

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

THOMAS CLEMENTE
OFFICER OF TARA ELECTRONICS, INC.

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 December 1, 1979
through November 30, 1982.

Petitioner, Thomas Clemente, Officer of Tara Electronics, Inc. 54-19 68th Street, Maspeth, New York 11378, 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 December 1, 1979 through November 30, 1982 (File No. 43099).

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 November 22, 1985 at 9:00 A.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly estimated the sales of Tara Electronics, Inc. on the basis of external indices.

11. Whether the Audit Division properly considered all such sales as taxable retail sales.

111. Whether Thomas Clemente is personally liable for the sales taxes determined due from Tara Electronics, Inc.

FINDINGS OF FACT

1. Tara Electronics, Inc. ("Tara") was engaged in the sale of appliances, televisions and electronic products. The store was located at 69-06 Grand Avenue,

Maspeth, New York until June, 1982 at which time the business moved to 70-01 Grand Avenue. Petitioner, Thomas Clemente, was the president and sole stockholder of the corporation.

2. On March 13, 1983, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period December 1, 1979 through November 30, 1982 for taxes due of \$250,021.18, plus penalty and interest of \$94,834.08, for a total of \$344,855.26. Petitioner was held personally liable as an officer of Tara for sales taxes the Audit Division determined to be due on an audit of Tara's books and records.

3. Petitioner, on behalf of Tara, executed consents extending the period of limitation for assessment of sales and use taxes for the period June 1, 1979 through May 31, 1982 to March 20, 1983.

4. The only records produced by Tara for audit were incomplete sales invoices and cancelled checks. The Audit Division examined sales invoices for March, 1981 which amounted to \$56,817.52. The customer names on the invoices were both individuals and businesses and no sales tax was collected. Some resale certificates were on file, however, they did not cover any of the sales for March, 1981. The Audit Division concluded that the sales invoices were useless for audit purposes since they could not be verified with any other sales records. Because of the inadequate sales records, the Audit Division estimated sales on the basis of purchases. Purchases from the check disbursements for the period September 1, 1980 through January 31, 1981 were \$221,434.00, not including purchases from Savemart, Inc. The Audit Division had contacted Savemart, Inc. to obtain the amount of purchases made by petitioner in order to verify the accuracy of the check disbursements. Savemart's records showed purchases of \$577,138.00 for the period December 1, 1980 through February 28,

1982. The Audit Division found two purchases that were not included in Tara's records and therefore used the purchases provided by Savemart, Inc. in estimating sales. Purchases for the period March 1, 1982 through October 30, 1982 were estimated based on averages from the above purchases. Total purchases for the period December 1, 1980 through October 30, 1982 amounted to \$1,906,034.00. An estimated markup of 30 percent was applied to said purchases to arrive at sales of \$2,477,844.00. The three month average of theses sales, \$323,197.00, was used as a basis to estimate sales for the period December 1, 1979 through September 30, 1980. Total sales for the audit period amounted to \$3,770,632.00. The Audit Division considered all such sales taxable because of Tara's inadequate recordkeeping.

5. Tara was located in a business district with various types of other stores. The store was accessible from the street and had a large display of merchandise. The store located at 69-06 Grand Avenue had a sign in the window stating "wholesale and retail".

6. Petitioner described Tara's business operation as a "jobber", that is, for a service fee it picked up merchandise from the warehouse of a major appliance company and shipped such merchandise directly to retail stores. Another type of sale was referred to as "consumer delivery". A typical transaction was that a retail store called Tara and requested that it deliver an item to a consumer. The retail store advised Tara of the amount of money to collect from the customer upon delivery. Tara retained the amount it charged the retail store for the merchandise. The balance, including any sales tax the retail store charged the customer, was turned over to the retail store. Tara prepared an invoice showing the sale to the retail store along with the name of the customer. Petitioner alleged that Tara never made any retail sales, however, the records

to establish the wholesale nature of the business were lost when the store changed locations.

7. Petitioner submitted numerous resale certificates issued to Tara on various dates throughout the audit period, however, no evidence with respect to the amount of sales made to any of the vendors was produced.

8. The audit workpapers include a partial listing of Tara's sales for March 1981 amounting to \$38,958.00. A comparison of the workpapers with exemption certificates offered at the hearing indicates that \$11,290.00, or 29 percent of such sales, were retail sales.

9. Petitioner was the sole person responsible for the management and financial affairs of Tara.

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" including purchases. When books and records are incomplete or unreliable the use of external indices is permissible (Matter of Korba v. N.Y.S. Tax Commission, 84 A.D.2d **655**).

B. That Tara provided incomplete and inadequate books and records for audit. Accordingly, the Audit Division properly determined sales pursuant to the provisions of section 1138(a) of the Tax Law.

C. That section 1132(c) of the Tax Law specifically provides that "it shall be presumed that all receipts for property or services are subject to tax until the contrary is established and the burden of proving that any receipt... is not taxable shall be upon the person required to collect tax or the customer.

Unless (1) a vendor shall have taken from the purchaser a certificate in such form as the tax commission may prescribe, signed by the purchaser and setting forth his name and address..., the number of his registration certificate... to the effect that the property or service was purchased for resale...".

D. That based on petitioner's credible testimony regarding the nature of Tara's business (Finding of Fact "6") and the comparison of sales to exemption certificates (Finding of Fact "8"), 71 percent of Tara's sales are considered sales for resale. This allowance provides a more accurate reflection of Tara's liability than the assessment which deemed all sales taxable. Tara failed to establish, however, that the remaining 29 percent of sales were nontaxable.


E. That Thomas Clemente was a person required to collect tax within the meaning and intent of section 1131(1) of the Tax Law and therefore, is personally liable for the taxes due from Tara in accordance with section 1133(a) of the Tax Law.

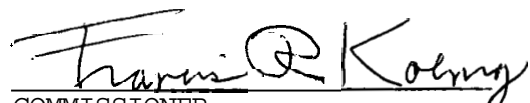
F. That the petition of Thomas Clemente is granted to the extent indicated in Conclusion ~~of~~ Law "D"; the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 18, 1983; and that, except as so granted, the petition is in all other respects denied.

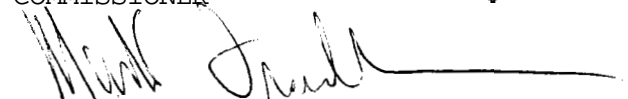
DATED: Albany, New York

STATE TAX COMMISSION

MAR 20 1987


PRESIDENT


COMMISSIONER


COMMISSIONER