

STATE OF NEW YORK

STATE **TAX** COMMISSION

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In the Matter of the Petition

of

LOUIS ILLIANO,  
OFFICER OF ICAM FOOD CORP.

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 March 1, 1980  
through July 31, 1983.

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Petitioner, Louis Illiano, Officer of ICAM Food Corp., 2421 East 21st Street, Brooklyn, New York 11229, 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 **March** 1, 1980 through July 31, 1983 (File No. 55590).

A hearing was held before Frank Landers, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on **May** 1, 1987 at 9:00 A.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

#### ISSUE

Whether the Audit Division, in the absence **of** books and records, properly determined the additional sales tax liability of ICAM Food Corp. for the period **March** 1, 1980 through July 31, 1983, based on the results of an observation test.

#### FINDINGS OF FACT

1. During the period at issue, ICAM Food Corp. ("ICAM") operated a luncheonette on the corner of Oxford Street and Oriental Boulevard in the Manhattan Beach section of Brooklyn (opposite Kingsborough Community College). The business was open 7:00 A.M. to **9:00** P.M., Monday through Thursday, 7:00

A.M. to 4:00 P.M. on Fridays, 8:30 A.M. to 3:30 P.M. on Saturdays and was closed on Sundays. ICAM's customers were for the most part students at the college. ICAM sold newspapers, beer, ice cream, cigarettes, candy and hamburgers. Breakfast was also sold in the mornings. The business was closed in September 1983 when ICAM was evicted by a new landlord. At all times relevant, petitioner, Louis Illiano, was the president of ICAM.

2. On June 6, 1984, the Audit Division, as the result of a field audit, issued to ICAM Food Corp. a Notice of Determination and Demand for Payment of Sales and Use Taxes Due assessing sales tax of \$54,273.58, plus penalty of \$12,406.56 and interest of \$16,931.92, for a total amount due of \$83,612.06 for the period March 1, 1980 through July 31, 1983. The notice contained the following explanation:

"Since you have not submitted your records for audit as required by Section 1142 of the Tax Law, the following taxes are determined to be due in accordance with the Tax Law, and is based upon available records and information."

On the same date, the Audit Division issued to petitioner, Louis Illiano, a similar notice with the following explanation:

"You are personally liable as officer of ICAM Food Corp. under Sections 1131(1) and 1133 of the Tax Law for the following taxes determined to be due in accordance with Section 1138(a) of the Tax Law."

3. The above notices were timely issued pursuant to consents executed by Louis Illiano on behalf of ICAM which extended the statute of limitations for issuing an assessment for sales and use taxes for the period March 1, 1980 through February 28, 1981 to June 20, 1984.

4. Petitioner discarded the guest checks and cash register tapes and did not maintain a general ledger. The auditor made four appointments to review whatever books and records ICAM did maintain. All the appointments were

cancelled by ICAM's accountant. Consequently, he decided to use external indices, namely, an observation test, to determine ICAM's sales tax liability.

5. On May 17, 1983, two auditors from the Brooklyn District Office observed ICAM's business from 8:00 A.M. to 4:00 P.M. From the information obtained during the observation, the auditors extrapolated taxable sales per week of \$4,318.42 based on the business hours indicated in Finding of Fact "1", above. This amount was projected to compute taxable sales per quarter of \$56,139.00 and for the audit period of \$767,233.00. ICAM was given credit for taxable sales reported of \$101,073.00, which resulted in additional taxable sales of \$666,160.00 and additional sales tax due of \$54,273.58.

6. About the time of the observation test, Oriental Boulevard was under improvement, specifically, by installation of new pavement, sewers and sidewalks. Petitioner contended that on the date of the observation test, the corporation's sales, which usually averaged between \$150.00 and \$200.00 per day, were increased by \$500.00 for the following reasons, pedestrian traffic was routed so that it passed the front of the store; an estimated 65 construction workers utilized the store; and the 4 or 5 truck vendors who competed with ICAM for the students' business were not on the street that day.

7. Petitioner further maintained that business decreased during the summer semester when the college's enrollment dropped from 5,000 to approximately 1,400; and an even sharper decline occurred during July and August when the college was closed. Petitioner also claimed that he closed the business anywhere between two to four weeks during the summer.

8. Other than his testimony, petitioner offered no evidence to support his contentions.

CONCLUSIONS OF LAW

A. That in view of petitioner's inability and/or failure to produce complete and adequate books and records for audit, the Audit Division was justified in employing external indices, in this instance an observation test, to determine ICAM's sales tax liability. (Tax Law §§ 1135 and 1138).


B. That under the circumstances herein, the audit method selected was reasonable. When a taxpayer's recordkeeping is faulty, exactness is not required of the examiner's audit (Matter of Meyer v. State Tax Commission, 61 AD2d 223, 228). Petitioner failed to sustain the burden of showing that the method of audit or the amount of tax assessed was erroneous. In this particular case, absent documentary evidence, we can only find petitioner's testimony insufficient to justify any adjustment to the assessment.

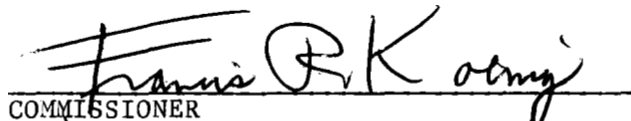
C. That the petition of Louis Illiano is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 6, 1984 is sustained.

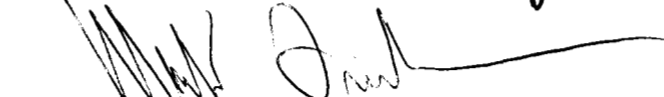
DATED: Albany, New York

STATE TAX COMMISSION

AUG 27 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER