

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter **of** the Petition

of

ARCO MINI MART,
EDSON E. and GERTRUDE EVANS

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 September 1, 1979
through May 31, 1981.

Petitioners, **Arco** Mini Mart, Edson E. and Gertrude Evans, 4328 Harlem Road, Snyder, New York 14226, 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, 1979 through May 31, 1981 (File No. 42264).

A hearing was held before James J. Morris, Jr., Hearing Officer, at the offices of **the** State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York on February 28, 1986 at 9:15 A.M. Petitioners appeared by **Neil Weinberg, Esq.** The Audit Division appeared by **John P. Dugan, Esq.**, (Deborah J. Dwyer, **Esq.**, of counsel).

ISSUE

Whether petitioner Gertrude Evans was an owner or partner of **Arco** Mini Mart and therefore liable for sales tax assessed.

FINDINGS OF FACT

1. On October 21, 1982, the Audit Division issued a Notice **of** Determination and Demand for Payment of Sales and Use Taxes Due against "Edson E. and Gertrude (sic) Evans d/b/a **Arco** Mini Mart" for total additional tax due of \$68,606.44 and penalty of \$16,887.89, plus interest. The period for which the assessment was issued was September 1, 1979 through May 31, 1981. The explanation for the

assessment was "(s)ince you have not submitted your records for audit as required by Section 1142 of the Tax Law, the following taxes are determined to be due in accordance with the Tax Law, and are based upon available records and information."

2. The assessment was based on third party verification of gasoline sales furnished by Atlantic Richfield. Petitioners do not contest the amount of the assessment, **or** the liability of Edson E. Evans. It was stipulated at the hearing that the only issue remaining was the liability of Gertrude Evans.

3. Petitioners Edson E. Evans and Gertrude Evans filed a certificate of conducting business as partners in the Office of the Erie County Clerk **on** August 7, 1978. The name of the business was Evans **Arco** Mini Mart. The business sold gasoline, groceries and other items.

4. The business was registered with the Sales Tax Bureau of the Department of Taxation and Finance. The validation by the Sales Tax Bureau is dated June 7, 1978. Edson E. Evans and Gertrude Evans were listed on the certificate as the owners of the business. Only Mr. Evans' social security number is shown on the registration form.

5. On November 3, 1978, Edson E. Evans and Gertrude Evans executed and acknowledged a Certificate of Discontinuance of Business as partners under the name of Evans **Arco** Mini Mart and on the same date Edson E. Evans filed a certificate of conducting business under an assumed name as an individual in the Erie County Clerk's Office.

6. The lease for the business premises at 2977 Niagara Falls Boulevard in **Amherst**, New York, was in the name of Edson E. Evans. Gertrude Evans was not named **on** the lease.

7. During the period at issue, petitioner Edson E. Evans was a school teacher. He worked in the store after school, in the evenings and on weekends. Gertrude Evans worked in the store from approximately 9:00 A.M. to 2:00 P.M. daily, when she would return home to care for their three school age children.

8. Petitioner Edson E. Evans managed the business on a day-to-day basis. He hired and fired employees, dealt with Atlantic Richfield representatives and did most of the ordering for the business.

9. The federal Schedule 'C' attached to petitioners' 1980 Federal Income Tax Return shows the proprietor of the business to be "Edson Evans".

CONCLUSIONS OF LAW

A. That under section 1133(a) of the Tax Law, every person required to collect sales or use tax **is** personally liable for the tax imposed, collected, or required to be collected.

B. That section 1131(1) of the Tax Law provides as follows:

"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 partnership."

C. That petitioner Gertrude Evans is not a "vendor" as such term is defined in section 1101(b)(8) of the Tax Law. Thus, she would be liable for the tax assessed only if she were a member of a partnership against which tax was assessed.

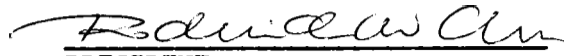
D. That petitioner Gertrude Evans ceased to be a partner of Evans **Arco** Mini Mart on November 3, 1978. She was not a partner during the audit period and thus **is** not liable for the taxes assessed.

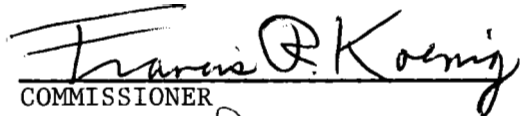
E. That the petition of **Arco** Mini Mart, Edson E. and Gertrud Evans, is granted to the extent that the Notice of Determination and Demand for Payment of Sales and Use Taxes Due is cancelled insofar as it applies to petitioner Gertrud Evans. The Notice of Determination and Demand for Payment of Sales and Use Taxes Due is sustained insofar as it applies to petitioner Edson E. Evans.

DATED: Albany, New York

STATE TAX COMMISSION

JUL 03 1986


PRESIDENT


COMMISSIONER


COMMISSIONER

P 319 372 872

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1985-480-794

PS Form 3800, June 1985

Sent to Alfred M. Matt Edson E + Gertrude Evans	
Street and No. 4328 Harlem Rd.	
P.O., State and ZIP Code Snyder, N.Y. 14226	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt showing to whom and Date Delivered	
Return Receipt showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

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NO INSURANCE COVERAGE PROVIDED
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★ U.S.G.P.O. 1985-480-794

PS Form 3800, June 1985

Sent to Neil Weinberg	
Street and No. 305 Brisbane Bldg	
P.O., State and ZIP Code Buffalo, N.Y. 14203	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt showing to whom and Date Delivered	
Return Receipt showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	