

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

SALEH M. HUSSAIN, ALI HUSSAIN,
ALI KHULAKI AND ABDULA M. ABDULA
D/B/A HUSSAIN GROCERY :

DECISION

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, 1974
through August 31, 1977. :

Petitioners, Saleh M. Hussain, 225 Parkside Avenue, Brooklyn, New York 11226, Ali Hussain, 1864 Nostrand Avenue, Brooklyn, New York 11226, Ali Khulaki, 1272 Nostrand Avenue, Brooklyn, New York, and Abdula M. Abdula, 1290 Nostrand Avenue, Brooklyn, New York 11226 d/b/a Hussain Grocery, 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, 1974 through August 31, 1977 (File No. 26501).

A hearing was held before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 8, 1985 at 9:30 A.M. Petitioners appeared by Stanley Israel, Esq. The Audit Division appeared by John P. Dugan, Esq. (Mark F. Volk, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined additional sales and use taxes due from Hussain Grocery for the period September 1, 1974 through August 31, 1977.

II. If so, whether the penalty and interest in excess of the statutory minimum should be waived.

FINDINGS OF FACT

1. During the period at issue, the petitioners, Saleh M. Hussain, Ali Hussain, Ali Khulaki and Abdula M. Abdula operated, as a partnership, Hussain Grocery ("Hussain"), a neighborhood grocery store at 1288 Nostrand Avenue in Brooklyn, New York.

2. On December 23, 1977, as the result of a field audit of Hussain's books and records, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against the petitioners for taxes due of \$10,066.40, plus penalty and interest of \$4,082.01, for a total amount due of \$14,148.41, for the period September 1, 1974 through August 31, 1977. On October 19, 1977, Hussain, by signature of petitioner Saleh M. Hussain, executed a consent extending the statute of limitations for issuing an assessment for sales and use taxes due for the period at issue to September 20, 1978.

3. In or about September, 1977, an examiner for the Audit Division initiated an audit of Hussain's books and records. The petitioners maintained no books or records and the only documents made available to the examiner were copies of sales and use tax returns and U.S. Partnership Returns of Income. The examiner therefore utilized Hussain's rent expense for 1976 and his professional experience in performing audits of similar businesses to determine taxable sales. It had been the examiner's experience that gross sales per year for this type of business were 20 times rent. Gross sales were therefore determined to be \$306,000.00 (\$5,100.00 rent expense for 1976 x 20 x 3 year audit period). The examiner, also based on his experience, determined that taxable sales were 45 percent of gross sales. Taxable sales were therefore

determined to be \$137,700.00 ($\$306,000.00 \times 45\%$). Credit was given for taxable sales reported of \$13,670.00 to compute additional taxable sales of \$124,030.00. The examiner also determined purchases subject to use tax of \$1,800.00, which amount has not been contested by the petitioners. The examiner finally computed the additional sales and use taxes due of \$10,066.40 ($\$124,030.00 + \$1,800.00 = \$125,830.00 \times 8\%$).

4. At the hearing, petitioner Saleh M. Hussain and his brother, petitioner Ali Hussain, testified that the business did not keep any books or records and that they (the partners) did not know what was required of them. They indicated that gross sales were written down on a piece of paper daily and that this piece of paper was kept in a box in the store along with purchase invoices. Every three months, the documents were given to their accountant, Bertie Graham, to prepare the sales and use tax return and presumably the U.S. Partnership Return of Income. When the documents were returned, petitioners discarded them. The petitioners did not know that the documents should have been retained. The petitioners depended on their accountant for their record keeping obligations.

5. It was apparent at the hearing that the petitioners were immigrants to this country and had difficulty understanding the English language. They obviously did not know or comprehend what was required of them under the Tax Law.

6. For the years 1974 and 1975, the petitioners' rent expense was \$4,320.00 and \$4,800.00, respectively.

CONCLUSIONS OF LAW

A. That section 1138(a)(1) of the Tax Law provides, in pertinent part, that if a return required by Article 28 is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined from

such information as may be available. If necessary, the tax may be estimated on the basis of external indices, such as rental paid.

B. That the Audit Division's determination of additional taxes due was determined from such information as was available and external indices in accordance with section 1138(a)(1) of the Tax Law. The examiner properly determined the additional taxes due based on the petitioners' rent and the examiner's professional experience in performing audits of similar businesses. However, the examiner should have used petitioners' rent for 1974 and 1975 in determining additional sales tax due for the quarterly periods during said years and not petitioners' rent for 1976. Petitioners' rent expense for 1974 and 1975 was \$4,320.00 and \$4,800.00, respectively, pursuant to Finding of Fact "6".

C. That section 1145(a)(1)(ii) of the Tax Law provides, in pertinent part, that if the Tax Commission determines that the failure (to remit tax on time) is due to reasonable cause and not due to willful neglect, it shall remit penalty and interest in excess of the statutory minimum. Petitioners' reliance on their accountant to meet their obligations under the Tax Law and their lack of understanding of what was required of them, do not constitute reasonable cause [20 NYCRR 536.1(b)].

D. That the petition of Saleh M. Hussain, Ali Hussain, Ali Khulaki and Abdula M. Abdula d/b/a Hussain Grocery is granted to the extent indicated in Conclusion of Law "B"; the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due

issued December 23, 1977; and that, except as so granted, the petition is denied.

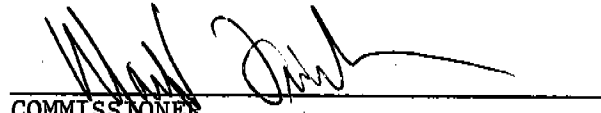
DATED: Albany, New York

FEB 18 1986

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER