

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of
Robert & Mary Carlino :

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of
Personal Income Tax :
under Article 22 of the Tax Law
for the Year 1974. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 23rd day of May, 1980, he served the within notice of Decision by certified mail upon Robert & Mary Carlino, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert & Mary Carlino

Brant Lake, NY 12815
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
23rd day of May, 1980.

Joanne Knapp

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Robert & Mary Carlino :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of :
Personal Income Tax :
under Article 22 of the Tax Law :
for the Year 1974. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 23rd day of May, 1980, he served the within notice of Decision by certified mail upon the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Sirs
Telling & Potter
209 Montcalm St.
Ticonderoga, NY 12883

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
23rd day of May, 1980.

Joanne Knapp

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

May 23, 1980

Robert & Mary Carlino
Brant Lake, NY 12815

Dear Mr. & Mrs. Carlino:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 690 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Telling & Potter
209 Montcalm St.
Ticonderoga, NY 12883
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
CARLINO MARKET	:	DECISION
for Redetermination of a Deficiency or	:	
for Refund of Unincorporated Business	:	
Tax under Article 23 of the Tax Law for	:	
the Year 1974.	:	

In the Matter of the Petition	:	
of	:	
GEORGE CARLINO AND MARGARET CARLINO	:	DECISION
for Redetermination of a Deficiency or	:	
for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the Year	:	
1974.	:	

In the Matter of the Petition	:	
of	:	
ROBERT CARLINO and MARY CARLINO	:	DECISION
for Redetermination of a Deficiency or	:	
for Refund of Personal Income Tax under	:	
Article 22 of the Tax Law for the Year	:	
1974.	:	

Petitioners, Carlino Market, George Carlino and Margaret Carlino and Robert Carlino and Mary Carlino, all located in Brant Lake, New York 12815, filed petitions for redetermination of deficiencies or for refund of personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law for the year 1974 (File Nos. 20558, 20559, and 20560).

On July 24, 1979, petitioners advised the State Tax Commission, in writing, that they desired to waive a small claims hearing and to submit the case to

the State Tax Commission, based on the entire record contained in the file.

ISSUE

Whether additional sales tax paid by Carlino's Market, as the result of a sales tax audit, is a proper partnership deduction.

FINDINGS OF FACT

1. Petitioner, Carlino Market, a retail grocery store, timely filed a New York State Partnership Return for 1974. On said return, petitioner claimed a deduction for a sales tax assessment, paid as the result of a sales tax audit for the periods ending August 31, 1971 through May 31, 1974. The amount claimed was \$15,165.00, which consisted of additional sales tax of \$12,750.00 and interest of \$2,415.00. Schedule U-D was prepared, but no unincorporated business tax was due since the exemption was greater than the net income reported. Petitioners, George and Margaret Carlino and Robert and Mary Carlino, timely filed New York State income tax resident returns for 1974 wherein George Carlino and Robert Carlino each reported their distributive shares from the partnership, Carlino Market, in which they shared profits and losses equally.

2. On March 30, 1977, the Audit Division issued a Statement of Audit Changes to Carlino Market wherein the deduction claimed for sales tax of \$12,750.00 was disallowed as an "improper deduction". Additionally, business income was increased by \$9,174.00, as the result of a cash flow analysis and business expenses were reduced by \$224.00. Accordingly, a Notice of Deficiency was issued against petitioner, Carlino Market, on September 26, 1977, asserting unincorporated business tax of \$827.00, plus interest of \$172.17, for a total due of \$999.17.

On March 30, 1977, statements of audit changes were issued to petitioners, George and Margaret Carlino and Robert and Mary Carlino, wherein their reported

New York incomes were increased by 50 percent of the total partnership adjustment. Accordingly, notices of deficiency were issued against each on September 26, 1977.

3. The issue, with respect to the cash flow analysis adjustment, was resolved at a pre-hearing conference wherein all parties to the conference agreed to reduce said adjustment from \$9,174.00 to \$3,576.00 based on substantiation presented. The adjustment for personal expenses disallowed, in the amount of \$224.00, was previously conceded by petitioners. The remaining unresolved issue is the deductibility of the sales taxes paid as the result of a sales tax audit assessment.

4. *Petitioners contended that the additional sales tax assessed was not collected due to their failure to properly interpret the law as to the taxability of items which they sold in the grocery store. The sales tax assessment was based on the application of a taxable purchase percentage to the sales reported. Petitioners contended that the assessed sales taxes paid constituted a deductible, ordinary and necessary business expense since the assessment was paid from the partnership's funds and it was impossible to identify and recover the tax from specific customers.*

5. The Audit Division determined that the sales taxes at issue were not included in the gross receipts of the business.

6. The Audit Division maintained that the sales tax assessment was based on sales tax collected by petitioner but not remitted to the State. The record does not indicate whether or not the sales taxes at issue were actually collected by petitioner, Carlino Market.

CONCLUSIONS OF LAW

A. That petitioner, Carlino Market, has not sustained its burden of proof required under section 689(e) of the Tax Law to show that the additional

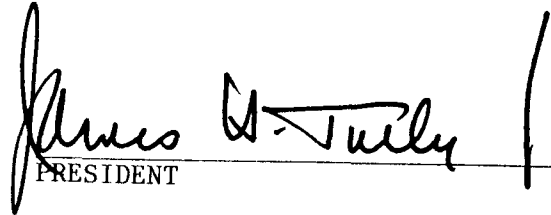
sales taxes assessed and paid were not collected from its customers. Consequently, the sales taxes at issue are not deductible. The question as to whether said taxes would be deductible if, in fact, they were not collected, is, at this time, moot.

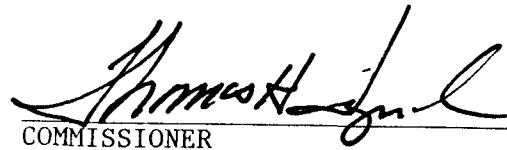
B. That the petitions of Carlino Market, George Carlino and Margaret Carlino, and Robert Carlino and Mary Carlino are granted to the extent of the adjustment regarding the cash flow analysis agreed on during a pre-hearing conference pursuant to Finding of Fact "3" supra. That the Audit Division is hereby directed to modify accordingly the notices of deficiency issued September 26, 1977; and that, except as so granted, the petitions are in all other respects denied.

DATED: Albany, New York

MAY 23 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER