

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

A. TOMASSI & CO., INC.

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, 1978  
through February 28, 1981.

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In the Matter of the Petition

of

ANGELO T. TOMASSI,  
PRESIDENT OF A. TOMASSI & CO., INC.,

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 March 1, 1978  
through February 28, 1981.

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In the Matter of the Petition

of

PAUL V. TOMASSI,  
SECRETARY-TREASURER OF A. TOMASSI & CO., INC.,

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, 1978  
through February 28, 1981.

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Petitioners, A. Tomassi & Co., Inc., 9 Valley Road, Port Washington, New York 11050, Angelo T. Tomassi, president of A. Tomassi & Co., Inc., 21 Cypress Avenue, Glen Head, New York 11545, and Paul V. Tomassi, secretary-treasurer of A. Tomassi & Co., Inc., 65 Knollwood Road, Roslyn, New York 11576, filed petitions 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, 1978 through February 28, 1981 (File No. 37380).

On May 22, 1984, petitioners advised the State Tax Commission in writing that they desired to waive a hearing and to submit their cases to the State Tax Commission based on the records contained in the file; all briefs were to be submitted by July 18, 1984. After due consideration of the record, the State Tax Commission hereby renders the following decision.

#### ISSUES

I. Whether certain purchases of trucks and excavation equipment were "for resale" and thus not subject to sales and use taxes, where such equipment was not used exclusively for rentals to others, but also for self-use by petitioner A. Tomassi & Co., Inc.

II. Whether petitioners, Angelo T. Tomassi and Paul V. Tomassi, were "persons required to collect sales tax" within the meaning of sections 1133(a) and 1131(1) of the Tax Law and, therefore, could be held personally liable for any taxes due from petitioner A. Tomassi & Co., Inc.

III. Whether petitioners Angelo T. Tomassi and Paul V. Tomassi, as individuals, are liable for simple interest on any sales tax determined to be due.

#### FINDINGS OF FACT

1. Petitioner A. Tomassi & Co., Inc. (hereinafter "the corporation") does business as an excavation contractor and as a lessor of excavation equipment. Petitioners Angelo T. Tomassi and Paul V. Tomassi were, respectively, president and secretary-treasurer of the corporation during the years in dispute.

2. On January 12, 1982, the Audit Division issued three separate notices of determination and demand for payment of sales and use taxes due to each of the petitioners listed above. The notice issued to the corporation asserted

that sales and use taxes were due for the period March 1, 1978 through February 28, 1981 in the amount of \$37,534.24, plus interest. The notice issued to petitioner Angelo T. Tomassi asserted that sales tax, in the amount of \$7,267.40, plus interest, was due for the period March 1, 1978 through February 28, 1981. The notice issued to Paul V. Tomassi was the same as Angelo T. Tomassi's in amount of sales tax due and as to the basis for liability. Each of the notices were issued as a result of a field audit conducted by the Audit Division in the latter part of 1981.

3. The auditor examined the corporation's books and records from March 1, 1978 to February 28, 1981. Gross sales from the corporation's general ledger for the audit period were compared with gross sales as reported on the corporation's sales tax returns for the audit period. This examination showed that gross sales per books were \$1,383,338.00 while gross sales per returns were only \$1,279,518.00, thus revealing a discrepancy of \$103,820.00. Petitioners were unable to explain or substantiate this discrepancy at the time of audit and they have offered no evidence to explain the discrepancy as of this time. This discrepancy resulted in additional sales tax due of \$7,267.40.

4. A test period for the quarter ending August 31, 1980 was used to analyze petitioner's expense purchases because the expense purchase records for the audit period were not made available to the auditor. The analysis showed that the corporation failed to pay sales tax on 24.7 percent of its fuel purchases and on 51.9 percent of its machinery repairs and maintenance purchases. Application of these percentages to the aforementioned purchases resulted in additional purchases subject to use tax of \$132,658.75 and additional use tax due of \$9,286.16.

5. The audit also revealed that \$299,724.00 of truck and excavation equipment purchases were made during the audit period without payment of sales tax. Accordingly, additional use tax of \$20,980.68 was determined due on these purchases.

6. In sum, the field audit determined additional taxable sales and purchases subject to use tax to be \$536,202.75, with total additional sales and use taxes due of \$37,534.24.

7. During the course of the audit, the auditor determined that the corporation failed to collect sales tax on the sale of two pieces of excavating equipment totalling \$35,500.00 with a tax due of \$2,485.00. However, the petitioner subsequently submitted resale certificates covering said sales and the tax due thereon was not included in the notices of determination.

8. As mentioned above, the corporation maintained it was engaged in excavation contracting and in the leasing of its excavation equipment. The assertion advanced is that the heavy equipment the corporation purchased was used for rentals to others 90 percent of the time and for self-use the remaining 10 percent of the time. Thus, petitioners claim, these purchases should be considered "purchases for resale", and therefore, totally exempt from sales and use taxes.

The Audit Division maintains that exemptions in the tax law must be strictly construed such that the "purchase for resale exemption" requires the purchaser to be exclusively contemplating either rental or resale and no self-use at all. Consequently, since the Tax Law makes no allowance for allocation between taxable and non-taxable uses, the petitioner owes sales and use taxes on the full amounts paid for this equipment.

9. Petitioners Angelo T. Tomassi and Paul V. Tomassi submitted no evidence rebutting the Audit Division's assertion that they were "persons required to collect tax" on behalf of the corporation.

CONCLUSIONS OF LAW

A. That section 1101(b)(4)(i) of the Tax Law defines retail sales as "[a] sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property...".

That 20 NYCRR 526.6(c) explains the resale exclusion as follows:

"(1) Where a person, in the course of his business operations, purchases tangible personal property or services which he intends to sell, either in the form in which purchased, or as a component part of other property or services, the property or services which he has purchased will be considered as purchased for resale, and therefore not subject to tax until he has transferred the property to his customer."

B. That only purchases made for the exclusive purpose of resale come within the resale exclusion provided for in section 1101(b)(4)(i) of the Tax Law (Michelli Contracting Corporation, State Tax Commission, May 27, 1983); therefore, the Audit Division properly determined that petitioner's purchases of trucks and excavation equipment were subject to tax.

C. That petitioner Angelo T. Tomassi and petitioner Paul V. Tomassi were "persons required to collect tax" pursuant to section 1131(1) of the Tax Law and as such were personally liable for the tax due from the corporation as well as any applicable interest accrued thereon within the meaning and intent of section 1133(a) of the Tax Law. The Tax Law does not excuse an officer of a corporation under a duty to act for such corporation from personal liability for interest due.

D. That the petitions of A. Tomassi & Co., Inc., Angelo T. Tomassi, president of A. Tomassi & Co., Inc., and Paul V. Tomassi, secretary-treasurer of A. Tomassi & Co., Inc., are denied, and the notices of determination and demand for payment of sales and use taxes due issued January 12, 1982 are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

APR 29 1985

*Roderick Allen*  
PRESIDENT

*Francis R. Koenig*  
COMMISSIONER

*Mark Dink*  
COMMISSIONER