

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions

of

ANGELA'S RESTAURANT - SYZZI FOOD CORPORATION,
AND ANGELA CIPRIANO, AS OFFICER

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 September 1, 1981 :
through August 31, 1984.

Petitioners, Angela's Restaurant - Syzzi Food Corporation and Angela Cipriano, as officer, 57 Lyons Place, Staten Island, New York, 10314, 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 September 1, 1981 through August 31, 1984 (File Nos. 59196 and 59197).

A hearing was held before Jean Corigliano, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 7, 1986 at 9:30 A.M., with additional evidence to be submitted by September 5, 1986. Petitioners appeared by Howard Bernstein, Esq. The Audit Division appeared by John P. Dugan, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUE

Whether the Audit Division correctly estimated petitioners' taxable sales for the period under consideration.

FINDINGS OF FACT

1. On December 20, 1984, the Audit Division issued against petitioner Angela's Restaurant - Syzzi Food Corporation ("Syzzi's"), a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period September 1, 1981 through August 31, 1984, asserting a tax due of \$32,706.00 plus penalty

and interest. On the same date, an identical notice was issued to Angela Cipriano, as officer of the corporation.

2. Syzzi's was selected for audit when a business files match revealed a wide discrepancy between taxable sales reported on its 1982 State sales tax returns and gross sales reported on its 1982 Federal income tax return.

3. Syzzi's owned and operated a restaurant which was out of business when the audit commenced in September 1984. Several telephone calls were made to the home of Angela Cipriano to arrange for an audit of the restaurant's books and records. On at least two occasions, the auditor spoke with Mrs. Cipriano who agreed to have her husband return the auditor's calls. However, the auditor never received a positive response to his requests to schedule an audit appointment.

4. Because no other information was made available, the auditor estimated petitioners' tax liability on the basis of Syzzi's 1982 Federal income tax return, where it reported gross sales of \$140,000.00 for the fiscal year ended December 31, 1982. The auditor determined that, because of the nature of the business, 100 percent of Syzzi's gross sales were taxable. He estimated taxable sales per quarter of \$35,000.00 and total taxable sales for the audit period of \$420,000.00 with a tax due on that amount of \$34,650.00. For the same period, Syzzi's reported taxable sales of \$23,468.00 and remitted tax due on that amount of \$1,944.00. After giving Syzzi credit for tax paid, petitioner's total tax liability was determined to be \$32,706.00.

5. Statements of proposed audit adjustment were sent by certified mail to Syzzi's and to Angela Cipriano at her residential address. They were returned to the Audit Division marked "unclaimed."

6. An accountant, hired by petitioners in connection with the hearing, estimated Syzzi's tax liability, using an analysis of bank deposits as a source from which he determined taxable sales. He presented worksheets showing deposits made to two bank accounts in Syzzi's name. Total deposits were segregated into four categories: capital contributions, loans, taxable sales and rental income. On the basis of these deposits, the accountant calculated total taxable sales during the audit period of \$135,183.00, capital contributions of \$26,672.68 and rental income of \$10,600.00. Two bank statements offered to verify the bank deposits could not be reconciled to the accountant's worksheets.

7. Petitioners asserted that they intentionally overstated gross receipts on Syzzi's Federal income tax return in order to induce the Small Business Administration ("SBA") to provide loans to the business.

8. On December 4, 1979, the SBA made a loan to Syzzi's in the amount of \$105,000.00. The timetable for disbursement of the loan is not revealed by the record. Syzzi's defaulted on the loan prior to August 26, 1982.

9. The monies identified in the accountant's workpapers as capital contributions were actually loans made by family members to Angela Cipriano to be used to maintain Angela's Restaurant.

10. Syzzi's terminated its business operations on June 21, 1984.

CONCLUSIONS OF CAW

A. That section 1138(a)(1) of the Tax Caw 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. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, ...scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors."

B. That in light of the petitioners' failure to respond to the Audit Division's repeated requests for an audit appointment or to make available any

books and records, the Audit Division was warranted in estimating their tax liability on the basis of Syzzi's 1982 Federal income tax return.

C. That exactness **is** not required when the taxpayer's **own** failure to comply with the Tax Law renders it impossible (Matter of Meyer v. State Tax Commission, 61 AD2d 223). Furthermore, where the method of audit **is** reasonably calculated to reflect the taxes due, the burden rests on the taxpayer to demonstrate that the method of audit or the amount of tax assessed **is** erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. Tully, 84 AD2d 858). The testimony of Syzzi's accountant, standing alone, is inadequate to establish that the summary of bank deposits accurately depicted Syzzi's taxable sales since records of bank deposits do not necessarily portray true sales. Consequently, both the summary and the fact that some of the deposits represented loans from family members were useless to show that the Audit Division's estimate of petitioner's tax liability was in error.


D. That Syzzi's terminated its business operations on June 21, 1984. Petitioners' tax liability **will** be modified accordingly.

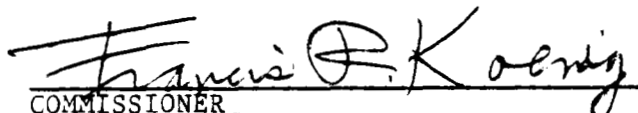
E. That the petitions of Angela's Restaurant - Syzzi Food Corporation, and Angela Cipriano, as officer, are granted to the extent indicated in Conclusion of Law "D"; that the notices of determination and demands for payment of sales and use taxes due issued on December 20, 1986 shall be modified accordingly; and that in all other respects, the petitions are denied.

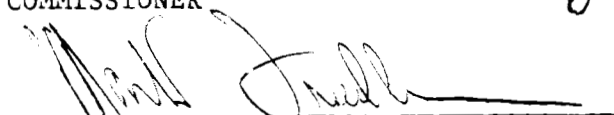
DATED: Albany, New York

STATE TAX COMMISSION

FEB 13 1987


PRESIDENT


COMMISSIONER


COMMISSIONER