

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petitions	:	
	:	
of	:	
	:	
FOSKOS MARKET, INC.	:	
and FOTIOS TAGARIS, OFFICER	:	DECISION
for Revision of Determinations or for Refunds	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period September 1, 1978	:	
through November 30, 1981.	:	

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Petitioners, Foskos Market, Inc. and Fotios Tagaris, Officer, 1731 Broadway, New York, New York 10019, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1978 through November 30, 1981 (File Nos. 39782 and 39783).

A formal 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 February 26, 1985 at 9:15 A.M. Petitioners appeared by Jack M. Portney, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Kevin A. Cahill, Esq., of counsel).

#### ISSUES

- I. Whether a timely petition was filed by or on behalf of Fotios Tagaris.
- II. Whether, if so, Fotios Tagaris was a person under a duty to collect and pay over sales and use taxes on behalf of Foskos Market, Inc.
- III. Whether the Audit Division properly resorted to external indices in determining the tax liability of Foskos Market, Inc. and, if so, whether petitioner's have substantiated any items warranting reduction or cancellation of the resultant assessment.

FINDINGS OF FACT

1. On August 20, 1982, the Audit Division issued to petitioner Foskos Market, Inc. a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the sales tax quarterly periods ended November 30, 1978 through November 30, 1981, assessing sales tax due in the amount of \$234,296.21, plus penalty and interest. On the same date, the Audit Division also issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner Fotios Tagaris, assessing against Mr. Tagaris, as an officer of Foskos Market, Inc., the same amounts for the same periods as the aforementioned Notice issued to Foskos Market, Inc.

2. Validated consents had been executed on behalf of Foskos Market, Inc. pursuant to which assessment of sales and use taxes for the period in question could be made on or before September 20, 1982.

3. Foskos Market, Inc. operates as a supermarket with a delicatessen section where sandwiches and hot meals are prepared. On or about September 9, 1981, the Audit Division attempted to commence a field audit of the books and records of Foskos Market, Inc., but found such books and records to be incomplete and, for the most part, non-existent. In particular, there was no record of cash purchases, no day books, journals or cash register tapes were kept, and only a partial amount of purchase invoices were available. Additional records available were a check disbursements journal, Federal and State income tax returns and State sales tax returns.

4. The only purchases recorded by Foskos Market, Inc. were purchases by

check paid to one supplier (Krasdale), and disbursements for such purchases alone were \$43,000.00 higher than the amount of purchases shown per income tax returns. Sales per sales tax returns could not be reconciled with sales per books and, in many instances, the returns reflected gross sales and taxable sales as the same amount, thus showing no non-taxable sales. The method used by Foskos Market, Inc.'s accountant in computing sales tax liability was to estimate thirty percent of its gross sales, from figures supplied by Mr. Tagaris, as being taxable sales.

5. Accordingly, based on the foregoing, the records were deemed inadequate by the Audit Division and an observation test was selected as the method of audit. The use of an observation test was agreed to by petitioners' accountant at the time of the audit, with November 23, 1981 selected as the day of observation.

6. A five and one-half hour physical observation was conducted, spanning the hours from approximately 9:45 A.M. to 3:15 P.M. on November 23, 1981, during which time all sales on each of the two cash registers being operated, plus take-out sales were observed and recorded. Total sales of \$1,660.35 were observed, of which \$963.83 were taxable sales. The ratio of taxable sales to total sales was thus determined to be 58.05 percent.

7. Opening and closing cash register readings were taken, spanning the hours from 8:00 A.M. to 3:15 P.M. on November 23, 1981, which revealed total sales of \$2,027.87 for such period. This figure was divided by 7 to arrive at sales per hour, with such sales per hour multiplied by 19 as the number of hours Foskos Market, Inc. was open. The resultant figure was multiplied by 6 (days per week open) and by 12.5 (weeks per sales tax quarterly period) to

arrive at \$412,825.00 as sales per quarter. Taxable sales per quarter of \$239,645.00 was derived by applying the 58.05 percent taxable ratio to total sales per quarter. Finally, such audited taxable sales per quarter less taxable sales as reported per quarter resulted in additional taxable sales per quarter upon which sales tax was computed and assessed.

8. Petitioners admit that the books and records maintained were not accurate or adequate and do not contest the propriety of resorting to an observation test as a means of determining liability. However, petitioners do maintain that the resultant assessment is overstated, asserting as follows:

- for a portion of the audit period Foskos Market, Inc. was open less than 19 hours per day;
- that the day observed was the day before Thanksgiving and thus sales of taxable items were inordinately high;
- that the hours observed encompass that part of the business day when taxable sales are highest;
- that construction of a new building across the street from Foskos Market, Inc. during part of the audit period adversely affected the business.

9. No evidence substantiating the above-noted claims was offered at the hearing. Petitioners' representative and present accountant has established a bookkeeping system for petitioners. Submitted in evidence were income tax returns, sales tax returns and accompanying schedules and analyses based thereon pertaining to periods subsequent to those at issue, reflecting, inter alia, sales figures and tax liability substantially lower (by about one-half) than those found for the audit period. It is asserted that such figures are a truer measure of the business activity of Foskos Market, Inc.

10. No petition for Mr. Tagaris was offered in evidence at the hearing nor could such a petition be located by the Audit Division. However, correspondence from the Tax Appeals Bureau to Mr. Tagaris' representative confirms the filing of a timely petition by or on behalf of Mr. Tagaris.

11. The audit report reflects that Mr. Tagaris was Secretary of Foskos Market, Inc. One of the consent documents referred to in Finding of Fact "2", supra, is signed by Mr. Tagaris as President of Foskos Market, Inc. No evidence to refute the allegation that Mr. Tagaris was a responsible officer under a duty to comply with the terms of Articles 28 and 29 of the Tax Law on behalf on Foskos Market, Inc. was submitted at the hearing.

#### CONCLUSIONS OF LAW

A. That where, as here, adequate records are not maintained, the Audit Division is authorized to resort to external indices in determining tax liability [Tax Law §1138(a); Matter of George Korba v. New York State Tax Comm., et. al, 84 A.D.2d 655]. In fact, petitioners do not contest the use of an observation test as a means of determining tax.

B. That no evidence was submitted which would warrant cancellation or reduction of the assessment against petitioner Foskos Market, Inc. It is noted that the evidence introduced pertaining to later years and the record keeping method set up and used in such years does not form a basis for reduction of the instant assessment, nor have petitioners submitted evidence which in any way substantiates the assertions set forth in Finding of Fact "8".

C. That based on the evidence it is reasonable to conclude that a timely petition was filed by or on behalf of Mr. Tagaris (see Finding of Fact "10"),

and thus there is jurisdiction over Mr. Tagaris. No evidence was submitted contradicting the assertion of Mr. Tagaris' liability within the meaning of Tax Law sections 1131(1) and 1133(a), and thus the assessment against him as an officer of Foskos Market, Inc. is sustained.


D. That the petitions of Foskos Market, Inc. and Fotio Tagaris, Officer, are hereby denied and the notices of determination and demand for payment of sales and use taxes due dated August 20, 1982 are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JUL 16 1985

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER