

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
JOHN IVELI, OFFICER OF	:	DECISION
GOURMART AMSTERDAM 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 Periods Ended	:	
February 29, 1980 through May 31, 1982.	:	
	:	

Petitioner, John Iveli, officer of Gourmart Amsterdam Corp., 11 Skyland Drive, Spring Valley, New York 10977, 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 periods ended February 28, 1980 through May 31, 1982 (File No. 43375).

A 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 June 7, 1985 at 9:00 A.M. Petitioner appeared by Finkel, Goldstein & Berzow (Michael D. Brofman, Esq. of counsel). The Audit Division appeared by John P. Dugan, Esq. (Mark F. Volk, Esq. of counsel).

#### ISSUE

Whether the Audit Division properly determined additional sales taxes due from Gourmart Amsterdam Corp. for the periods ended February 29, 1980 through May 31, 1982.

#### FINDINGS OF FACT

1. Petitioner, John Iveli, was the president of Gourmart Amsterdam Corp. ("the corporation"), a New York corporation, which operated a supermarket at 1440 Amsterdam Avenue, New York, New York. Mr. Iveli also managed the business.

Prior to the period at issue, the corporation filed New York State and local sales and use tax returns reflecting taxes due but enclosed no remittance therewith. The returns showed taxes due in the following amounts:

<u>Period Ended</u>	<u>Date Filed</u>	<u>Tax</u>
5/31/77	7/27/77	\$6,331.00
11/30/77	3/13/78	\$5,638.00
2/28/78	8/16/78	\$5,873.00
5/31/78	7/14/78	\$5,957.00
8/31/78	8/8/79	\$5,281.00
11/30/78	8/8/79	\$5,997.00
2/28/79	8/8/79	\$6,215.00
5/31/79	8/8/79	\$6,047.00
8/31/79	1/10/80	\$5,869.00

No explanation was given as to why the return for the period ended 8/31/77 was not offered into evidence or if a return was not filed for said period.

2. On February 11, 1983 the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Mr. Iveli as a shareholder, officer and director of the corporation for the period ended February 29, 1980 through May 31, 1982, asserting taxes, penalty and interest due in the amount of \$83,688.43, scheduled as follows:

<u>Period Ended</u>	<u>Tax Due</u>	<u>Penalty Due</u>	<u>Interest Due</u>
2/29/80	\$7,914.10	\$553.98	\$239.37
5/31/80	7,914.10	553.98	179.53
8/31/80	3,968.00	992.00	139.58
11/30/80	7,914.10	633.12	265.39
2/28/81	7,914.10	553.98	218.55
5/31/81	7,914.10	633.12	299.21
8/31/81	7,914.10	553.98	208.15
11/30/81	7,914.10	553.98	202.94
2/28/82	7,914.10	553.98	226.36
5/31/82	7,914.10	633.12	299.21
	<u>\$75,194.90</u>	<u>\$6,215.24</u>	<u>\$2,278.29</u>

Mr. Iveli does not contest the fact that he was the person responsible for collecting and paying over sales taxes on behalf of the corporation.

3. The assessment was issued because the corporation failed to file sales and use tax returns for the period indicated thereon (except the period ended August 31, 1980) and also because, as affirmed in the Audit Division answer to petitioner's perfected petition, "according to documentation of the New York State Division of Alcoholic Beverage Control the Gourmart Amsterdam Corp. was conducting business as of July 14, 1982. At the hearing held herein, the Audit Division presented no evidence to support this affirmation.

4. The Audit Division determined the taxes due for the period ended February 29 and May 31, 1980, and November 30, 1980 through May 31, 1982 by taking the largest tax reported by the corporation (May 31, 1977 - \$6,331.00) and increasing this amount by 25% (\$1,583.10) assuming the corporation's sales would have normally increased by the amount over the period ( $\$6,331.00 + \$1,538.10 = \$7,914.10$ ). The tax due for the period ended August 31, 1980 is the amount shown as due on the corporation's return filed for said period. The petitioner does not contest the tax due for this later period.

5. In or about August, 1980 the corporation was experiencing financial difficulty and as a result thereof was unable to meet its obligations. Consequently, four of the corporation's creditors filed an involuntary creditor's petition under Chapter 11 with the United States Bankruptcy Court for the Southern District of New York. At the end of August, 1980, the corporation, in default of obligations owing to White Rose Food Corp. and the Bilrite Fixture Co., Inc., surrendered to said corporations peaceful possession of the collateral covered by security agreements, including all personalty, chattels, furniture, fixtures, machinery and equipment and inventory in the premises and leasehold therefor. The corporation did not conduct any business or activities after this time.

6. The corporation's books and records were maintained on the business premises. However, when the petitioner attempted to retrieve them, he was advised by the new tenant that they were discarded.

7. During 1980, the corporation's business was substantially the same as it was during 1978 and 1979.

#### CONCLUSIONS OF LAW

A. That section 1138(a)(1) of the Tax Law provides, in pertinent part, that "(i)f a return required by [Article 28] is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined... 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... number of employees or other factors." A prior sales and use tax return of a taxpayer is an external index. However, in this case, the petitioner has shown that the corporation's business was substantially the same in 1980 as it was in 1978 and 1979. Petitioner has also shown that the corporation ceased operations at the end of August, 1980.

B. That the taxes due for the periods ended February 29, 1980 and May 31, 1980 are hereby reduced to \$6,215.00 per quarter which is the largest amount shown due on the corporation's sales and use tax returns during 1978 and 1979. The taxes due for the period ended August 31, 1980 remain at \$3,968.00 since this is the amount the corporation reported on its sales and use tax return and was not contested by petitioner. The taxes due for the periods ended November 30, 1980 through May 31, 1982 are hereby cancelled since the corporation was not in operation during this period.

C. That the petition of John Iveli, officer of Gourmart Amsterdam Corp., is granted to the extent indicated in Conclusion of Law "B", supra; the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued February 11, 1983; and that except as so granted, the petition is denied.

DATED: Albany, New York

NOV 07 1985

STATE TAX COMMISSION

*Richard W. Cline*  
PRESIDENT

*Francis R. Koenig*  
COMMISSIONER

*Mark J. Fiedler*  
COMMISSIONER