

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

JOSEPH V. and JOANN GIULIANO

for Redetermination of a Deficiency or for a :
Refund of New York State Personal Income Tax
under Article 22 of the Tax Law and New York
City Nonresident Earnings Tax under Chapter 46,
Title U of the Administrative Code of the City :
of New York for the Years 1977, 1978 and 1979.

In the Matter of the Petition

of

COMMONS DELI

DECISION

for Redetermination of a Deficiency or for
Refund of Unincorporated Business Tax under
Article 23 of the Tax Law for the Years 1977
and 1978.

In the Matter of the Petition

of

JOSEPH V. GIULIANO
D/B/A INTERNATIONAL SUPERETTE

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, 1978
through May 31, 1980.

Petitioners Joseph V. and JoAnn Giuliano, 27 Pondview Lane, New Rochelle,
New York 10804, filed a petition for redetermination of a deficiency or for
refund of New York State personal income tax under Article 22 of the Tax Law
and New York City nonresident earnings tax under Chapter 46, Title U of the

Administrative Code of the City of New York for the years 1977, 1978 and 1979 (File Nos. 36944, 36945, 36946 and 36947).

Petitioner Commons Deli., c/o Joseph Giuliano, 27 Pondview Lane, New Rochelle, New York 10804, filed a petition for redetermination of a deficiency or for refund of unincorporated business tax under Article 23 of the Tax Law for the period September 1, 1978 through May 31, 1980 (File No. 36762).

Petitioner Joseph V. Giuliano, doing business as International Superette, 27 Pondview Lane, New Rochelle, New York 10804, 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, 1978 through May 31, 1980 (File No. 37123).

A consolidated hearing was commenced before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 2, 1984 at 9:30 A.M., continued on June 3, 1985 at 1:15 P.M. and concluded on September 11, 1985 at 9:15 A.M., with all briefs to be submitted by November 27, 1985. Petitioners appeared by Murray Appleman, Esq. The Audit Division appeared by John P. Dugan, Esq. (Irving Atkins, Esq., of counsel at the October 2, 1984 hearing and Anne W. Murphy, Esq., of counsel at the subsequent hearings).

ISSUE

Whether the Audit Division properly employed an indirect method of income reconstruction, specifically, cash availability analyses, to determine the deficiencies in personal income, nonresident earnings and unincorporated business taxes and the assessment of sales and use taxes under consideration and if so, whether the results of the audit methodology were correct.

FINDINGS OF FACT

1. On February 3, 1982, the Audit Division issued to petitioners Joseph V. and JoAnn G. Giuliano four notices of deficiency asserting New York State personal income tax, unincorporated business tax and New York City nonresident earnings tax under Tax Law Article 22, Tax Law Article 23 and Chapter 46, Title U of the New York City Administrative Code, respectively, for the years 1977, 1978 and 1979 (plus interest and fraud penalties) scheduled as set forth below:

(a) Personal income tax and nonresident earnings tax

	<u>1977</u>	<u>1978</u>	<u>1979</u>
Additional income disclosed by cash availability analyses	\$115,738.00	\$178,735.00	\$186,228.00
Disallowed business expenses	--	3,598.00	25,283.00
Statutory medical adjustment	<u>124.35</u>	<u>--</u>	<u>--</u>
Net adjustment	\$115,862.35	\$182,333.00	\$211,511.00
Taxable income previously stated	<u>23,632.73</u>	<u>29,887.00</u>	<u>4,502.00</u>
Corrected taxable income	\$139,495.08	\$212,220.00	\$216,013.00
Tax on corrected taxable income	\$ 19,234.25	\$ 28,441.07	\$ 27,658.26
N.Y.C. nonresident earnings tax	<u>5,598.29</u>	<u>8,725.46</u>	<u>8,888.56</u>
Corrected tax	\$ 24,832.54	\$ 37,166.53	\$ 36,541.82
Tax previously computed	<u>(2,488.88)</u>	<u>(3,471.58)</u>	<u>(204.12)</u>
Total additional tax due	\$ 22,343.66	\$ 33,694.95	\$ 36,337.70

(b) Unincorporated business tax

	<u>1978</u>	<u>1979</u>
Additional income disclosed by cash availability analyses	\$ 89,368.00	\$186,228.00
Covenant not to compete, expense deduction disallowed	3,598.00	25,283.00
Allowance for taxpayer services	<u>(2,093.00)</u>	<u>(2,527.00)</u>
Net adjustment	\$ 90,873.00	\$208,984.00
Taxable business income previously stated	<u>9,126.00</u>	<u>4,890.00</u>
Corrected taxable income	\$ 99,999.00	\$213,874.00
Tax on corrected taxable income	\$ 4,999.95	\$ 9,624.33
Tax previously computed	<u>(432.88)</u>	<u>(137.56)</u>
Total additional tax due	\$ 4,567.07	\$ 9,486.77

On January 16, 1981, Mr. Giuliano had executed a consent serving to extend the period of limitation for assessment of personal income and unincorporated

business taxes for the taxable years 1977 to April 15, 1982

2. On January 22, 1982, the Audit Division issued to petitioner Commons Deli a Notice of Deficiency asserting unincorporated business tax due for 1977 and 1978, plus accrued interest and fraud penalties. The deficiency was predicated on cash availability analyses performed of the two partners of the partnership, Joseph V. Giuliano and Vincent D'Acri.

	<u>1977</u>	<u>1978</u>
Additional income disclosed by cash availability analysis of Joseph V. Giuliano	\$115,738.00	\$89,367.00
Additional income disclosed by cash availability analysis of Vincent D'Acri	17,808.00	5,812.00
Exemption		(2,500.00)
Allowance for taxpayer services	<u>(6,623.21)</u>	<u>(10,000.00)</u>
Net adjustment	\$126,922.79	\$82,679.00
Taxable business income previously stated	<u>8,507.18</u>	<u>(10,676.00)</u>
Corrected taxable income	\$135,429.97	\$72,003.00
Tax on corrected taxable income	\$ 7,448.65	\$ 3,600.15
Tax previously computed	<u>(447.36)</u>	<u>-0-</u>
Total additional tax due	\$ 7,001.29	\$ 3,600.15

On January 16, 1981, Mr. Giuliano had executed a consent serving to extend the period of limitation for assessment of unincorporated business tax against Messrs. Giuliano and D'Acri doing business as Commons Deli for the taxable year 1977 to April 15, 1982.

3. On December 18, 1981, the Audit Division issued to Joseph V. Giuliano doing business as International Superette a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, assessing sales and use taxes under Tax Law Articles 28 and 29 for the period September 1, 1978 through May 31, 1980 in the principal amount of \$12,188.58, plus accrued interest.

4. In its answer, the Audit Division withdrew the fraud penalties asserted against Mr. and Mrs. Giuliano in the notices dated February 3, 1982 and against Commons Deli in the notice dated January 22, 1982, and substituted in lieu thereof negligence penalties under Tax Law sections 685(b) and 722 and New York

5. Commons Deli was engaged in business as a delicatessen and grocery store. Messrs. Giuliano and D'Acri operated the business as a partnership prior to July 1, 1978. On such date, Mr. Giuliano purchased Mr. D'Acri's partnership interest and thereafter operated the business as a sole proprietorship under the trade name International Superette. On March 9, 1980, Mr. Giuliano sold the business to a third party.

6. The principal bases on which the deficiencies and the assessment under consideration rest are cash availability analyses conducted of the personal and business records of Mr. and Mrs. Giuliano for the years 1977 through 1979 and of Mr. D'Acri for the period January 1, 1977 through June 30, 1978. The shortage disclosed by the examination of Mr. D'Acri's records was considered additional income realized by Commons Deli during 1977 and the first half of 1978. (Insofar as Mr. D'Acri is not a petitioner, the Audit Division analysis of his records and the results thereof are not treated in detail herein.) The examination of Mr. and Mrs. Giuliano's checking and savings account, brokerage account and the business checking account disclosed excesses of cash expenditures over sources of cash available in the amounts shown below.

	<u>1977</u>	<u>1978</u>	<u>1979</u>
<u>Cash in</u>			
Wages	\$ 14,641	\$ 18,625	\$ 15,704
Dividends	7,607	9,452	1,955
Transfers from savings and checking accounts	26,114	52,337	5,000
Drawings from business	1,600	750	15,000
Purchases withdrawn for personal use	--	1,000	1,000
Interest	--	--	1,781
	<u>\$ 49,902</u>	<u>\$ 82,164</u>	<u>\$40,440</u>
<u>Cash out</u>			
Deposits to checking accounts	\$130,087	\$133,709	\$187,752
Deposits to savings accounts	18,497	30,574	--
Personal living expenses	14,116	14,116	14,116
Capital contribution to business	2,000	2,500	

Wages, dividends and interest were in the amounts reported on Mr. and Mrs. Giuliano's New York State Income Tax Resident Returns. The examiner computed personal living expenses by reference to cancelled checks bearing 1979 dates (payable to, for example, utilities, clothing stores and charitable organizations) and by estimates for food, automobile expenses, recreation and entertainment and cash out-of-pocket expenses. The shortages were treated as additional income realized by the Giulianos in 1977, 1978 and 1979 for personal income tax and nonresident earnings tax purposes, as additional income realized by the partnership Commons Deli in 1977 and in the first half of 1978 for unincorporated business tax purposes, and by the sole proprietorship International Superette for unincorporated business tax purposes in the latter half of 1978 and in 1979.

7. During the pendency of this proceeding, Mr. and Mrs. Giuliano presented for the Audit Division's review certain documentation which caused the Division to reduce the cash shortages for 1977, 1978 and 1979 to \$92,168.54, \$157,235.00 and \$163,828.00, respectively. The adjustments are summarized below.

(a) 1977

Additional cash in	
proceeds of certificate of deposit	\$13,869.46
loan repayment	6,700.00
Cash out, item eliminated	
capital contribution to business	3,000.00

(b) 1978, additional cash in

loan from employer	\$15,000.00
transfers from savings and checking accounts	6,500.00

(c) 1979, additional cash in

transfers from savings and checking accounts	\$22,600.00
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8. For purposes of verifying taxable sales reported by Mr. Giuliano, doing business as International Superette ("Superette"), the Audit Division commenced an examination of the store's records and operations in June 1980

The audit report characterized Superette's books as "poor" and noted that sales invoices and purchase invoices, ~~inter alia~~, were unavailable. Initially, the Audit Division proposed an adjustment of \$406.58 to Superette's compensating use tax; Mr. Giuliano consented to the adjustment and remitted full payment therefor. (According to the audit report, the Audit Division never cashed Mr. Giuliano's check.) The Division subsequently discovered errors in the sales tax examiner's workpapers and augmented the audit adjustment to \$2,916.08, consisting of sales tax of \$2,509.50 **in** addition to the original use tax of \$406.58. The sales tax was determined to be due upon a certain percentage of Superette's grocery sales (arrived at via a taxable ratio test) and upon sales of sandwiches (arrived at via an on-site observation test). No assessment was issued, however, awaiting completion of the cash availability analysis (Finding of Fact "6"). The sales tax examiner considered the cash shortages as additional gross sales of Superette, and by comparison of the increased gross sales with gross sales reported, computed an error rate of 173.3 percent for the period September 1, 1978 through November 30, 1978 and an error rate of 162.2 percent for the period December 1, 1978 through March 9, 1980 (the date Mr. Giuliano sold the business). He then employed the earlier findings with respect to Superette's taxable grocery and sandwich sales to arrive at the amount of the sales tax assessment. The assessment was subsequently revised to \$10,562.58 (sales tax of \$10,156.00 plus use tax of \$406.58) based on additional documents submitted by Mr. Giuliano (Finding of Fact "7").

Reported sales, 9/78 - 11/78	\$ 90,153.00	
Error rate	<u>1.733</u>	
Sales per audit		\$156,235.00
 Reported sales, 12/78 - 3/80	 \$389,408.00	
Error rate	<u>1.622</u>	
Sales per audit		621,620.00

Sales per audit, 9/78 - 3/80	\$787,855.00
Less: sandwich sales	<u>(30,835.00)</u>
Net sales	\$757,020.00
Taxable ratio	<u>.30137</u>
Taxable sales	\$228,143.00
Add: sandwich sales	<u>30,835.00</u>
Total taxable sales	\$258,978.00
Reported taxable sales	<u>(132,024.00)</u>
Additional taxable sales	\$126,954.00
Tax rate	<u>.08</u>
Sales tax due	\$ 10,156.00
Use tax due	<u>406.58</u>
Total tax due	\$ 10,562.58

9. Throughout the period under consideration, Mr. Giuliano held a full-time executive position with Meadowbrook Farms, a dairy company. During evenings and on weekends, he sold insurance policies, mutual funds and real estate to supplement the family income. As a consequence of his busy schedule, he left the record keeping and the management of funds to Mrs. Giuliano, who frequently transferred funds between accounts to take advantage of varying interest rates.

10. Prior to his ownership of an interest in Commons Deli, Mr. Giuliano owned two similar business establishments; he sold the first delicatessen/grocery store in 1973 for approximately \$75,000.00 to \$85,000.00, and the second in 1975 or 1976 for approximately \$100,000.00.

11. Aside from the documents which when offered to the Audit Division resulted in reductions to the cash shortages (Finding of Fact "7"), Mr. and Mrs. Giuliano presented no proof to establish any further error in the calculation of the asserted deficiencies and the assessment.

CONCLUSIONS OF LAW

A. That if the Audit Division determines that there is a deficiency of income tax upon examination of the taxpayer's return, it may mail a notice of deficiency to the taxpayer. (Tax Law Section 6015, 1-720, N.Y. Tax Law § 6015)

Administrative Code section U46-31.0[a].) The Audit Division need not make a preliminary finding that the taxpayer's records are inadequate prior to employing an indirect method of income reconstruction. "[T]he Government must be free to use all legal evidence available to it in determining whether the story told by the taxpayer's books accurately reflects his financial history." (Holland v. United States, 348 U.S. 121, 132 [1954].) For purposes of ascertaining any sales and use taxes due under Articles 28 and 29, on the other hand, the Audit Division may resort to external indices only where deficiencies in the taxpayer's record keeping render an item-by-item examination impossible. (Section 1138[a][1]) The Audit Division's procedures in the instant matter were proper. It did not, nor was it required to, determine the inadequacy of petitioners' books before performing cash availability analyses to arrive at shortages for personal income, nonresident earnings and unincorporated business taxes. It did find Superette's records inadequate before it relied upon taxable ratio testing, an on-premises observation and the cash availability analyses to compute the assessment of sales and use taxes. (~~See~~ Finding of Fact "8"). Finally, petitioners offered no evidence to establish that they maintained and furnished for the Audit Division's review comprehensive and reliable records **from** which taxable sales could **be** verified.

B. That petitioners offered no evidence to establish error **in** the Audit Division's procedure.

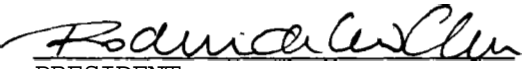
C. That the petition of Joseph V. and JoAnn Giuliano is granted to the extent indicated in Findings of Fact "4" and "7"; the notices of deficiency issued on February 3, 1982 are to be modified accordingly; and except as so modified the deficiencies are in all other respects sustained. The petition of Commons Deli is granted to the extent indicated in Findings of Fact "4" and "7"; the notices of deficiency issued on February 3, 1982 are to be modified accordingly; and except as so modified the deficiencies are in all other respects sustained.

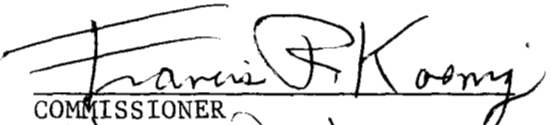
"7"; the Notice of Deficiency issued on January 2, 1982 is to be modified accordingly; and except as so modified, the deficiency is in all other respects sustained. The petition of Joseph V. Giuliano doing business as International Superette **is** granted to the extent indicated in Finding of Fact "8"; the assessment issued on December 18, 1981 **is** to be modified accordingly; and except as so modified, the assessment is in all other respects sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 28 1986


PRESIDENT


COMMISSIONER


COMMISSIONER