

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
WEST GRENVILLE LIQUORS, INC. :
DETERMINATION :
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 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, 1989 through November 30, 1991.

On February 11, 1995 and February 22, 1995, respectively, petitioner, appearing by Frank Velleca, President, and the Division of Taxation, appearing by William F. Collins, Esq. (Kathleen D. Church, Esq., of counsel), consented to have the controversy determined on submission without hearing. On March 10, 1995, the Division of Taxation submitted documentary evidence. The due date for petitioner's submission of documentary evidence and brief was May 8, 1995. Petitioner submitted neither documentary evidence nor a brief. By letter received June 1, 1995, the Division of Taxation advised that it would not file a brief in this matter. Therefore, June 1, 1995 commenced the six-month period for the issuance of this determination. After due consideration of the record,

Timothy J. Alston, Administrative Law Judge, renders the following determination.

ISSUE

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

FINDINGS OF FACT

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>	Assessment <u>No.</u>	<u>Period</u>
	Tax Amount <u>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:

Assessment <u>No.</u>	Revised Tax Amount <u>Asses</u>
<u>sed</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.

CONCLUSIONS OF LAW

A. Under Tax Law § 1138(a)(1), where a sales tax return is not filed or if filed is incorrect or insufficient, the Division is authorized to determine the amount of tax due from such information as may be available. A presumption of correctness attaches to a notice of determination upon its issuance (see, Matter of Hammerman, Tax Appeals Tribunal, August 17, 1995). The burden of proof to overcome a sales tax assessment thus

rests with the taxpayer (see, Allied New York Services v. Tully, 83 AD2d 727, 442 NYS2d 624).

B. In the instant matter, petitioner did not submit any evidence in support of its petition. Accordingly, petitioner has "surrendered to the statutory presumption of correctness" and the subject assessments, as revised, must be sustained (see, Matter of Tavolacci v. State Tax Commn., 77 AD2d 759, 431 NYS2d 174, 175). For the record, it is noted that the audit herein is facially sound (see, Matter of Sol Wahba, Inc. v. State Tax Commn., 127 AD2d 943, 512 NYS2d 542).

C. The petition of West Grenville Liquors, Inc. is denied and 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
October 12, 1995

/s/ Timothy J. Alston

ADMINISTRATIVE LAW JUDGE