

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of  
ESTATE OF AMADEO VILARDI  
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, 1977  
through November 30, 1979.

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DECISION

Petitioner, Estate of Amadeo Vilardi, c/o Angelo Cestari, Executor, 1752 81st Street, Brooklyn, New York 11214, 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, 1977 through November 30, 1979 (File No. 34464).

A formal hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 12, 1984 at 9:15 A.M., with all briefs and additional documentary evidence to be submitted by March 4, 1985. Petitioner appeared by Newmark, Lamb, Dowling & Marchisio, Esqs. (James W. Dowling, Jr., Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether there existed any foundation for the Audit Division's issuance of assessments to the Estate of Amadeo Vilardi.

FINDINGS OF FACT

1. On January 8, 1980, the Audit Division issued to petitioner, Estate of Amadeo Vilardi, in the care of the Executor, Angelo Cestari, a Notice of

Determination and Demand for Payment of Sales and Use Taxes Due, assessing sales and use taxes alleged to be due on sales of food and liquor by La Perville, Inc., and tax allegedly due on the bulk sale of the business assets of said corporation in the total amount of \$59,340.79, plus penalty and interest, encompassing the period September 1, 1977 through November 1, 1979.

On June 16, 1981, subsequent to a field examination of the books and records of La Perville, Inc., the Audit Division issued an additional assessment against petitioner in the care of the Executor, Angelo Cestari, assessing sales and use taxes for the period March 1, 1978 through November 30, 1979 in the amount of \$32,166.12, plus penalty and interest.

2. La Perville, Inc. operated a catering hall. During his lifetime, Amadeo Vilardi was the sole shareholder of the corporation. Mr. Vilardi died at Brooklyn Hospital on March 19, 1976, approximately one and one-half years before the audit period commenced. Petitioner's representative in the within proceeding forwarded a photocopy of the Certificate of Death to the Audit Division, Brooklyn District Office, on or about June 6, 1980.

3. The field examination was precipitated by the bulk sale of the business assets of La Perville, Inc. In December, 1979, the sales tax examiners assigned to the matter contacted Juvenal Marchisio, a partner in the law firm Newmark, Lamb, Dowling & Marchisio (the Estate's representative), and a Mr. Chartash, an accountant, to gain access to the corporation's books and records. Apparently, Messrs. Marchisio and Chartash experienced difficulty in securing the requested records; the manager and several other employees, who were then actually conducting the business on a day-to-day basis, were doing so without the consent of the Estate. The audit report states, in pertinent part:

"Initial failure of vendor to produce records predicated the issuance of assessment #S001080824 in the sum of \$59,340.79 plus penalty and interest and related assessment to the purchaser to protect the Statute of Limitation regarding bulk sale."

The examiners were subsequently furnished with certain purchase records but because they never received any sales records, they resorted to a markup test to verify the corporation's taxable sales. The federal corporation income tax return filed by La Perville, Inc. for 1977 reflected a markup for food and liquor of 118.56 percent. The examiners considered such a markup unacceptably low and consequently employed the markup calculated on a previous audit of 230.69 percent. Application of the markup to the corporation's purchases resulted in taxable food sales and taxable liquor sales of \$309,297.07 and \$71,504.35, respectively. The corporation's sales tax liability as found by the audit is summarized below.

Tax on sales of food and liquor	\$100,742.81
Plus: tax on bulk sale of assets	4,000.00
Less: tax paid with returns filed	(9,867.21)
	<u>\$ 94,875.60</u>

For each quarterly period with the exception of the quarter ended February 28, 1978, the tax as determined upon audit exceeded the tax assessed in the Notice of Determination and Demand of January 8, 1980. On June 16, 1981, as above-stated, a second Notice of Determination and Demand was issued against the Estate, assessing increments to the tax for each quarter then open under the statute of limitations. No adjustment was made to the tax for the quarter ended February 28, 1978, originally assessed at \$7,524.00 but computed on audit at \$7,392.20.

4. According to the testimony of the supervisor of the sales tax examiners, it is usual Audit Division procedure to issue an officer assessment against the officer's estate after the officer's death. The examiners never requested nor

were they ever furnished with letters testamentary. Either Mr. Marchisio or Mr. Chartash advised them that Mr. Angelo Cestari was Executor of the Estate, and they accordingly forwarded a power of attorney form to Mr. Cestari for his execution. (A power of attorney appointing Mr. Dowling, petitioner's representative in this proceeding, was properly executed by Mr. Cestari on October 27, 1981 and is appended to the petition.)

5. La Perville, Inc. filed sales and use tax returns for only three of the quarterly periods under review, the quarters ended November 30, 1977, May 31, 1978 and August 31, 1978. A part-quarterly return for the period January 1 through January 31, 1978 was signed by Gilda Vilardi (wife of Amadeo), as treasurer. The signature of Angelo Cestari appears at the line denominated, "Signature of preparer, if other than vendor."

6. Mr. Cestari presently suffers from Alzheimer's disease and according to his physician, would be incapable of offering testimony at a hearing. Petitioner maintains that Mr. Cestari was solely a shareholder of La Perville, Inc., that he never served in any managerial capacity, and that the assessment against the Estate lacks a foundation.

#### CONCLUSIONS OF LAW

A. That section 1133(a) of Article 28 of the Tax Law imposes on any person required to collect sales tax personal liability for the tax imposed, collected or required to be collected. Section 1131(1), in defining persons required to collect the tax, includes corporate officers who are under a duty to act for the corporation in complying with any requirement of Article 28. The resolution of whether an officer was under such a duty turns upon a factual determination in each instance. The relevant factors in the determination include, but are not limited to, the following: the officer's day-to-day

responsibilities in the corporation; the officer's involvement in and knowledge of the financial affairs of the corporation; the identity of the person who prepared and signed the sales and use tax returns; the officer's authority to sign checks on the corporation's accounts; and in the case of a closely-held corporation, the benefits the officer received from corporate profits.

B. That the Audit Division issued the assessments under consideration to Mr. Vilardi's Estate, the owner of all the outstanding shares of La Perville, Inc. It is thus clear that the Audit Division's action had a reasonable basis and the assessments were not without foundation.

C. That petitioner offered no proof to refute that the Estate was a person required to collect tax on behalf of La Perville, Inc. or to refute the amount of the assessments. An adjustment is warranted, however, for the period ended February 28, 1978, and the tax assessed for such quarter should be reduced to the amount as disclosed by the audit procedures, \$7,392.20 (see Finding of Fact "3").

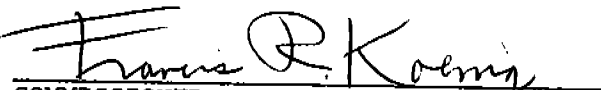
D. That the petition of Estate of Amadeo Vilardi is granted to the extent indicated in Conclusion of Law "C"; the assessments issued on January 8, 1980 and June 16, 1981 are to be reduced in accordance therewith; and except as so granted, the petition is in all other respects denied.

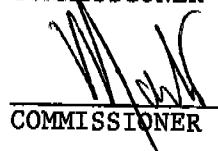
DATED: Albany, New York

STATE TAX COMMISSION

**JUL 10 1985**

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

