

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

PASQUALE IANNUZZI,
OFFICER OF LIDO MOBILE INTERNATIONAL, LTD.

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 June 1, 1979
through February 28, 1981.

Petitioner, Pasquale Iannuzzi, officer of Lido Mobile International, Ltd., 1181 Pelham Parkway North, Bronx, New York 10469, 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 June 1, 1979 through February 28, 1981 (File No. 38896).

A hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 8, 1986 at 9:15 A.M., with all briefs to be filed by December 3, 1986. Petitioner appeared by Ernest W. Kaufman, Jr., Esq. The Audit Division appeared by John P. Dugan, Esq. (Paul A. Lefebvre, Esq., of counsel).

ISSUES

I. Whether petitioner is liable, pursuant to Tax Law sections 1131(1) and 1133(a), for unpaid taxes assessed against Lido Mobile International, Ltd.

11. Whether, if so, the dollar amount of such taxes as assessed is correct.

FINDINGS OF FACT

1. On May 28, 1982, following a field audit, the Audit Division issued to petitioner, Pasquale Iannuzzi, as an officer of Lido Mobile International, Ltd., ("Lido") a Notice of Determination and Demand for Payment of Sales and

Use Taxes Due for the period June 1, 1979 through February 28, 1981 in the amount of \$22,323.78, plus penalty and interest. The dollar amount of this assessment is identical to the dollar amount determined on audit to be owed by Lido Mobile International, Ltd.

2. The components of this assessment may be broken down as follows:

- a) \$17,341.86; sales tax assessed on sales claimed but not substantiated to be exempt as capital improvements, and sales tax collected in excess of sales tax actually remitted.¹
- b) \$2,985.36; use tax assessed on the cost of materials purchased and installed by petitioner where the installation was substantiated as exempt via proper capital improvement certificates.
- c) \$1,460.32; use tax assessed on fixed assets purchased.
- d) \$536.24; use tax assessed on recurring purchases.

3. On March 5, 1985, following a Tax Appeals Bureau pre-hearing conference, the Audit Division issued to petitioner a Notice of Assessment Review, pursuant to which the aforementioned assessment against petitioner was reduced to \$16,925.86, plus penalty and interest. This reduction reflects elimination of the use tax items [Finding of Fact "2-b, c and d" (above)] as initially assessed against petitioner. In addition, the sales tax amount shown in Finding of Fact "2-a" (\$17,341.86), as originally assessed against petitioner, has been reduced by \$416.00 based upon substantiation, via a properly completed capital improvement

1 Sales tax on disallowed capital improvements totalled \$14,856.16; sales tax collected in excess of sales tax remitted totalled \$2,485.70.

certificate, of one sale by petitioner as an exempt capital improvement.²
Accordingly, the \$16,925.86 of sales tax remaining at issue consists of the following two components:

- a) \$14,440.16; sales tax computed and assessed on certain sales claimed as exempt sales (capital improvements or sales for resale) but disallowed on audit as unsubstantiated.
- b) \$2,485.70; sales tax shown as collected per records, but not remitted per sales tax returns.

4. The above dollar figures were computed, as noted, upon an audit of Lido Nobile International, Ltd. ("Lido"), a corporation formed in or about 1979 by petitioner, Pasquale Iannuzzi, together with Messrs. Joseph Greco and Frank Abbatte. Lido was engaged in the business of wholesale sales and retail sales and installation of kitchen cabinets imported from Italy.

5. Although the record is unclear as to the specific number of shares held by each of Lido's above-named shareholder/officers, it is clear that petitioner was the majority shareholder at the time of Lido's incorporation. Approximately three or four months after such incorporation, Mr. Abbatte left Lido, with his shares of stock being transferred to one Mario Lisanti. Again, although the record does not specify the exact number of shares held at such time, it appears that petitioner held more shares than either Mr. Greco or Mr. Lisanti, but that the combined total of shares held by Messrs. Greco and Lisanti exceeded the number of shares held by petitioner.

2 Use tax on materials purchased by petitioner in connection with such capital improvement (\$177.36) was calculated as part of the amount owed by Lido Mobile International, Ltd., but was not assessed against petitioner and is not at issue herein.

6. In addition to being an officer and shareholder of Lido, petitioner also worked for Lido as a salesman/promoter, with his work centered on introducing Lido's imported cabinets to the market and securing sales contracts. By contrast, Messrs. Greco and Lisanti were to perform the cabinet installations on retail sales and installation contracts as secured by Lido. Two signatures were required on checks issued by Lido, and petitioner, Mr. Greco and Mr. Lisanti were all authorized signatories on Lido's bank account. All three individuals were involved in signing checks and directing the payment of bills on behalf of Lido.

7. In April of 1981, the Audit Division commenced its audit of Lido. The auditor based his audit upon a direct examination of all sales invoices presented to him, as well as upon his examination of Lido's sales and purchase journals, purchase invoices, general ledger, and resale and capital improvement certificates. Lido's records were described as Incomplete and in poor condition.

8. As relevant to the \$16,925.86 in sales tax at issue herein (noting that use tax as determined on audit and initially assessed against petitioner has apparently been withdrawn from assessment against petitioner via the Notice of Assessment Review), the auditor's calculations may be summed up as follows:

a)	\$185,702.00	claimed but disallowed exempt sales
	x .08	tax rate
	<u>\$ 14,856.16</u>	sales tax initially assessed
	- 416.00	credit allowed based on substantiation of
		one claimed exempt sale
	<u>\$ 14,440.16</u>	sales tax on claimed but unsubstantiated
		exempt sales
b)	\$ 4,710.94	sales tax charged and collected per invoices
	- 2,225.24	sales tax remitted per returns
	<u>\$ 2,485.70</u>	collected but unremitted sales tax

9. In or about July of 1981, after commencement of the audit, petitioner asserts that Lido's other shareholders effectively froze petitioner out of any ability to have an active role in Lido's financial operation by refusing to

join petitioner in signing checks or by signing checks but thereafter stopping payment **on** such checks and, in addition, by refusing to allow petitioner to have access to Lido's books and records. These disagreements between petitioner and Lido's other principals continued through November 23, 1981, at which time petitioner resigned as an officer and director of Lido and demanded, in light of outstanding liabilities including sales taxes, that Lido be dissolved and the proceeds be used to satisfy such liabilities.

10. On or about December 23, 1981, petitioner entered into an agreement whereby he sold his 80 shares of stock in Lido to Messrs. Greco and Lisanti in exchange, inter alia, for \$4,000.00 (payable at the rate **of** \$150.00 per week), the corporation's 1977 Buick station wagon (valued at \$1,000.00) and the right to collect **on** all salary due him up to the date **of** the agreement. In addition, petitioner was to be indemnified by Lido and Messrs. Greco and Lisani from any debts of the corporation including, but not limited to, sales taxes.

11. Petitioner immigrated to the United States from Italy in 1967 and worked installing marble until forming Lido in 1979. Petitioner received a high school education in Italy, but has taken no courses in business or accounting. He has a somewhat limited understanding of the English language. Petitioner could not specifically recall, but indicated that he probably signed sales tax returns **on** behalf of Lido.

12. Petitioner asserts that the disagreements among Lido's principals were long-standing and that he had wanted to leave the business almost immediately after its formation. In addition to contesting the assertion of his responsibility for the unpaid taxes at issue, petitioner maintains the amount assessed should be reduced based on substantiation of exempt sales and **on the** allegation that Lido never received payment for certain jobs.

13. Lido's practice was to receive 40 percent of a given contract amount as a down payment upon contract execution, 40 percent upon delivery of the cabinets and 20 percent upon completion of the contract. Petitioner asserted, by testimony, that contract amounts owed by four purchasers³ were not, or may not, have been received by Lido. No other evidence regarding the alleged nonpayment contracts, other than an allegation that Jacobson Construction was bankrupt, was provided, nor is there any specification of any amounts which may or should have been received (e.g. the 40 percent down payment upon a contract's execution).

14. At the hearing, petitioner submitted three resale certificates and thirteen capital improvement certificates. Ten of the capital improvement certificates were accepted previously by the auditor, thus reducing the amount of sales tax in the initial assessment as issued. At hearing, the Audit Division conceded that one resale certificate, pertaining to REW Contracting, Inc. in the amount of \$3,600.00, was proper and conceded that tax in the amount of \$282.00 should be eliminated from the assessment. Finally, of the remaining five certificates submitted by petitioner, three are complete and acceptable and two are rejected as follows:

3 The four purchasers and the amounts were:

1. Jacobson Construction; \$4,121.00 (based on five different contracts)
2. Vito Vacara; \$2,000.00
3. Frank Abbatte; \$180.00
4. Bruce Bierman; \$250.00

a. Certificates Acceptable

<u>Type of Certificate</u>	<u>Exhibit No.</u>	<u>Purchaser</u>	<u>Contract Amount</u>
Resale	1	Crafted Cabinets, Inc.	\$ 332.00
Resale	10	Sagitalia, Inc.	268.00
Capital Improvement	16	Margolis	12,889.00
Total			<u>\$13,489.00</u>

b. Certificates Unacceptable

<u>Type of Certificate</u>	<u>Exhibit No.</u>	<u>Purchaser</u>	<u>Contract Amount</u>
Capital Improvement	4	Cesa J. Bianchi	\$ 9,141.00
Capital Improvement	8	Traber	7,177.00
Total			<u>\$16,318.00</u>

CONCLUSIONS OF LAW

A. That section 1133(a) of the Tax Law places personal liability for the taxes imposed, collected or required to be collected under Article 28 upon "every person required to collect any tax" imposed by said article. Section 1131, subdivision (1) furnishes the following definition for the term "persons required to collect tax":

"'Persons required to collect tax' or 'person required to collect any tax imposed by this article' shall include: every vendor of tangible personal property or services; every recipient of amusement charges; and every operator of a hotel. Said terms shall also include any officer or employee of a corporation or of a dissolved corporation who as such officer or employee is under a duty to act for such corporation in complying with any requirement of this article and any member of a partnership."

B. That resolution of the issue of personal liability for sales tax due turns upon a factual determination in each case (Vogel v. New York State Dept. of Taxation and Finance, 98 Misc2d 222; Chevlowe v. Koerner, 95 Misc2d 388). Relevant factors in making such determination include, inter alia, day-to-day responsibilities in the Corporation, involvement in and knowledge of the corporation's financial affairs and its management, the identity of who prepared and signed tax returns and the authority to sign checks (Vogel, supra, p 225. See also 20 NYCRR 526.11[b]).

C. That petitioner was a person under a duty to collect, truthfully account for and pay over the sales taxes at issue herein on behalf of Lido within the meaning and intent of Tax Law § § 1131(1) and 1133(a). Notwithstanding the disagreements among Lido's principals, petitioner had authority to sign checks and did **so**, and he was during the period in question an officer and shareholder of Lido and was at least coequally involved in and responsible for the everyday business operations and management **of** Lido. Finally, petitioner does not appear to have been "frozen out" of Lido's affairs, nor did he resign from and end his association with Lido until well after the period at issue, by which time the instant audit had been nearly completed.

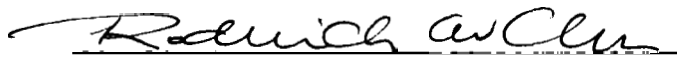
D. That, in accordance with Finding of Fact "14", petitioner has substantiated the claim of exemption on sales in the aggregate amount of \$13,489.00, and the Audit Division has conceded to exemption of one additional sale in the amount of \$3,600.00. Thus, the assessment **is** to be reduced by the amount of sales tax which would be calculated as due on such sales.

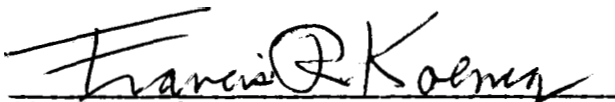
E. That the petition **of** Pasquale Iannuzzi, officer **of** Lido Mobile International, Ltd., **is** granted to the extent indicated in Conclusion of Law "D"; the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated May 28, 1982, as reduced by the Notice **of** Assessment Review dated March 5, 1985, is to be further reduced in accordance herewith; and such notice, as reduced, together with applicable penalty and interest, **is** sustained.

DATED: Albany, New York

STATE TAX COMMISSION

FEB 24 1987


PRESIDENT


COMMISSIONER


COMMISSIONER