

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ROSEDALE GARAGE, INC.	:	
and	:	DECISION
ANTHONY STRATI and AMELIA STRATI	:	
AS OFFICERS	:	
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 June 1, 1979	:	
through August 31, 1982.	:	

Petitioners, Rosedale Garage, Inc. and Anthony Strati and Amelia Strati as officers, 92 Preston Avenue, White Plains, New York 10605, 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 June 1, 1979 through August 31, 1982 (File Nos. 45736, 45737 and 45738).

A hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 9, 1985, at 9:00 A.M. Petitioners appeared by Don J. Guarnieri, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUE

Whether the Audit Division properly determined petitioners' sales tax liability.

FINDINGS OF FACT

1. On May 11, 1983, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner Rosedale Garage, Inc. ("Rosedale") in the amount of

\$23,462.08 plus interest of \$5,844.29 for a total due of \$29,306.37 for the period June 1, 1979 through August 31, 1982. On the same date, the Audit Division issued identical notices to petitioners Anthony Strati and Amelia Strati, as officers of Rosedale.

2. Petitioners had executed consents extending the period of limitation for assessment of sales and use taxes for the period June 1, 1979 through February 29, 1980 to June 20, 1983.

3. Petitioners operated a gas station which sold tires, batteries and accessories and provided automobile repair services in addition to selling gasoline. Upon audit, the auditor found a discrepancy of \$174,435.83 between Federal income tax returns and sales reported on sales tax returns and a discrepancy of \$158,868.07 between petitioners' cash receipts journal and sales reported on sales tax return. Since petitioners' records were inaccurate and inadequate, the auditor performed a purchase markup test to determine petitioners' sales tax due. The auditor determined individual markups on gasoline, soda, oil and tires, batteries and accessories (for simplicity hereinafter referred to as TBA). Individual markups for each item in the TBA category were also determined. The auditor applied the markups to Rosedale's purchases for the entire three year audit period resulting in audited taxable sales of \$2,239,029.89. The auditor subtracted reported sales from the audited sales to arrive at additional taxable sales of \$246,839.89.

4. Petitioners agreed with the results of the audit with the exception of the TBA determination and the fact that no credit was given for tax exempt sales. With respect to the exempt sales, petitioners had no exemption certificates or other proof of exempt sales, however, they thought some type of allocation should be given for such sales. The TBA markup yielded TBA sales for the audit period of \$174,654.48. Rosedale's accountant did his own independent audit

using the Audit Division's markup percentages and determined that TBA sales for the audit period totalled \$125,305.00. However, petitioners' accountant's audit method involved applying the Audit Division's markup percentages to one year's purchases and multiplying the result by three as opposed to the Audit Division's use of all of Rosedale's purchases for the entire three year period.

CONCLUSIONS OF LAW

A. That section 1132(c) of the Tax Law provides in part, that sales will be deemed taxable at retail unless the vendor takes from the purchaser a proper exemption certificate. Although this presumption may be overcome by sufficient evidence, see Matter of Ruemil Contract Interiors, Inc., State Tax Commission, September 9, 1983, merely stating that tax exempt sales occurred and that a percentage of sales should be allocated as exempt is not sufficient evidence to overcome the presumption of taxability. In the absence of any evidence to the contrary, all sales must be deemed to be subject to tax.

B. That a "...vendor is obligated to maintain records of his sales for audit purposes (Tax Law, §1135), and the State, when conducting an audit, must determine the amount of tax due 'from such information as may be available,' but 'if necessary, the tax may be estimated on the basis of external indices' (Tax Law, §1138, subd. [a])." Korba v. New York State Tax Commission, 84 A.D.2d 655. Exactness in determining the amount of sales tax liability is not required where it is the petitioner's own failure to maintain proper records which necessitates the use of external indices. Markowitz v. State Tax Commission, 54 A.D.2d 1023 aff'd 44 N.Y.2d 684.

C. That the audit performed by Rosedale's accountant was not sufficient to refute the findings of the Audit Division. Petitioners utilized only one year's purchases to determine sales for a three year period whereas the Audit

Division utilized the total purchases for the three year audit period to determine sales and therefore the Audit Division's method was more representative of sales for the audit period and thus more accurate.

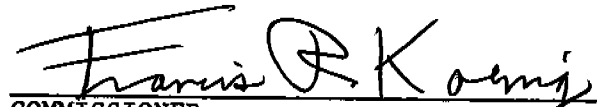
D. That the petition of Rosedale Garage, Inc. and Anthony Strati and Amelia Strati, as officers, is denied and the notices of determination and demand for payment of sales and use taxes due issued May 11, 1983 are sustained.

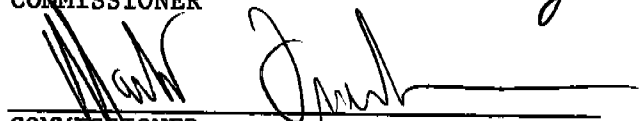
DATED: Albany, New York

STATE TAX COMMISSION

DEC 13 1985


PRESIDENT


COMMISSIONER


COMMISSIONER