

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
PETER REGALO AND CARLO MONTORO (DECEASED) :  
d/b/a C & P AUTO REPAIRS :  
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 December 1, 1978 :  
through May 31, 1981. :

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In the Matter of the Petition :  
of :  
PETER REGALO, PARTNER :  
C & P AUTO REPAIRS :  
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 December 1, 1978 :  
through May 31, 1981. :

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DECISION

In the Matter of the Petition :  
of :  
ESTATE OF CARLO MONTORO :  
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 December 1, 1978 :  
through May 31, 1981. :

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Petitioners, Peter Regalo and Carlo Montoro (Deceased) d/b/a C & P Auto Repairs and Peter Regalo, Partner, C & P Auto Repairs, 475 Main Street, Malcolm Towers, Fort Lee, New Jersey 07024, and Estate of Carlo Montoro, c/o Anna Montoro, 33 Van Wardt Place, Tappan, New York 10983, 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 December 1, 1978 through May 31, 1981 (File Nos. 42544, 42545 and 42546).

A hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 6, 1985 at 1:15 P.M. Petitioners appeared by Milton S. Kestenbaum, P.A. and Theodore Mate, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

#### ISSUE

Whether the Audit Division properly estimated the tax liability of petitioners on the basis of external indices.

#### FINDINGS OF FACT

1. Petitioners, Peter Regalo and Carlo Montoro (deceased), were partners in the operation of C & P Auto Repairs, an automobile repair business located at 279 East 148th Street, Bronx, New York. The business was discontinued on or about May 14, 1981.
2. On December 20, 1982, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Peter Regalo and Carlo Montoro d/b/a C & P Auto Repairs covering the period December 1, 1978 through May 31, 1981 for taxes due of \$4,636.16, plus interest of \$1,338.02, for a total of \$5,974.18. On the same date, notices were also issued to the individual partners for the same amounts.
3. At the hearing, counsel for the Audit Division conceded that the notices were not timely issued with respect to periods ending February 28, 1979, May 31, 1979 and August 31, 1979.

4. Petitioners produced the following books and records for audit: sales tax returns, federal and state income tax returns, cancelled checks and bank statements. Petitioners did not provide any sales invoices, cash receipts journal or any other records that could be used to verify the taxable sales reported. Because of the incomplete books and records, the Audit Division estimated that petitioners' sales were \$35,000.00 per year. The auditor based his estimate on prior audit experience with similar businesses and considered the size of the premises, neighborhood and the personal income tax returns of the partners. The total estimated taxable sales for the audit period were \$87,500.00 as compared to reported taxable sales of \$29,548.00, leaving additional taxable sales of \$57,952.00 and tax due thereon of \$4,636.16.

5. Petitioners sold the real property in which they operated the business for \$20,000.00. Peter Regalo worked four or five hours a day for five days a week. Carlo Montoro (now deceased) was seriously ill during the audit period and only worked a few hours a day. There were no other employees. The business was located in a low income, deteriorated neighborhood in the South Bronx. Petitioners took the position that, due to the foregoing factors, the sales estimated by the Audit Division were excessive.

#### CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides that "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" and authorizes, where necessary, an estimate of tax due "on the basis of external indices".

B. That section 1135 of the Tax Law provides that every person required to collect tax shall keep records of every sale and all amounts paid, charged or

due thereon and of the tax payable thereon. Such records shall include a true copy of each sales slip, invoice, receipt or statement.

C. That petitioners maintained inadequate and incomplete books and records. When books and records are incomplete and unreliable, the use of external indices is permissible (Matter of Korba v. New York State Tax Commission, 84 A.D.2d 655). Accordingly, the Audit Division properly determined petitioners' tax liability pursuant to the provisions of section 1138(a) of the Tax Law.

D. That the estimate procedures adopted by the Audit Division were reasonable under the circumstances and petitioners failed to sustain their burden to demonstrate by clear and convincing evidence that the method of audit or the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. State Tax Commission, 85 A.D.2d 858).

E. That, in accordance with Finding of Fact "3", the notices issued on December 20, 1982 were issued beyond the statute of limitations provided in section 1147(b) of the Tax Law for the periods indicated. Therefore, the taxes assessed for said periods amounting to \$1,206.88 are cancelled.

F. That the petitions of Peter Regalo and Carlo Montoro (deceased) d/b/a C & P Auto Repairs, and Peter Regalo as partner of C & P Auto Repairs, and Estate of Carlo Montoro are granted to the extent indicated in Conclusion of Law "E"; the Audit Division is hereby directed to modify the notices of determination and demand for payment of sales and use taxes due issued December 20, 1982; and that, except as so granted, the petitions are in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

NOV 07 1985

R. Dennis W. Allen  
PRESIDENT

Francis R. Koenig  
COMMISSIONER

Mark J. J...  
COMMISSIONER