

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

JAMES E. TOGNI, SR.

D/B/A TYROLEAN AUTOMATIC VENDING

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, 1978
through January 31, 1981.

In the Matter of the Petition

of

TYROLEAN VENDING, 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 February 1, 1981
through November 30, 1982.

In the Matter of the Petition

of

JAMES E. TOGNI, SR. AND ROSERY TOGNI

OFFICERS OF TYROLEAN VENDING, LTD.

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 February 1, 1981
through November 30, 1982.

Petitioner, James E. Togni d/b/a Tyrolean Automatic Vending, 450 Horan Road, Syracuse, New York 13209, 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, 1978 through January 31, 1981 (File No. 42414).

Petitioner, Tyrolean Vending Ltd., 450 Horan Road, Syracuse, New York

and use taxes under Articles 28 and 29 of the Tax Law for the period February 1, 1981 through November 30, 1982 (File No. 47017).

Petitioners, James E. Togni, Sr. and Rosery Togni, 4365 Clark Terrace, Marcellus, New York 13108, filed a petition for redetermination of a deficiency **or** for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period February 1, 1981 through November 30, 1982 (File Nos. 47018 and 47019).

A hearing was commenced before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York on July 12, 1985 at 9:00 A.M., continued at the same offices on November 20, 1985 at 9:15 A.M. and November 21, 1985 at 12:05 P.M. and concluded on November 22, 1985 at 9:00 A.M. with all briefs to be submitted by April 9, 1986. Petitioners appeared by Dirk J. Oudemool, Esq. and by Grimaldi, Fagliarone & Tornatore (Robert Fagliarone, CPA). The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether it was permissible for the Audit Division to use a projection of results from a test period to determine petitioners' tax liability arising from unpaid sales tax on recurring expense purchases.

11. Whether the Audit Division, correctly determined petitioners' sales tax liability arising from sales through vending machines.

111. Whether the Audit Division is required to seek collection of unpaid sales tax from the purchaser before it seeks collection of unpaid **sales** tax from the seller.

IV. Whether the transfer of tangible personal property to Tyrolean

retail sale or whether it was nontaxable as a transfer of property to a corporation upon its organization.

V. Whether the penalties and interest in excess of the statutory minimum, which were imposed against the corporation and two **of** its officers, should be waived.

FINDINGS OF FACT

1. On December 7, 1982, the Audit Division issued a Notice **of** Determination and Demand for Payment: of Sales and Use Taxes Due to James **E.** Togni, doing business as Tyrolean Automatic Vending. The notice assessed sales and use taxes for the period September 1, 1978 through January 31, 1981 in the amount of \$101,138.42 plus interest **of** \$31,605.45 for a total amount due of \$132,743.87.

2. On May 27, 1983, the Audit Division issued a Notice of Determination and Demand for Payment **of** Sales and Use Taxes Due to Tyrolean Automatic Vending, Inc. [sic]. The notice assessed sales and use taxes due for the period February 1 1981 through November 30, 1982 in the amount of \$102,650.75 plus penalty of \$21,942.50 and interest of \$20,583.78 for a total amount due of \$145,177.03. On the same date, separate notices were issued **to** James Togni, Sr. and Rosery Togni, as responsible officers, assessing the same amount of taxes which were assessed against Tyrolean Automatic Vending, Inc.

3. Tyrolean Automatic Vending ("the proprietorship") was a sole proprietorship which engaged in sales of food and drink items through vending machines. The proprietorship provided its services to a wide variety of firms in the Syracuse metropolitan area. The prices which the proprietorship charged to its customers varied from one customer to another depending on the location, the type of product sold and other arrangements with the particular customer. The

products sold at various locations would vary depending on what that particular customer desired.

4. In the course of the audit of the proprietorship, the Audit Division requested to see the books and records. Thereafter, summary sales records for the sales tax quarters under audit were examined. In addition, the Audit Division reviewed and summarized some monthly cash and sales reports to determine whether they corresponded with the quarterly summary reports. On the basis of this examination, the Audit Division determined that the proprietorship's sales as reported on Mr. Togni's Federal income tax return were correct. Although requested, the proprietorship declined to provide a list of the vending machine locations until after the audit was completed.

5. In order to ascertain the sales tax due on various categories, the Audit Division divided the proprietorship's sales by the categories of the various merchandise which petitioner sold. For the period September 1978 through February 1980 there were no monthly or quarterly reports. However, utilizing the sales and use tax returns to obtain total sales and information provided by the vendor to determine the ratio of sales in the various categories to total sales, the Audit Division was able to estimate the sales by category for those time periods wherein either monthly or quarterly sales summaries were not available.

6. In the course of the audit, it was determined that 100 percent of the proprietorship's canned food sales were subject to sales tax based on Audit Division experience that these items were sold in a heated state. In contrast, the proprietorship reported 20 percent of its canned food sales as subject to sales tax.

7. The Audit Division determined that 100 percent of the proprietorship's coffee sales were subject to tax. This coincided with the proprietorship's reporting of coffee sales as taxable.

8. The Audit Division found that the proprietorship did not consider any milk sales as subject to sales tax. The Audit Division concluded that 33 1/3 percent of the proprietorship's milk sales were subject to tax.

9. The Audit Division divided the total cigarette sales by an average selling price of \$0.80 per pack in order to determine the number of packs of cigarettes sold.' The Audit Division then subtracted the New York State cigarette tax on the number of cigarettes sold to determine the amount of taxable sales. The sales tax due was then computed on the amount of taxable sales. In contrast to the Audit Division's method, it was the proprietorship's practice to report 42.7 percent **of** total cigarette sales as taxable sales.

10. The Audit Division found that the proprietorship considered all of its ice cream sales exempt. In contrast, the Audit Division concluded that 33 1/3 percent of the proprietorship's ice cream sales were subject to sales tax.

11. The Audit Division concluded that 33 1/3 percent of the proprietorship's snack sales were subject to sales tax. In contrast, petitioner did not report any of its snack sales as being subject to sales tax.

12. The proprietorship reported 25 percent of its candy sales as subject to sales tax. However, the Audit Division concluded that 100 percent of the candy sales were subject to sales tax.

13. The Audit Division found that petitioner had a category of sales known as cold food. It was concluded on the basis of a conversation with Mr. Togni and upon counting the bins in the vending machines which the proprietorship had in storage that 75 percent of the proprietorship's cold food sales consisted of prepared food such as sandwiches. The remaining 25 percent of the cold food sales consisted of unprepared foods such as fruit. The Audit Division assessed sales tax on 100 percent of the prepared food sales. The unprepared food sales were considered 33 1/3 percent taxable. In contrast to the foregoing, the proprietorship considered 14 percent of its cold food sales as subject to sales tax.

14. The Audit Division examined the proprietorship's category of soda sales and found that it had been the proprietorship's practice to report five percent of its soda sales category as subject to sales tax. The audit revealed that the proprietorship's category of soda sales included sales of iced tea. Since the proprietorship's soda sales category did not distinguish soda sales from iced tea sales, the Audit Division estimated that 1.5 percent of the proprietorship's total soda sales consisted of iced tea sales. The Audit Division then computed the tax due on the basis that 100 percent of soda sales were subject to sales tax and 33 1/3 percent of the iced tea sales were subject to sales tax.

15. The Audit Division compared the sales reflected on Mr. Togni's Federal income tax returns with the sales shown on the New York State and local sales and use tax returns and found that the Federal income tax returns reported \$75,818.00 more in gross sales than amounts shown on the sales and use tax returns. Since neither Mr. Togni nor his accountant was able to provide an

explanation for this discrepancy, the entire amount of the discrepancy was deemed taxable.

16. The Audit Division examined recurring expense purchases for the months of September, October and November 1980 by matching the cancelled checks to the available purchase invoices in order to determine whether sales tax had been paid. Ostensibly because some purchase invoices were missing and the proprietorship did not have a purchase journal, the Audit Division decided to attribute the amount **of** tax found due for this period to all of the periods under audit. However, the workpapers disclose that only a small number **of** invoices were missing. In addition, the workpapers explained that a detailed audit was not performed because a small amount **of** tax was found due for the test period, i.e., \$168.41,

17. The Audit Division compared the proprietorship's lists of asset purchases and assets disclosed on the Federal income tax return with the invoices which were available for the entire audit period. In those instances where the proprietorship could not locate the invoice or the invoice could be located but the proper amount **of** tax wasn't paid, additional sales tax was assessed.

18. Tyrolean Vending Ltd. ("corporation") was incorporated on April 15, 1979. However, the corporation was dormant and had neither officers nor business activity until February 1, 1981. On this date, the corporation commenced the business activity of the proprietorship. Mr. James Togni, Sr. became the president of this entity and Rosery Togni became secretary-treasurer.

19. The audit of the corporation was conducted in the same manner as the audit of the proprietorship with certain significant exceptions:

a. The Federal corporation income tax returns disclosed that the corporation had gross sales in excess of the sales reported by the corporation on its sales tax returns. The corporation attributed the entire difference to sales through amusement machines. However, since the corporation could only document that it had approximately three amusement machines, an adjustment was made for amusement machine sales and the balance was held subject to sales tax.

b. The Audit Division assessed sales tax on certain equipment sales on which an exemption certificate was not available.

c. The Audit Division assessed sales tax on the transfer of the assets from the proprietorship to the corporation. The value of the assets was ascertained from the balance sheet of the U.S. Corporation Income Tax Return for the period April 1, 1980 through March 31, 1981.

d. A penalty was assessed against the corporation because Mr. Togni was ostensibly told of the sales tax liabilities on vending machine sales during the audit of the partnership in August 1981. However, the method of reporting did not change.

20. During the period September 1978 through November 1982, the proprietorship and then the corporation had a system for maintaining records based upon advice from an accounting firm. One individual served as the bookkeeper. This person filed and paid bills, maintained journals and was responsible for payroll. A second individual was responsible for maintaining sales records and insuring that the selling prices of the various items were kept current. A third individual was responsible for counting the cash receipts.

21. Both the proprietorship and the corporation employed individuals known as route personnel. It was the duty of the route personnel to put goods into the machines and take money out of the machines.

22. The proprietorship and the corporation had a reporting system to which the route personnel were expected to adhere. At the beginning of a business day each route person would be given a route sheet which listed the locations of the vending machines which the route person was to go to and the service which was to be performed. Each route person was also given certain inventory which would be charged to him. A route supervisor would supervise the removal of inventory.

23. At the assigned location, the route person would place the designated items into the machines and record it on the route sheet. When cash was removed from a machine it was placed into a bag. In addition, a ticket was removed from the route sheet which identified the machine from which the cash was obtained. The next morning the cash was counted and recorded on a ticket. The amount of cash recorded on the ticket would then be entered into the business's records.

24. Occasionally, a route person recorded an item in the wrong column.

25. The foregoing route tickets were used from the time the computer operation began in 1981. These records were maintained for the balance of the audit period.

26. On the basis of the route tickets, a computer printout could be generated showing the customer, the product sold, the selling price and the total sales for a month. The reports could also be generated on a weekly basis.

27. In the course of the audit of the corporation, the Audit Division was advised that the corporation was having difficulty generating reports.

28. The sales records maintained by the proprietorship and the corporation were not sufficiently detailed to distinguish sales of all taxable items from

sales of nontaxable items. For example, one could not distinguish from the sales records whether natural juice or artificial juice was sold. Further, the records did not isolate the sales of iced tea. With respect to the route tickets from "all purpose" machines, petitioners acknowledged that any item selling for about \$0.70 could either be taxable or nontaxable.

29. Prior to the use of the computer system, the proprietorship and corporation utilized a manual system for storing the information which the computer could generate.

30. The proprietorship and the corporation had a system for the filing of purchase invoices. The system consisted of maintaining a file on each company from which either the proprietorship or the corporation would make purchases. The invoice would be placed in the appropriate supplier's file after it had been paid.

31. The invoices on file showed the date the invoice was paid, the check number and the amount the check was drawn for.

32. The payments would be recorded in a cash disbursement journal which showed the check number, the supplier's name, and the date of the check. Additionally, a column would indicate the nature of the expense.

33. The cash disbursements journal and the filed invoices were available to the Audit Division at the time the audit was conducted.

34. Mr. Togni was advised by an accountant in 1972 or 1973 of what percentage of his sales of various products were subject to sales tax. This information was then passed on to a bookkeeper who used it as a guide to prepare the sales tax returns during the periods in issue.

35. Throughout the audit period, Mr. Togni was aware that cigarettes,

did not inquire as to the nature of the percentages provided by his accountant.

36. In August 1982, the Audit Division advised petitioner that the rates used for calculating sales tax due were erroneous. From that time forward, the corporation began filing in accordance with the information received from the Audit Division.

37. **All** of the motor vehicles which the company purchased were licensed and used over the road.

38. On February 1, 1981, all of the assets and liabilities of the proprietorship were transferred to the corporation. In addition, Mr. Togni received capital stock and a demand note from the corporation. A portion of the assets transferred were encumbered by liabilities. When these assets were transferred, the corporation assumed these liabilities and correspondingly relieved Mr. Togni of said liabilities. At the hearing, the corporate petitioner argued, among other things, that the amount of sales tax assessed on the transfer should be reduced by the amount **of** the liabilities which encumber said assets.

39. Petitioners presented testimony by an accountant who reviewed petitioners sales for a period of two months. The accountant estimated what constituted sandwich sales based upon selling price. That **is**, sandwiches were determined to be items which sold for over \$0.85. On the basis of this analysis, petitioners maintained that 60.8 percent **of** their cold food sales were sandwiches. Petitioner also presented a list of facilities which purportedly have eating facilities. According to the list, 29.79% of those at locations which have vending machines have eating facilities.

40. Petitioners' accountant examined their records and based upon selling price estimated that 56.2 percent **of** the amount that petitioners' records show

as candy sales were actually candy sales. The balance purportedly consisted of snacks and pastries.

41. Petitioners maintained that 20 percent of the cold food sales were sold in an unheated state. However, this was not substantiated by any evidence.

42. Petitioners' accountant opined that the amount of tax assessed on cigarette sales was appropriate and was unable to reach a conclusion with respect to the tax assessed on soda sales.

43. At the hearing, the Audit Division conceded, on the basis of certain documentary evidence, that the amount of unpaid sales tax assessed against the proprietorship on the acquisition of fixed assets should be reduced by \$721.00. In addition, the Audit Division conceded, on the basis of other documentary evidence, that the unpaid sales tax assessed against the corporation on the acquisition of fixed assets should be reduced by \$73.50.

CONCLUSIONS OF LAW

A. That, in determining the amount of a sales tax assessment, it is the duty of the Audit Division to select a method "reasonably calculated to reflect the taxes due" (see Matter of Grant Co. v. Joseph, 2 NY2d 196, 206, cert denied 355 US 869). When the Audit Division employs such a method, it becomes incumbent upon the petitioner to establish error (Matter of Meyer v. State Tax Comm., 61 AD2d 223, 227, ly denied 44 NY2d 645).

B. That resort to the use of a test period to determine the amount of tax due must be based upon an insufficiency of record keeping which makes it virtually impossible to determine such liability and conduct a complete audit (Matter of Chartair, Inc. v. State Tax Commission, 65 AD2d 44). Petitioners maintained books and records pertaining to recurring expense purchases which

verification of the payment of sales tax on petitioners' purchases since they were filed in a manner which rendered them readily accessible. Accordingly, the use of a test period to determine petitioners' liability on recurring expense purchases was unwarranted. Therefore, the amount of unpaid sales tax assessed against the proprietorship and the corporation on recurring expense purchases is reduced to the amount of tax found due during the respective test periods.

C. That on December 14, 1978, the following audit policy was adopted:

"There is a rebuttable presumption that 66 2/3% of the vending machine sales of nontaxable food are considered for off-premises consumption. This presumption may be rebutted by a vendor who can submit evidence to prove that the sales for off premises consumption are in excess of 66 2/3%." (TSB-M-79[1]S.)

D. That the foregoing audit policy has been recognized in determinations of the State Tax Commission (s.g., Matter of Standard Vending of Oneonta, Inc., State Tax Commission, February 11, 1983; Matter of Serve Well Enterprises, Inc., State Tax Commission, November 26, 1982).

E. That 20 NYCRR 527.8(g)(1); (2) provides:

"Sales through vending machines. (1) Vending machine operations carried on in premises where facilities such as tables, chairs, benches, counters, etc. are provided for customers are considered to be eating establishments selling food or drink for on premises consumption and sales made through such machines are taxable.

(2) When food or drink is sold through vending machines and no facilities are provided for customers, such sales are deemed to be for off premises consumption and are taxed accordingly."

F. That since no evidence has been presented as to the amount of sales at those locations which do not have eating facilities, it is not possible to determine what portion of the total sales of food and drink enumerated in Tax

off premises consumption. Accordingly, no adjustment is warranted by petitioners' assertion that approximately 70 percent of the locations did not have dining facilities.

G. That petitioners' analysis of that portion of cold food sales which constituted sandwich sales and the portion of the candy sales category which constituted sales of snacks and pastries must be rejected. Mr. Togni's **own** testimony shows that the accountant's analysis of sandwich sales as being only items which **sold** for more than \$0.85 is in error. Similarly, there is no way to confirm the accuracy of petitioner's accountant's analysis of the candy sales category. It is noted that exactness is not required when it is petitioners own failure to maintain proper records which prevents exactness in the determination of sales tax liability (Matter of Markowitz v. State Tax Commission, 54 AD2d 1023, affd 44 NY2d 684).

H. That the Audit Division properly deemed the additional sales reflected on, respectively, the personal income tax returns and the Federal corporation income tax returns as sales subject to sales and use tax since no other explanation has been provided. However, it is reasonable to assume that these additional sales were sales through vending machines. Accordingly, the Audit Division is directed to divide the additional sales in proportion to petitioners' sales of their various categories in order to ascertain petitioners' sales tax liability. It is noted that the sales tax should be eliminated from those categories to avoid imposing sales tax **on** the sales tax.

I. That Tax Law § 1131(1) provides that a vendor of tangible personal property is considered a person required to collect tax. Further, Tax Law § 1133(a) imposes personal liability for the collection of tax on every person

required to collect tax. The Audit Division is not required to initially seek collection of unpaid sales tax from the purchasers of tangible personal property.

J. That certain transactions are excluded from the definition of a retail sale by Tax Law §1101(b)(4)(iii). Among these exclusions are transfers of tangible personal property to a corporation upon its organization in return for solely the issuance of stock (22 NYCRR 526.6[d][5]). However, "[t]ransfers made to a dormant corporation, which **is** being activated, are not eligible for the exclusion." (20 NYCRR 526.6[d][5][iii].) Since the transfer at issue herein was made to a dormant corporation which was being activated, the Audit Division properly concluded that the transaction was subject to sales tax.

K. That the Audit Division properly declined to reduce the value of the assets transferred by the liabilities outstanding on these assets. Sales tax is computed upon the receipts of a retail sale (Tax Law §1105[a]). The term receipt is defined as "[t]he amount of the sale price of any property... valued in money, whether received in money or otherwise" (Tax Law § 1101[b][3]). The assumption of the liabilities on the assets constituted a form of consideration for the transfer of the assets and therefore must be included in the amount of the sales price of the property. Therefore, the assumption of the liabilities constituted a receipt subject to tax.

L. That Tax Law §1145(a)(1) provides that "[a]ny person failing to file a return or to pay or pay over any tax to the tax commission within the time required by this article shall be subject to a penalty". However, if the taxpayer establishes that the failure to comply with the law was due to reasonable cause and not willful neglect, said penalties and interest in excess of the minimum prescribed under Tax Law §1145 will be remitted. (Tax Law §

1145[a], 20 NYCRR 526.1[a]). In view of the substantial discrepancy bet

the sales which should have been reported as subject to sales tax and those which petitioner reported, it is concluded that petitioners did not act with reasonable cause. This conclusion is supported by the fact that Mr. Togni was aware that sales of cigarettes, soda, heated **foods** and prepared foods were subject to sales tax. Nevertheless, he continued to use the percentages which were provided by an accountant.

M. That since the corporation amended its reporting method to bring it in closer conformity with the requirements of Articles 28 and 29 of the Tax Law for the periods ending August 31, 1982 and November 30, 1982, the penalty and interest in excess of the minimum is cancelled for these periods.

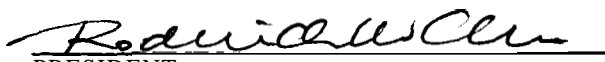
N. That the notices of determination and demands for payment of sales and use taxes due are to be modified in accordance with Finding of Fact "43".

O. That the petition of James E. Togni, d/b/a Tyrolean Automatic Vending, Tyrolean Vending Ltd., and James Togni, Sr. and Rosery Togni, as officers of Tyrolean Vending, Ltd., is granted only to the extent of Conclusions of Law "B", "H", "M" and "N". That the Audit Division is directed to modify the notices of determination and demands for payment of sales and use taxes due accordingly; and that, except as so granted, the petitions are denied.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 16 1987


PRESIDENT


COMMISSIONER


COMMISSIONER