Petitioner submitted at the hearing gas and electric bills of \$323.03 for November 1985, and \$359.05 and \$131.28 for December 1985.

(c) Petitioner claims to have been robbed four times causing the loss or destruction of his business records. These thefts, however, do not appear to have been reported to the police.

3. The auditor did not testify at the hearing.

4.(a) The audit workpapers show that the sales tax returns reported gross sales of \$97,259.10. Taxable sales were the same.

(b) Sales shown on petitioner's books were \$108,990.72 or about 12% higher than reported on the returns, and for 1984 and 1985 were within one-half of one percent of the sales reported on the Federal income tax returns.

(c) The auditor did not examine petitioner's bank deposits.

5.(a) Petitioner had some purchase invoices but in the opinion of the auditor not enough to do a complete audit for the entire audit period and so they were not used.

(b) The purchases per petitioner's books for 1984 and 1985 were reconciled with the purchases on the Federal income tax returns by amounts deemed to be used for personal consumption.

6.(a) The auditor did not visit petitioner's premises while it was open for business. He did, in February 1987, look in the window but made no attempt to enter and inspect the premises. He saw posted in the window certain favorable restaurant reviews which petitioner admitted he had solicited.

(b) The auditor arrived at a figure for the total audited sales of petitioner by obtaining figures for two other restaurants each deemed to be comparable to petitioner's restaurant, one with audited sales of \$395,709.88 and another with audited sales of \$645,791.00 and averaging them. The result, less sales reported by petitioner, was \$423,491.34. This was 435% more than petitioner had reported on his returns.

(c) The identity of the two restaurants from which the determination in this case was derived has not been disclosed to the taxpayer. The details behind the computation of the sales of such restaurants is not in the record.

7.(a) A Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period June 1, 1983 through August 31, 1986 was issued on May 6, 1987 to petitioner for tax due of \$31,432.25, penalty under Tax Law § 1145(a)(1)(i) of \$7,563.58 and interest of \$9,077.16 for a total amount due of \$48,072.99.

(b) Another notice was issued the same day for the period June 1, 1985 through August 31, 1986 for penalties under Tax Law § 1145(a)(1)(vi) for omission of 25% of taxes required to be shown on the tax return and amounted to \$1,358.59.

(c) A consent extending the period of limitation to September 20, 1987 for the period June 1, 1983 through May 31, 1984 was executed by petitioner on August 29, 1986.

CONCLUSIONS OF LAW

A. The calculation of tax due in this case is arbitrary and unreasonable. The amount of tax asserted to be due is calculated as an average of the audited sales of two other restaurants

(\$395,709.88 and \$645,791.00). The identity of those restaurants were not disclosed to either the petitioner or the Administrative Law Judge. Even the details behind the figures were not disclosed. Any cross-examination in this matter was necessarily frustrated. In this State the law is very clear that in an administrative hearing "[a] party shall have the right of cross-examination" (State Administrative Procedure Act § 306 [3]). Evidence which is not subject to cross-examination may be admissible but only if the citizen has the power to subpoena the underlying data in question (Matter of Gray v. Adduci, 73 NY2d 741; Matter of Kucherov v. Chu, 147 AD2d 877). In this case it is clear that the underlying data, the identity and records of the other restaurants, are kept secret under the provisions of Tax Law 1146(a). Since the petitioner herein does not even know the identity of the other restaurants, he can not effectively cross examine concerning the sales of those restaurants. Any determination or redetermination of tax based on such evidence violates petitioner's rights. The evidence of sales from other restaurants therefore cannot be considered part of the record. This being so, the calculation of tax due has no basis in the record and is arbitrary and must be cancelled (Matter of King Crab Restaurant, Inc. v. Chu, 134 AD2d 51; Matter of Fortunato, Tax Appeals Tribunal, February 22, 1990).

B. The petition of Vincent Basileo d/b/a Mimmo's Restaurant & Pizzeria is granted and the notices of determination issued May 6, 1987 are cancelled.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE