

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

February 24, 1987

Richard Cocilova & Sons, Inc.
107 Main St. West
Rochester, NY 14614

Gentlemen:

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) 1090 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law 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
Audit Evaluation Bureau
Assessment Review Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:
John R. Parrinello
Redmond & Parrinello
315 Executive Office Bldg.
Rochester, NY 14614

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
RICHARD COCILOVA AND JOAN COCILOVA
for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Years 1977 through 1981.

In the Matter of the Petition
of
RICHARD COCILOVA & SONS, INC.
for Redetermination of a Deficiency or for
Refund of Corporation Franchise Tax under
Article 9-A of the Tax Law for the Fiscal Years
Ended June 30, 1977 through June 30, 1981.

DECISION

In the Matter of the Petition
of
RICHARD COCILOVA & SONS, INC.
and RICHARD COCILOVA, AS OFFICER
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, 1976
through May 31, 1982.

Petitioners, Richard Cocilova and Joan Cocilova, 216 Fetzner Road, Rochester, New York 14626, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1977 through 1981 (File No. 40882).

Petitioner, Richard Cocilova & Sons, Inc., 107 Main Street West, Rochester, New York 14614, filed a petition for redetermination of a deficiency or for

refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal years ended June 30, 1977 through June 30, 1981 (File No. 40963).

Petitioners, Richard Cocilova & Sons, Inc. and Richard Cocilova, as officer, 216 Fetzner Road, Rochester, New York 14626, 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, 1976 through May 31, 1982 (File Nos. 40961, 50514, 50515, 53494 and 53724).

A consolidated hearing was commenced before Arthur S. Bray, Hearing Officer, at the offices of the State Tax Commission, 259 Monroe Avenue, Rochester, New York, on September 12, 1985 at 1:15 P.M., continued at the same offices on September 13, 1985 at 1:30 P.M., January 13, 1986 at 1:15 P.M., January 14, 1986 at 9:15 A.M., January 15, 1986 at 9:15 A.M., and concluded at the same offices on January 16, 1986 at 9:15 A.M., with all briefs to be submitted by June 20, 1986. Petitioners appeared by Redmond & Parrinello (John R. Parrinello, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether the failure of the Audit Division to serve certain answers within the period prescribed by 20 NYCRR 601.6 warrants finding the Audit Division in default.

II. Whether the statute of limitations bars the Audit Division from asserting deficiencies of personal income tax, corporation franchise tax and sales tax.

III. Whether the Audit Division properly determined the amount of sales and use tax due from Richard Cocilova & Sons, Inc. and Richard Cocilova, as a responsible officer of Richard Cocilova & Sons, Inc.

IV. Whether the Audit Division properly determined that Richard Cocilova & Sons, Inc. had additional taxable income subject to corporation franchise tax as the result of a sales tax audit of Richard Cocilova & Sons, Inc.

V. Whether the Audit Division properly determined that petitioners, Richard and Joan Cocilova, had additional income subject to personal income tax.

VI. Whether the Audit Division's assessment of a fraud penalty against Richard Cocilova & Sons, Inc. and Richard Cocilova pursuant to section 1145(a)(2) of the Tax Law was proper.

VII. Whether the Audit Division properly determined that Richard Cocilova & Sons, Inc. was liable for fraud penalty pursuant to Tax Law § 1085(e).

VIII. Whether the Audit Division's assertion of fraud penalties against the individual petitioners pursuant to Tax Law § 685(e) was proper.

IX. Whether petitioner Joan Cocilova was an "innocent spouse" pursuant to Tax Law § 651(b)(5)(i) and thus not liable for the asserted deficiency of personal income tax for the years 1977 through 1981.

FINDINGS OF FACT

1. Richard Cocilova & Sons, Inc. (the "corporation") filed New York State and local sales and use tax returns for the period June 1, 1976 through February 28, 1981. The return for the period ended May 31, 1981 was filed on October 2, 1981. No sales and use tax returns were filed for the period June 1, 1981 through May 31, 1982.

2. On September 20, 1982, the Audit Division issued two notices of determination and demands for payment of sales and use taxes due to the corporation assessing a deficiency of sales and use taxes. The first notice assessed tax for the period June 1, 1976 through November 30, 1979 in the amount of

\$143,402.00, plus penalty of \$71,701.00 and interest of \$74,907.97, for a total amount due of \$290,010.97. The second notice assessed tax for the period December 1, 1979 through May 31, 1980 in the amount of \$35,229.00, plus penalty of \$17,614.50 and interest of \$10,704.36, for a total amount due of \$63,547.86. On December 17, 1982, the Audit Division issued two notices of determination and demands for payment of sales and use taxes due to Richard Cocilova, as president of the corporation, which, respectively, assessed the same amount of tax, penalty and interest which were assessed against the corporation on September 20, 1982. In each instance, the penalty assessed was pursuant to Tax Law § 1145(a)(2) for fraud.

3. The perfected petition challenging the foregoing assessments was filed on January 4, 1984 and the answer to the perfected petition was filed on or about March 23, 1984.

4. On December 15, 1983, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to the corporation for the period June 1, 1980 through February 28, 1981 in the amount of \$45,001.00, plus penalty of \$22,500.50 and interest of \$17,648.67, for a total amount due of \$85,150.17. On the same date, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued to Richard Cocilova, as president of the corporation, assessing the same amount of tax, penalty and interest which were assessed against the corporation. The penalties were asserted pursuant to Tax Law § 1145(a)(2) for fraud.

5. The perfected petition challenging the foregoing notices was filed on January 10, 1985 and the answer thereto filed on or about March 4, 1985.

6. On March 28, 1984, the Audit Division issued two notices of determination and demands for payment of sales and use taxes due for the period March 1,

1981 through May 31, 1982. The first notice was issued to the corporation in the amount of \$98,239.04, plus penalty of \$49,119.52 and interest of \$30,570.02, for a total amount due of \$177,928.58. The penalty was asserted pursuant to Tax Law § 1145(a)(2) for fraud. The second notice was issued to Richard Cocilova, as president of the corporation, and asserted the same amount of tax, penalty and interest as had been assessed against the corporation.

7. The perfected petition challenging the foregoing assessments was filed on January 10, 1985 and the answer to the perfected petition was filed on or about March 4, 1985.

8. The corporation filed New York State corporation franchise tax reports for the fiscal years ended June 30, 1977 through June 30, 1981.

9. On November 17, 1982, the Audit Division issued five notices of deficiency to the corporation asserting deficiencies of corporation franchise tax as follows:

<u>Period Ended</u>	<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
June 30, 1977	\$ 3,431.40	\$1,877.83	\$ 1,715.70 ¹	\$ 7,024.93
June 30, 1978	3,772.90	1,744.06	1,886.45 ¹	7,403.41
June 30, 1979	7,163.60	2,702.54	3,581.80	13,447.94
June 30, 1980	33,744.10	9,862.06	16,872.05	60,478.21
June 30, 1981	22,213.60	4,627.40	11,606.80	39,447.80

10. The foregoing penalties were asserted to be due pursuant to Tax Law § 1085(e) for fraud.

¹ It is recognized that the Notice of Deficiency for the period ended June 30, 1978 omitted an amount as an additional charge. However, it is clear from a comparison of the total amount sought with the tax and interest asserted to be due, that the Audit Division asserted a penalty equal to fifty percent of the tax.

11. The perfected petition challenging the foregoing notices was filed on January 4, 1984 and the answer to the perfected petition was submitted on or about March 23, 1984.

12. The Audit Division received New York State income tax resident returns on behalf of Richard and Joan Cocilova for the years 1977 through 1981. The reporting status selected was married filing joint returns.

13. On November 11, 1982, the Audit Division issued two notices of deficiency to petitioners, Richard and Joan Cocilova. The first Notice of Deficiency asserted a deficiency of personal income tax for the years 1977 and 1978 in the amount of \$10,225.04, plus penalty of \$5,112.53 and interest of \$4,164.57, for a total amount due of \$19,502.14. The second Notice of Deficiency asserted a deficiency of personal income tax for the years 1979 through 1981 in the amount of \$91,820.81, plus penalty of \$45,910.41 and interest of \$14,556.51, for a total amount due of \$152,287.73. In each instance, the penalty was asserted pursuant to Tax Law § 685(e) for fraud.

14. The perfected petition protesting the foregoing notices was filed on January 4, 1984 and the answer to the perfected petition was submitted on or about March 23, 1984.

15. During the periods in issue, the corporation operated an automobile service station at 105-107 West Main Street in Rochester, New York. It was located at the corner of Main Street and Plymouth Avenue in downtown Rochester. This corner was a major intersection in downtown Rochester. The service station had nine gasoline pumps and four service bays. One service bay was used as a car wash.

16. Mr. Richard Cocilova, Sr. was the president and sole officer of the corporation.

17. The premises of the service station were obtained through a lease executed by Mr. Cocilova and Northeast Stations & Service, Inc. ("NSI"). The gasoline sold by the corporation was obtained from NSI. Each morning, NSI would contact its dealers to get a measurement of the amount of gasoline in the tanks. Depending on the space available in the tanks, a delivery would be made.

18. Under the contractual arrangement entered into by Mr. Cocilova and NSI, gasoline was considered sold to Mr. Cocilova when it passed through the meters on the pumps. At least once a year, the County of Monroe would check the accuracy of the meters.

19. Approximately two or three times a week, Mr. Cocilova, as an NSI dealer, would complete a settlement report which would add the current meter readings and subtract the previous meter readings in order to determine the number of gallons sold. This would then be multiplied by the prevailing wholesale price of gasoline to ascertain the amount that would be remitted to NSI. A gasoline dealer was expected to remit payment for gasoline in conjunction with the submission of the settlement report.

20. Two or three times a week, an individual from NSI would appear at the service station to collect the settlement report and payment for the gasoline. It was Mr. Cocilova's practice to pay for the gasoline by bank draft or money order with the balance of \$200.00 or \$300.00 in cash. At one time, a representative from NSI requested that Mr. Cocilova pay by personal check. However, Mr. Cocilova never complied with this request.

21. NSI utilized two methods to verify the accuracy of the settlement reports. First, it was the practice of NSI's accounting department to compare the meter readings on the settlement report with meter readings on file.

Secondly, approximately once a month, an individual from NSI would go to the service stations, record meter readings and measure the gasoline in the tanks in order to ascertain whether there was a loss of gasoline.

22. At the outset of the field audit, an auditor went to the office of Mr. Cocilova's accountant and requested to examine the corporation's books and records. At this juncture, the accountant provided the auditor with a sales journal, a purchases/disbursements journal and a box of information containing purchase invoices pertaining to tires, batteries and accessories and money orders.

23. The accountant was cooperative in providing these records which were available.

24. Mr. Cocilova's accountant advised the auditor that Mr. Cocilova would tell him what his sales tax liability was for a particular period. Utilizing this information, the accountant would calculate the corporation's taxable and gross sales. The auditor concluded that there would be no point in examining the original sales documentation since they were not utilized to prepare the journals. Further, since Mr. Cocilova dealt with money orders and cash, there would not be any way of ascertaining whether all of the sales invoices were present.

25. The amount of sales for corporate franchise tax purposes was arrived at mathematically by Mr. Cocilova's accountant based upon changes in the corporation's assets and liabilities, and Mr. Cocilova's salary and expenses incurred during the month.

26. In the course of the audit examination, it was observed that during the eighteen sales tax quarters from May 1975 through February 1981, there were fourteen quarters where the corporation reported a taxable ratio of 85.7

percent and nine quarters where the corporation reported a taxable ratio of 85.714 percent.

27. The Audit Division compared the receipts reflected on the corporation's franchise tax returns with the sales reported on the sales tax returns. For the fiscal year ended June 30, 1979, the corporation franchise tax returns disclosed total receipts of \$940,440.00, while the sales tax returns for the same period reported gross sales of \$321,484.00, resulting in a difference of \$618,956.00. For the fiscal year ended June 30, 1980, the total receipts reflected on the corporation's franchise tax returns were \$1,117,226.00, while the gross sales reported on sales tax returns was \$432,443.00, resulting in a difference of \$684,783.00.

28. Mr. Cocilova's accountant advised the Audit Division that during the fiscal years ended June 30, 1979 through June 30, 1981, the corporation had three checking accounts. These accounts were at Marine Midland Bank, Lincoln First Bank and Chemical Bank. During the fiscal years ended June 30, 1979 through June 30, 1981, the total amounts deposited in these accounts were \$43,725.62, \$23,987.96 and \$11,463.83, respectively. Nevertheless, the corporate franchise tax returns reported total receipts during each of these years in excess of \$900,000.00.

29. In order to determine audited taxable sales for the period June 1976 through June 1978, the Audit Division utilized the amounts reported as receipts on the State of New York Corporation Franchise Tax Report for the respective periods. Each annual amount of receipts was divided by twelve to determine a monthly sales figure for each year. The monthly sales figures were then added together in groups of three to determine sales per quarter. Thereafter, the sales per quarter were reduced by the excise tax on gasoline to arrive at

taxable sales per quarter. The taxable sales per quarter were then multiplied by seven percent to determine audited sales tax due per quarter. In order to determine the amount of tax due, the Audit Division subtracted the amount of sales tax which had previously been paid from the audited sales tax due.

30. The Audit Division ascertained the amount of excise tax to subtract on the basis of the number of gallons of gasoline which the corporation sold. This information was obtained, in turn, from petitioner's supplier, NSI.

31. For the period July 1978 through November 1978, the Audit Division utilized a purchase markup methodology. Since the Audit Division did not have selling prices or records of the amount of sales of leaded and unleaded gasoline, the Audit Division computed the corporation's markup on gasoline for the period December 1978 through June 1979. In order to compute the corporation's markup, the Audit Division obtained from NSI the number of gallons sold. The selling prices for the period December 1978 through June 1979 were obtained from newspaper articles published in the "Times-Union" and "Democrat and Chronicle" which are newspapers circulated in the Rochester area. On the basis of this information, the Audit Division ascertained that the corporation's markup on purchases was 1.2013834. This markup was then multiplied by the gasoline purchases shown on the corporation's books to determine gasoline sales for the period July 1978 through November 1978.

32. The amount of the corporation's purchases of tires, batteries and accessories for the period July 1978 through November 1978 were obtained from the corporation's records. These purchases were marked up 100 percent to arrive at sales of tires, batteries and accessories. The markup of 100 percent was based on the audit experience of the Rochester District Office of the Department of Taxation and Finance.

33. For the period December 1978 through November 1981, the Audit Division utilized information from NSI as to the number of gallons of gasoline the corporation purchased and selling prices printed in area newspapers or averages thereof as to the corporation's selling price of gasoline. The number of gallons purchased was multiplied by the selling price to determine the amount of gasoline sales. This amount of gasoline sales was reduced by the excise tax on gasoline to determine audited gasoline sales. The additional tax determined to be due was reduced by the sales tax previously reported.

34. For the months December 1978 through June 1981, the Audit Division determined the corporation's sales of tires, batteries and accessories by multiplying the purchases reflected on the corporation's books by the previously determined markup of 100 percent.

35. For the balance of the sales tax audit periods in issue, the sales tax assessed on gasoline sales was computed in the same manner as that used for the period December 1978 through November 1981. For the months of July 1981 through May 1982, the Audit Division considered monthly sales of tires, batteries and accessories to be one-twelfth of the amount of sales of tires, batteries and accessories determined on audit for the fiscal year ended June 30, 1981.

36. In order to determine the amount of the corporate franchise tax due on audit for the fiscal year ended June 30, 1977 and June 30, 1978, the Audit Division proceeded on the premise that the sales tax due on the additional sales constituted income to the corporation which was subject to corporation franchise tax. The unremitted sales tax was then considered a distribution of dividends from the corporation to Mr. and Mrs. Cocilova.

37. With respect to the fiscal years ended June 30, 1979, June 30, 1980 and June 30, 1981, the additional sales found on audit, in addition to the

unremitted sales tax due on the additional sales found on audit, were deemed to be additional income subject to corporation franchise tax. The additional corporate income was then assumed to be paid to Mr. Cocilova as a constructive dividend.

38. After one portion of the audit had been completed, the matter was referred to the Special Investigations Bureau for an investigation of the possibility of initiating criminal proceedings. Upon learning of the possibility of criminal proceedings being commenced, petitioners' attorney refused to provide access to the corporation's books and records.

39. In 1967, the Audit Division conducted an audit of an automobile gasoline station operated by Mr. Cocilova known as Greece Gulf Service Station. The audit resulted in finding a deficiency of tax.

40. In 1971, the Audit Division conducted a field audit of a gasoline station operated by Mr. Cocilova known as the Main & Plymouth Gulf Service Station. This station was located at 107 West Main Street, Rochester, New York. In the course of the field audit, Mr. Cocilova was requested to provide books and records. Apparently, since Mr. Cocilova did not maintain records, a complete set of records was not provided. Consequently, in order to determine sales, the Audit Division utilized the gallons of gasoline delivered to Mr. Cocilova and selling prices obtained from audits of other Gulf Oil Company dealers by the Rochester District Office. The information as to the number of gallons of gasoline delivered to Mr. Cocilova was obtained from Gulf Oil Company. Sales of tires, batteries and accessories were estimated to be 20 percent of gross sales, except for the period when the station was under repair when the percentage was reduced to 10 percent. The estimates used to determine sales of tires, batteries and accessories were based upon audits of other service

stations in the Rochester area. The audit resulted in a finding of additional tax due of \$40,885.60. At the conclusion of the audit, the method of conducting the audit was explained to Mr. Cocilova and his attorney at a concluding conference. Neither Mr. Cocilova nor his attorney offered any criticism or evidence at the concluding conference.

41. Joan Cocilova graduated from high school. Thereafter, she received no formal education.

42. Joan and Richard Cocilova were married in 1954. At the time of their marriage, Joan Cocilova was eighteen years old and resided with her mother and father.

43. At or about the time of her marriage, Joan Cocilova was employed by Eastman Kodak Company in a position involving splicing films and sending films out to schools. Mrs. Cocilova was employed in this position for about one and one-half years. She has not been employed since that time.

44. Since the termination of her employment with Eastman Kodak Company, Mrs. Cocilova's time has been occupied as a housewife and mother of five children. During the periods in issue, Mr. Cocilova would give Mrs. Cocilova from \$100.00 to \$150.00 a week to pay for groceries and a department store bill. Mr. Cocilova would pay all of the other family expenses.

45. After their marriage, Mr. and Mrs. Cocilova moved into an apartment. Thereafter, they moved into a home owned by Mrs. Cocilova's grandparents. They subsequently purchased their own home in Greece, New York. In 1966, they purchased their current home in the Town of Greece. On September 11, 1967, Richard and Joan Cocilova transferred their current home to Joan Cocilova.

46. During the years 1977 through 1982, Mrs. Cocilova did not experience an increase in her standard of living, nor did she receive any jewelry.

However, Mrs. Cocilova did receive a mink and leather coat which she believed cost about \$800.00.

47. Petitioners took one vacation during the years in issue. This vacation, which consisted of a trip to Mexico, was paid for by Gulf Oil Company.

48. As of the time of the hearing, Mrs. Cocilova owned a 1978 Lincoln automobile which was purchased by Mr. Cocilova but registered in Mrs. Cocilova's name. The automobile was approximately three years old when it was acquired. The automobile was purchased with a loan from a bank which was subsequently satisfied. Prior to the 1978 Lincoln, Mrs. Cocilova drove a 1975 Lincoln which was two or three years old when acquired and disposed of in 1984.

49. During the years in issue, three sons of Mr. and Mrs. Cocilova were married. The number of wedding guests ranged from 250 to 500 individuals. Mrs. Cocilova believed that the cost of the wedding receptions were equally divided between the two families. However, she never saw her husband make a payment.

50. Sometime subsequent to 1976, Mr. Cocilova's cousin added a room onto the house approximately 12 feet by 16 feet. Mrs. Cocilova believed that Mr. Cocilova paid for just the materials.

51. Mrs. Cocilova was not a stockholder, officer, director or employee of the corporation. She had no involvement with the corporation.

52. Mrs. Cocilova visited the premises of the corporation on infrequent occasions when she was in the vicinity of the corporation. She was only familiar with the office since, when she did go to the corporation, she would usually speak to her husband for a few minutes without leaving her automobile.

53. Mrs. Cocilova relied on her husband to accurately prepare the personal income tax returns. She neither saw nor signed the personal income tax returns during the periods in issue.

54. The parties have stipulated that the underreporting of personal income asserted by the Audit Division is greater than 25 percent of the reported New York adjusted gross income.

CONCLUSIONS OF LAW

A. That 20 NYCRR 601.6(a)(1) requires the Law Bureau to serve an answer within sixty days of the acknowledgement of the receipt of an acceptable perfected petition. It is clear that some of the answers were not served within the time prescribed by 20 NYCRR 601.6(a)(1). However, since there has been no showing of prejudice to petitioners from the failure to serve some of the answers within the time required, the argument that the failure to serve some of the answers in a timely manner warrants granting relief in petitioners' favor must be rejected.

B. That Tax Law § 1083(c) provides that corporation franchise tax may be assessed at any time if a false and fraudulent corporation franchise tax return is filed with intent to evade tax. Similarly, Tax Law § 683(c) provides that a deficiency of personal income tax may be assessed at any time if a false and fraudulent personal income tax return is filed with intent to evade tax. Since the foregoing returns were filed with intent to evade tax (Conclusion of Law "K", infra), the asserted deficiencies of corporation franchise tax and personal income tax were not barred by the statute of limitations.

C. That Tax Law § 1147(b) provides, in part, that:

"except in the case of a willfully false or fraudulent return with intent to evade the tax, no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return; provided, however, that where no return has

been filed as provided by law the tax may be assessed at any time. For purposes of this subdivision, a return filed before the last day prescribed by law or regulation for the filing thereof or before the last day of any extension of time for the filing thereof shall be deemed to be filed on such last day."

D. That the notices assessing a deficiency of sales and use tax were timely since the returns filed were fraudulent and filed with an intent to evade tax (Conclusion of Law "J", infra) (Tax Law § 1147([b])).

E. That when records provided are incomplete or insufficient, it is the duty of the Audit Division to select a method reasonably calculated to reflect taxes due (Matter of Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858). The corporation did maintain some records which were available to the Audit Division. These records, however, were clearly insufficient for the verification of taxable sales as evidenced by the fact that the entries in the records were not premised upon original source documentation. The inadequacy of the records is also evidenced by the substantial discrepancy between sales reported on the sales tax returns and gross receipts reported on the corporation's franchise tax returns. Therefore, the Audit Division properly utilized external indices to determine the amount of sales taxes due.

F. That petitioners have not presented any evidence to establish that the Audit Division's analysis resulted in an incorrect determination of sales and use taxes due. It is noted that since the requisite sales records were not provided, it was permissible for the Audit Division to examine the corporation's purchases as disclosed by the corporation's supplier (see generally, Matter of Hillpike Service Station, Inc. and Ben Signorelli, as Officer, State Tax Commn., January 17, 1986). Furthermore, with respect to the markup applied to tires, batteries and accessories, it was permissible for the Audit Division to apply a markup premised upon Audit Division experience with similar businesses

(Matter of Convissar v. State Tax Commn., 69 AD2d 929). Since the audit procedures were reasonable under the circumstances and petitioners have not shown any error, there is no basis for adjusting the amount of sales and use taxes found due on audit.

G. That the Audit Division properly considered the additional sales as well as the sales tax proceeds collected by the corporation as additional income for corporation franchise tax purposes (Matter of Robert and Dorothy V. Beagle, State Tax Commn., May 28, 1986).

H. That inasmuch as Mr. Cocilova was the sole shareholder and officer of the corporation during the periods at issue and controlled the corporation's finances, the Audit Division properly attributed the additional corporate income to Mr. Cocilova as a constructive dividend (Matter of Thomas J. Bretscher and Dolores M. Bretscher, State Tax Commn., November 12, 1986; Matter of Robert and Dorothy V. Beagle, supra). Further, since joint New York income tax returns were filed for each of the years in issue, the Audit Division properly asserted income tax liability against Mrs. Cocilova based upon Mr. Cocilova's receipt of a constructive dividend during that year.

I. That a finding of fraud "requires clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representations, resulting in deliberate nonpayment or underpayment of taxes due and owing." (Matter of Cardinal Motors, Inc. and Salvatore Cardinale, as Officer, State Tax Commn., July 8, 1983; Matter of Walter Shutt and Gertrude Shutt, State Tax Commn., June 4, 1982).

J. That the Audit Division has sustained its burden of proof with respect to the imposition of the fraud penalty with respect to sales and use taxes

against the corporation and its officer, Mr. Cocilova. In reaching this conclusion, it should be noted that no single fact among those established at hearing is in itself conclusive evidence of fraud, yet upon review of the totality of facts established herein, we are of the opinion that petitioners' consistent pattern of misrepresentations and omissions evince a knowing, willful and deliberate attempt by petitioners to evade payment of taxes lawfully due.

Among the facts which collectively establish a fraudulent intent on the part of the corporation and its officer are: that Mr. Cocilova was an experienced businessman; that Mr. Cocilova was aware of his obligations with respect to sales and use taxes from prior audit experience; that Mr. Cocilova advised his accountant as to what to report; that the amount which was subsequently reported was far less than what was found on audit; and that Mr. Cocilova dealt at least primarily, if not exclusively, in bank drafts, money orders and cash. Taken together, these facts establish, by clear and convincing evidence, a knowing, willful and deliberate intent by the corporation and Mr. Cocilova, as its officer, to evade payment of sales and use taxes lawfully due and owing (see Matter of Robert and Dorothy V. Beagle, supra).

K. That the Audit Division has sustained its burden of proving fraud on the part of the corporation with respect to corporation franchise tax and Mr. Cocilova with respect to personal income tax. Similar to the rationale set forth in Conclusion of Law "J" herein, no single fact among those adduced at the hearing is conclusive evidence of fraud, yet collectively, the facts established at hearing show, by clear and convincing evidence, that the corporation and Mr. Cocilova with fraudulent intent underreported income during each of the tax years at issue.

L. That the Audit Division has failed to sustain its burden of proof of fraud with respect to Mrs. Cocilova, given her lack of involvement in both the running of the corporation and the preparation of the tax returns.

M. That Tax Law § 651(b)(5)(i) provides as follows:

"(5)(i) Under regulations prescribed by the tax commission, if

(A) a joint return has been made pursuant to paragraph (2)(A) or paragraph (3) of this subsection for a taxable year and on such return there was omitted from New York adjusted gross income an amount properly included therein which is attributable to one spouse and which is in excess of twenty-five per cent of the amount of New York adjusted gross income stated in the return,

(B) the other spouse establishes that in signing the return he or she did not know of, and had no reason to know of, such omission and

(C) taking into account whether or not the other spouse significantly benefited directly or indirectly from the items omitted from New York adjusted gross income and taking into account all other facts and circumstances, it is inequitable to hold the other spouse liable for the deficiency in tax for such taxable year attributable to such omission, then the other spouse shall be relieved of liability for tax (including interest, penalties and other amounts) for such taxable year to the extent that such liability is attributable to such omission from New York adjusted gross income."

N. That Mrs. Cocilova is entitled to the benefit of Tax Law § 651(b)(5)(i).

At the hearing, the parties stipulated that the Audit Division's asserted deficiency of personal income tax was at least twenty-five percent of New York adjusted gross income. This deficiency has been sustained and thus the first requirement of Tax Law § 651(b)(5)(i) has been satisfied.

O. That the remaining requirements of Tax Law § 651(b)(5)(i) have also been satisfied. There were insufficient facts available to Mrs. Cocilova to provide her with reason to know of the omitted income. In addition to the foregoing, there was no sudden rise in Mrs. Cocilova's standard of living; Mrs. Cocilova did not receive lavish gifts or receive additional money; she did

not participate in the family's financial affairs; and she was not involved in her family's or the corporation's record keeping activities. Thus, it would be inequitable to hold Mrs. Cocilova liable for the deficiency in tax. Accordingly, Mrs. Cocilova is entitled to the benefit that is provided for an innocent spouse by Tax Law § 651(b)(5)(i) (see Matter of Anne E. Bonhag v. Commn., 40 TCM 250 [1980]).

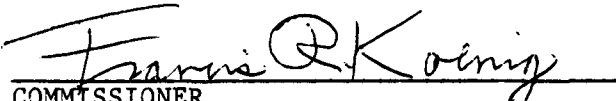
P. That the petition of Richard Cocilova and Joan Cocilova is granted to the extent of Conclusions of Law "L", "N" and "O"; that the petition of Richard Cocilova & Sons, Inc. is denied; that the petition of Richard Cocilova & Sons, Inc. and Richard Cocilova, as officer, is denied; except as granted above, the notices of deficiency and the notices of determination and demands for payment of sales and use taxes due are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

FEB 24 1987


PRESIDENT


COMMISSIONER


COMMISSIONER