STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

ANNIBALE CAPPELLERI 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, 1982
through November 30, 1984.

Petitioner, Annibale Cappelleri, 1742-72nd Street, Brooklyn, New York 11204, 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, 1982 through November 30, 1984 (File No. 61233).

A hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 4, 1987 at 1:15 P.M. Petitioner appeared by Nathan S. Brody, CPA. The Audit Division appeared by John P. Dugan, Esq. (Herbert Kamrass, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined that additional sales and use taxes were due for the period at issue.

II. Whether the audit method used was proper.

FINDINGS OF FACT

1. On March 20, 1985, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Annibale Cappalleri (hereinafter "petitioner") asserting additional sales and use taxes of $7,416.57 for the period March 1, 1982 through November 30, 1984, plus penalty of $1,432.67

and interest of $1,542.47, for a total due of $10,391.71. The aforesaid assessment was explained on said notice as follows:

> "The following taxes have been determined to be due in accordance with Section 1138 of the Tax Law, and are based on an audit of your records."

2. During the period at issue petitioner operated a retail ice cream truck. His reported sales consisted of both taxable and nontaxable items.

3. Petitioner failed to maintain a record of every sale. He further failed to maintain a record of his taxable and nontaxable sales. Petitioner sold such taxable items as soft ice cream, sodas, ice cream sodas and floats. His nontaxable sales were comprised of pre-packaged ice cream and pre-packaged ices.

4. Petitioner's gross sales of $142,909.00, as reported on his Federal income tax returns, reconciled with his sales reported in his books and records. However, on his sales tax returns for the periods at issue he reported gross sales of $53,747.00 and taxable sales of $11,163.00. Said taxable sales constituted approximately 20% of the gross sales reported on the returns.

5. Since petitioner's books and records were found to be inadequate, an indirect audit was performed. Said audit consisted of testing petitioner's 1984 purchases per books, which resulted in a taxable percentage of 65.185%. Said percentage was then applied to the reported sales per books of $142,909.00 to arrive at taxable sales per audit of $93,155.00. The taxable sales were multiplied by the applicable tax rate of 8.25%, yielding a tax liability of $7,685.30. The tax previously paid of $989.81 was then subtracted to arrive at net sales tax due of $6,695.49.

6. As a result of said test on purchases it was determined that $2,913.58 of the purchases were for items subject to use tax such as straws, spoons,

napkins and truck rental fees. Said amount was multiplied by three to arrive at purchases subject to use tax for the audit period of $8,740.74. Multiplying such amount by the applicable tax rate of 8.25% yielded use tax due for the audit period **of** $721.08.

7. The total tax due per audit ***is*** $7,416.57 (sales tax of $6,695.49 plus use tax of $721.08).

8. Petitioner's representative alleged that the full amount paid as a truck rental fee is not taxable since the amount charged for rent was comprised of several items. He argued that only 2.9% of the rental figure actually constituted rent. With respect to this issue, petitioner submitted a letter from Mister Softee Eastern New York Div., Inc. dated April 20, 1987, which states that:

> "You have asked me for an explanation of how we compute the sales tax on the rent that we show charged on our dealer's invoices of items purchased from us.
>
> The rent charged consists of electricity consumed, garbage collection, water consumed, outside truck washing and storage. Many years ago we were audited by the Sales Tax Department and a final ruling was made that 2.9% would be the proper charge for that portion of the rent item which was taxable, understanding, of course, that it consisted of the above five items."

9. Petitioner's representative testified that in the aforestated prior audit, no actual percentage was determined to constitute rent. Rather the amount deemed to be rent was roughly 2.9% of the total charges.

10. Petitioner's representative contended that the petitioner made a three month test for each year at issue which resulted in a more equitable result. No evidence was submitted with respect to such test.

CONCLUSIONS **OF LAW**

A. That Tax Law § 1138(a) provides that:

"[I]f 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, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors."

B. That Tax Law § 1135(a) provides that every person required to collect tax shall keep records of every sale and all amounts paid, charged or due thereon and of the tax payable thereon. Such records shall include a true copy of each sales slip, invoice, receipt or statement.

C. That petitioner did not produce books and records sufficient to determine his tax liability. When records are not provided or are incomplete and insufficient, it ***is*** the duty of the Audit Division to select a method of audit reasonably calculated to reflect taxes due (Matter of Urban Liquors, Inc. v. State Tax Commission, 90 AD2d 576). The Audit Division properly determined petitioner's sales on the basis of purchases in accordance with Tax Law § 1138(a).

D. That once a taxpayer's recordkeeping is determined to be faulty, exactness is not required of the examiner's audit (Meyer v. State Tax Commission, 61 AD2d 223).

E. That petitioner has the burden of demonstrating by clear and convincing evidence that the method of audit or amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization v. Tully, 82 AD2d 858, 859). Petitioner's representative's claim that the test allegedly done by petitioner ***is*** more accurate than the test done by the Audit Division is unfounded. Neither the test, nor the results and evidence with respect thereto, was submitted by petitioner. Petitioner has failed to show that the audit method used by the Audit Division or the results derived therefrom were erroneous.

F. That petitioner's argument with respect to rent *is* without merit since the amount claimed to actually represent rent during the years at issue is unsubstantiated. Furthermore, all expenses incurred in making a sale, regardless **of** their taxable status, are not deductible from the receipts (see Penfold **v.** State Tax Commission, **114** AD2d 696). Therefore, the entire amount charged for truck rental is properly subject to tax.

G. That the petition **of** Annibale Cappelleri is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 20, 1985 is sustained together with such additional penalty and interest as may be lawfully owing.

DATED: Albany, New York

AUG 14 1987

STATE TAX COMMISSION

PRESIDENT

COMMISSIONER

COMMISSIONER