

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

FUTURAMIC REMODELING CORP.

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, 1978  
through May 31, 1981.

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DECISION

In the Matter of the Petition

of

ANTHONY GIORGIO,  
OFFICER OF FUTURAMIC REMODELING CORP.

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, 1978  
through May 31, 1981.

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Petitioner Futuramic Remodeling Corp., 1516 Jarrett Place, Bronx, New York 10461, 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, 1978 through May 31, 1981 (File No. 40063).

Petitioner Anthony Giorgio, officer of Futuramic Remodeling Corp., 5 Elsie Lane, Farmingdale, New York 11735, 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, 1978 through May 31, 1981 (File No. 40064).

A consolidated hearing was held before Frank A. Landers, Hearing Officer,

at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 19, 1985 at 2:15 P.M., continued on March 4, 1986 at 1:15 P.M. and continued to conclusion on January 16, 1987 at 9:15 A.M., with all briefs to be filed by April 17, 1987. Petitioners appeared by Sidney A. Kaplan, C.P.A., on November 19, 1985 and March 4, 1986 and by James H. Tully, Esq. and Stewart Buxbaum, C.P.A., on January 16, 1987. The Audit Division appeared by John P. Dugan, Esq. (Kevin A. Cahill, Esq., of counsel).

#### ISSUE

Whether the Audit Division properly determined the sales and use tax liability of Futuramic Remodeling Corp. for the period June 1, 1978 through May 31, 1981.

#### FINDINGS OF FACT

1. On June 20, 1982, the Audit Division, as the result of a field audit, issued to petitioner Futuramic Remodeling Corp. ("Futuramic") a Notice of Determination and Demand for Payment of Sales and Use Taxes Due assessing sales and use taxes due of \$67,566.00, plus interest ~~of~~ \$4,855.00, for a total amount due of \$72,421.00 for the period June 1, 1978 through May 31, 1981. On the same date, the Audit Division issued a similar notice against petitioner Anthony Giorgio as an officer of the corporation.<sup>1</sup> The notices were timely because Futuramic filed an annual return for the period June 1, 1978 to May 31, 1979.

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1 At the hearing, the Audit Division requested that the notice against petitioner Anthony Giorgio be reduced by \$10,388.00 to \$57,178.00. The \$10,388.00 represents tax due ~~on~~ recurring expenses and material purchases referred to in the audit report as "use tax". However, said adjustment has not been made because, according to the Tax Law, officers are responsible for said tax.

2. On audit, the books and records of Futuramic were determined to be inadequate. Petitioners' representative admitted that the records were incomplete for the year ended May 31, 1981. Furthermore, Futuramic did not file a sales tax return for the annual period ended May 31, 1981.

3. The auditor first reviewed sales. February 1980 sales invoices were reviewed in detail and, based upon the job description and other evidentiary material, they were accepted as capital improvements. Gross sales per accountant's end-of-year worksheets for the years 1979 and 1980 totalling \$1,574,766.00 were greater than sales per sales tax returns of \$1,094,918.00 by \$479,848.00, or 43.82 percent. Gross sales per books for 1981 were estimated to be \$787,357.00, or estimated gross sales per sales tax return for 1981 of \$547,460.00 (\$1,094,918.00 divided by 2) plus 43.82 percent, or \$239,897.00. Since petitioners were unable to explain the difference between estimated gross sales per books for 1981 plus gross sales per worksheets for 1979 and 1980 and gross sales per sales tax returns, the auditor considered said amount totalling \$719,745.00 (\$479,848.00 + \$239,897.00) to be taxable sales. Credit was given for taxable sales reported of \$5,024.00, thereby leaving additional taxable sales of \$714,721.00 with additional tax due thereon of \$57,178.00.

4. The auditor next reviewed purchases. An analysis of September and October of 1980 material purchases revealed that 43.83 percent of said purchases were made without payment of tax. Either the invoice for the specific purchase showed that no tax was collected or there was no invoice available for review. The ratio of purchases to sales per the accountant's worksheets was 30.11

percent. Purchases per the worksheets were used on audit because they were higher than purchases per books by 65.58 percent. Purchases for the audit period were determined to be \$711,159.00, or purchases per the worksheets for 1979 of \$221,613.00 and 1980 of \$252,446.00 plus estimated purchases for 1981 of \$237,100.00. The 43.83 percent margin of error was applied to audited purchases of \$711,159.00 to compute purchases made without payment of tax of \$311,701.00. Credit was given for materials used in taxable sales of \$216,715.00 (\$719,745.00 x 30.11% [see Finding of Fact "3"]) to determine material purchases upon which tax is due of \$94,986.00 with tax due thereon of \$7,599.00.

5. Lastly, the auditor reviewed recurring expenses and found that tax was due in the amount of \$2,789.00 on purchases totalling \$34,866.00. The taxes found due on additional taxable sales, material purchases and recurring expenses total \$67,566.00. Petitioners do not contest the taxes due on recurring expenses and, therefore, said amount is not at issue.

6. Futuramic operated as a contractor, remodeling kitchens and bathrooms in residential property. At all times relevant, petitioner Anthony Giorgio was the president of Futuramic. On or about December 3, 1980, Mr. Giorgio, having started a new business, decided to discontinue Futuramic's business operations. No new contracts were executed subsequent to said date, and the only activities conducted by the remaining employees of Futuramic were the collection of monies due on completed jobs and the performance of warranty work.

7. Regarding the additional taxable sales which comprised the difference between gross sales per sales tax returns and gross sales per the accountant's

end-of-year worksheets, petitioners claim that sales according to the sales tax returns were on a cash basis and taken from the bank deposits, whereas sales per worksheets were total contracted sales including cancelled sales. Petitioners explained that when a customer signed a contract to perform, the amount was recorded as sales on its books. Subsequently, however, 50 percent of said sales were cancelled because either the customer changed his mind during the three-day cancellation period provided by regulation or the bank rejected financing for the job. Petitioners maintained that Futuramic reported sales in this manner because the larger amount of sales on the worksheet made its financial condition appear more favorable to banks and credit institutions. Petitioners failed to present any credible evidence to support this contention. Petitioners also claim that, except for taxable sales reported on Futuramic's sales tax returns, all sales made during the period at issue were capital improvements and exempt from sales tax. Petitioner submitted sufficient evidence, including documents and testimony, to support this contention.

8. Petitioners claim that tax was paid on all purchases because Futuramic instructed its suppliers to include tax on all bills, and, further, the invoices which showed that no tax was collected were actually requests for payment on account. No documentary or other evidence was presented to support these contentions. Petitioners also claim that the purchases made by Futuramic during September and October 1980 (the test months) were used to perform capital improvements for the Republic of Guinea, whereby said materials would be exempt from tax pursuant to section 1115(a)(15) of the Tax Law. Petitioners offered a contract with the Republic of Guinea, executed on August 5, 1980, to

perform major renovations on the residence of its Ambassador at 4650 Fieldston Road in the Bronx for a total price of \$290,327.00. By itself, the contract was insufficient to warrant a change in the assessment.

CONCLUSIONS OF LAW

A. That Tax Law § 1138(a)(1) provides, in pertinent part, as follows:

"If a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors."

B. That where a taxpayer's records are incomplete or insufficient, the Audit Division may select a method reasonably calculated to reflect the sales and use taxes due and the burden then rests upon the taxpayer to demonstrate by clear and convincing evidence that the method of audit or the amount of tax assessed was erroneous (Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858).

C. That the records of Futuramic Remodeling Corp. were incomplete and it was proper for the Audit Division to estimate its sales and use tax liability based on available information. However, petitioners have sustained the burden of proof to show that the additional taxable sales were actually capital improvements and not subject to tax.

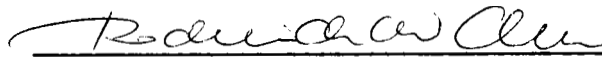
D. That the petitions of Futuramic Remodeling Corp. and Anthony Giorgio, officer of Futuramic Remodeling Corp., are granted to the extent indicated in Conclusion of Law "C"; the Audit Division is hereby directed to modify the

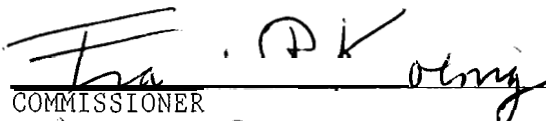
notices of determination and demands for payment of sales and use taxes due issued June 20, 1982; and that, except as so granted, the petitions are denied. It should be noted that the modification will also result in an adjustment to the use tax deficiency by eliminating the credit **for** materials used in taxable sales (see Finding of Fact "4").


DATED: Albany, New York

STATE TAX COMMISSION

AUG 31 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER