

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

**HUNTINGTON HILLS WINE & SPIRITS
CORPORATION** :

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 September 1, 2000 through November 30, 2003.

: DETERMINATION
DTA NOS. 820995 AND
821049

In the Matter of the Petition :

of :

CHRISTIAN PIMPINELLA :

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, 2001 through November 30, 2003.

Petitioner Huntington Hills Wine & Spirits Corporation 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 September 1, 2000 through November 30, 2003.

Petitioner Christian Pimpinella 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, 2001 through November 30, 2003.

On January 12, 2007 and January 30, 2007, respectively, petitioners, by their representative, Cathy Pimpinella, and the Division of Taxation by Daniel Smirlock, Esq.

(Michael B. Infantino, Esq., of counsel) consented to have this controversy determined upon a stipulation of facts and the submission of documents without hearing. All briefs were to be submitted by July 6, 2007, which date began the six-month period for the issuance of this determination. After due consideration of the entire record, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly determined upon audit that petitioners, Huntington Hills Wine & Spirits Corporation and Christian Pimpinella, as a responsible person, owed additional sales tax.

FINDINGS OF FACT

1. Petitioner Huntington Hills Wine & Spirits Corporation owned and operated a retail liquor store located at 5 Semen Road, Huntington, New York 11743. Petitioner Christian Pimpinella was president and owned 100% of the shares of the corporation.
2. On August 18, 2003, the Division of Taxation (Division) sent a letter to the Huntington Hills Wine & Spirits Corporation scheduling an appointment for September 3, 2003 on which to commence a sales and use tax field audit of the business operation for the period September 1, 2000 through May 31, 2003. The Division's letter requested that all of the business's books and records for the audit period be available for review. Among the records specifically requested were the general ledger, cash receipts journal, cash disbursements journal, federal income tax returns, purchase invoices, sales invoices, guest checks, cash register tapes, bank statements, financial statements and day books.
3. On September 15, 2003, the corporation, by petitioner Christian Pimpinella as president, executed a Consent Extending Period of Limitations for Assessment of Sales and Use

Taxes under Articles 28 and 29 of the Tax Law extending the period in which to assess sales and use taxes due for the period September 1, 2000 through May 31, 2001 to June 20, 2004.

4. On February 10, 2004, the Division sent a letter to Huntington Hills Wine & Spirits Corporation amending the audit period to cover the period September 1, 2000 through November 30, 2003. The Division's letter requested that all the books and records of the business relating to the audit period be made available for review. Among the records specifically requested were the general ledger, cash receipts journal, cash disbursements journal, federal income tax returns, purchase invoices, sales invoices, cash register tapes for the entire audit period and bank statements.

5. The corporation did not provide the auditor with sales invoices, guest checks, cash register tapes or other source documentation detailing the amount of retail sales of the business operation. In addition, the purchase invoices provided were incomplete. Purchase information obtained from third-party wholesalers revealed that the corporation's purchases during the initial audit period exceeded purchases actually recorded in the general ledger by \$33,400.59. As a result of the inadequacy and incompleteness of the business's books and records, and the discrepancy in the purchases, the auditor determined that a detailed audit would not be possible and decided to perform an indirect markup audit.

6. In December 2003, the corporation filed for Chapter 11 bankruptcy and began to sell off its inventory without replenishing its stock. When the auditor went to the business location in early January 2004 to obtain information concerning the sales price of goods sold, she discovered that there was too little inventory to compute an adequate markup. Instead, she used a markup percentage derived from the audit of another liquor store, for the same periods, in the nearby town of North Babylon.

7. Audited purchases were divided into liquor purchases (43%) and wine purchases (57%). The liquor and wine markups of 21.8% and 36.4%, respectively, which were determined on the previous audit, were applied to the audited purchases, resulting in audited taxable sales for the initial period of the audit (September 1, 2000 through May 31, 2003) of \$722,189.80. The auditor then subtracted reported taxable sales for the same period of \$622,941.00 from audited taxable sales to arrive at additional taxable sales of \$69,248.80 for the initial audit period, which resulted in a margin of error of 0.1061.

8. The above determined margin of error was applied against reported taxable sales per quarter for the entire audit period. The appropriate sales tax rate was applied to each respective quarter, resulting in additional taxable sales of \$74,753.39 and additional tax due of \$6,310.48, plus penalty and interest.

9. On May 17, 2004, the Division issued to petitioner Huntington Hills Wine & Spirits Corporation a Notice of Determination assessing sales tax due of \$6,310.48, plus penalty and interest, for the period September 1, 2000 through November 30, 2003. On June 10, 2004, the Division issued to petitioner Christian Pimpinella, as a responsible person, a Notice of Determination assessing sales tax due of \$5,055.38, plus penalty and interest, for the period February 1, 2001 through November 30, 2003. The difference in the tax assessed between the corporation and Mr. Pimpinella was due to the fact that the Consent Extending Period of Limitations for Assessment of Sales and Use Taxes under Articles 28 and 29 of the Tax Law executed by Mr. Pimpinella extended the period in which to assess sales and use taxes due for the period September 1, 2000 through May 31, 2001 to June 20, 2004 only with regard to the corporation.

10. At the Bureau of Conciliation and Mediation Services conference held on July 28, 2005, the margin of error was reduced to .0465 by reducing the markups on liquor and wine sales to 18% and 27%, respectively. The application of the reduced margin of error resulted in additional taxable sales of \$32,763.00 and additional tax due of \$2,768.00, plus interest. Penalties were abated.

11. The assessment against Mr. Pimpinella was also reduced by the application of the reduced margin of error. The result was the Notice of Determination issued to Mr. Pimpinella was reduced to tax due of \$2,217.00, plus interest.

CONCLUSIONS OF LAW

A. The standard for reviewing a sales tax audit where external indices were employed was set forth in ***Matter of AGDN, Inc.*** (Tax Appeals Tribunal, February 6, 1997), as follows:

a vendor . . . is required to maintain complete, adequate and accurate books and records regarding its sales tax liability and, upon request, to make the same available for audit by the Division (*see*, Tax Law §§ 1138[a]; 1135; 1142[5]; *see, e.g., Matter of Mera Delicatessen*, Tax Appeals Tribunal, November 2, 1989). Specifically, such records required to be maintained ‘shall include a true copy of each sales slip, invoice, receipt, statement or memorandum’ (Tax Law § 1135). It is equally well established that where insufficient records are kept and it is not possible to conduct a complete audit, ‘the amount of tax due shall be determined by the commissioner of taxation and finance from such information as may be available. If necessary, the tax may be estimated on the basis of external indices . . .’ (Tax Law § 1138[a]; *see, Matter of Chartair, Inc. v. State Tax Commn.*, 65 AD2d 44, 411 NYS2d 41, 43). When estimating sales tax due, the Division need only adopt an audit method reasonably calculated to determine the amount of tax due (***Matter of Grant Co. v. Joseph***, 2 NY2d 196, 159 NYS2d 150, *cert denied* 355 US 869); exactness is not required (***Matter of Meyer v. State Tax Commn.***, 61 AD2d 223, 402 NYS2d 74, *lv denied* 44 NY2d 645, 406 NYS2d 1025; ***Matter of Markowitz v. State Tax Commn.***, 54 AD2d 1023, 388 NYS2d 176, *affd* 44 NY2d 684, 405 NYS2d 454). The burden is then on the taxpayer to demonstrate, by clear and convincing evidence, that the audit method employed or the tax assessed was unreasonable (***Matter of Meskouris Bros. v. Chu***, 139 AD2d 813, 526 NYS2d 679; ***Matter of Surface Line Operators Fraternal Org. v. Tully***, 85 AD2d 858, 446 NYS2d 451).

B. In this case, the record establishes the Division's clear and unequivocal written requests for books and records of the corporation's sales, as well as the corporation's failure to produce such books and records for the Division's review. Letters from the Division to the corporation's suppliers to verify petitioner's purchase records indicated a discrepancy between the corporation's purchases as reported and purchases as indicated by its suppliers. Based upon this discrepancy and the lack of any source documentation to support the amount of reported sales, the Division deemed the business records to be inaccurate and unreliable and therefore resorted to a markup audit methodology. Having established the insufficiency of the corporation's books and records, the Division used the amount of purchases as supplied by the suppliers of the business operation, together with a markup determined on audit of a similar business located nearby.

C. The Division's use of third-party information to verify the purchase records was proper (*see Matter of Roebling Liquors v. Commissioner of Taxation & Finance*, 284 AD2d 669, 728 NYS2d 509, 512 [2001], *appeal dismissed* 97 NY2d 637, 735 NYS2d 493 [2001], *cert denied* 537 US 816, 154 L Ed 2d 20 [2002]). Indeed, "verification of books and records is an integral, accepted part of the audit process" (*Matter of Morano's Jewelers of Fifth Avenue, Inc.*, Tax Appeals Tribunal, January 2, 1992).

D. The discrepancy between the third-party purchase information and the corporation's reported purchases, in addition to the lack of source documentation to establish the amount of sales, was sufficient to show the inaccuracy and unreliability of the business's records and justified the Division's use of an indirect or estimated audit methodology (*see Matter of Roebling Liquors v. Commissioner of Taxation & Finance, supra*). In fact, the use of a markup audit method to calculate taxable sales of a liquor store, in the face of inadequate

records, has been consistently sustained (*see Matter of Murphy*, Tax Appeals Tribunal, March 17, 1994; *Matter of Robritt Liquor Store*, Tax Appeals Tribunal, December 27, 1991). It was thus incumbent upon petitioners to establish both the reason for the difference between the supplier information and their records and to substantiate the amount of reported taxable sales in order to prove that the Division's use of a markup audit was improper.

E. Petitioners, in essence, appear to take issue with the Division's audit result because it is imprecise. As a general proposition, any imprecision in the results of an audit arising by reason of a taxpayer's own failure to keep and maintain records of all of its sales as required by Tax Law §1135(a)(1) must be borne by that taxpayer (*Matter of Markowitz v. State Tax Commission, supra.; Matter of Meyer v. State Tax Commission, supra.*). In this instance, petitioners specifically complain that the markups used were too high and should be reduced. It is undoubtedly true that retail prices may have been, at times, either lower or higher than the prices used by the auditor in the calculation of the total sales amount. Nonetheless, petitioners' claim that the markups were not accurate falls far short of the evidence necessary to support petitioners' claim and override the results of the audit based on the corporation's purchases and markup determined during another audit. Again, petitioners provided no records establishing the actual selling price per item. Ultimately, the business's failure to maintain or provide any records of sales leaves no basis for changing the Division's audit results.

F. The petitions of Huntington Hills Wine & Spirits Corporation and Christian Pimpinella are denied and the notices of determination dated May 17, 2004 and June 10, 2004, as modified by the Conciliation Order dated November 25, 2005, are sustained.

DATED: Troy, New York
January 3, 2008

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE