

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Peter Regalo & Carlo Montoro (Dec'd) :
d/b/a C & P Auto Repairs :
:
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 December 1, 1978 :
through May 31, 1981. :

In the Matter of the Petition :
of :
Peter Regalo, Partner : AFFIDAVIT OF MAILING
C & P Auto Repairs :
:
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 December 1, 1978 :
through May 31, 1981. :

In the Matter of the Petition :
of :
Estate of Carlo Montoro :
:
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 December 1, 1978 :
through May 31, 1981. :
:

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 7th day of November, 1985, he served the within notice of Decision by certified mail upon Peter Regalo & Carlo Montoro (Dec'd) d/b/a C & P Auto Repairs, the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Peter Regalo & Carlo Montoro (Dec'd)
d/b/a C & P Auto Repairs
279 East 148th St.
Bronx, NY 10451

Page 2

Affidavit of Mailing

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
7th day of November, 1985.

David Paschuck

Anna A. Haglund

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Peter Regalo & Carlo Montoro (Dec'd) :
d/b/a C & P Auto Repairs :
: :
for Revision of a Determination or for Refund of :
Sales and Use Taxes under Articles 28 and 29 of :
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In the Matter of the Petition :
of :
Peter Regalo, Partner : AFFIDAVIT OF MAILING
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for Revision of a Determination or for Refund of :
Sales and Use Taxes under Articles 28 and 29 of :
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In the Matter of the Petition :
of :
Estate of Carlo Montoro :
: :
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 December 1, 1978 :
through May 31, 1981. :
:

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 7th day of November, 1985, he served the within notice of Decision by certified mail upon Milton S. Kestenbaum, the representative of the petitioners in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Milton S. Kestenbaum
92 Heatherdell Road
Ardsley, NY 10502

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

Page 2

Affidavit of Mailing

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
7th day of November, 1985.

David Parchurch

Quinn A. Haglund

Authorized to administer oaths
pursuant to Tax Law section 174

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

November 7, 1985

Peter Regalo & Carlo (Dec'd) Montoro
d/b/a C & P Auto Repairs
279 East 148th St.
Bronx, NY 10451

Dear Mr. Regalo:

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) 1138 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
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Milton S. Kestenbaum
92 Heatherdell Road
Ardsley, NY 10502
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Peter Regalo & Carlo Montoro (Dec'd) :
d/b/a C & P Auto Repairs :
: :
for Revision of a Determination or for Refund of :
Sales and Use Taxes under Articles 28 and 29 of :
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In the Matter of the Petition :
of :
Peter Regalo, Partner : AFFIDAVIT OF MAILING
C & P Auto Repairs :
: :
for Revision of a Determination or for Refund of :
Sales and Use Taxes under Articles 28 and 29 of :
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In the Matter of the Petition :
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for Revision of a Determination or for Refund of :
Sales and Use Taxes under Articles 28 and 29 of :
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through May 31, 1981. :
:

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 7th day of November, 1985, he served the within notice of Decision by certified mail upon Estate of Carlo Montoro, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Estate of Carlo Montoro
c/o Anna Montoro
33 Van Wardt Place
Tappan, NY 10983

Page 2
Affidavit of Mailing

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
7th day of November, 1985.

David Parshuck

Samuel A. Hagedorn
Authorized to administer oaths
pursuant to Tax Law section 174

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

November 7, 1985

Estate of Carlo Montoro
c/o Anna Montoro
33 Van Wardt Place
Tappan, NY 10983

Dear Mrs. Montoro:

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) 1138 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.

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Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Milton S. Kestenbaum
92 Heatherdell Rd.
Ardsley, NY 10502
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Peter Regalo & Carlo Montoro (Dec'd) :
d/b/a C & P Auto Repairs :
:
for Revision of a Determination or for Refund of :
Sales and Use Taxes under Articles 28 and 29 of :
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In the Matter of the Petition :
of :
Peter Regalo, Partner : AFFIDAVIT OF MAILING
C & P Auto Repairs :
:
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 December 1, 1978 :
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In the Matter of the Petition :
of :
Estate of Carlo Montoro :
:
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 December 1, 1978 :
through May 31, 1981. :
:

State of New York :

ss.:

County of Albany :

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 7th day of November, 1985, he served the within notice of Decision by certified mail upon Peter Regalo, Partner, C & P Auto Repairs, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Peter Regalo, Partner
C & P Auto Repairs
475 Main Street
Malcolm Towers
Fort Lee, NJ 07024

Page 2
Affidavit of Mailing

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
7th day of November, 1985.

Daniel Paschuck

James A. Deane
Authorized to administer oaths
pursuant to Tax Law section 174

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

November 7, 1985

Peter Regalo, Partner
C & P Auto Repairs
475 Main Street
Malcolm Towers
Fort Lee, NJ 07024

Dear Mr. Regalo:

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) 1138 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.

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Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Milton S. Kestenbaum
92 Heatherdell Rd.
Ardsley, NY 10502
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
PETER REGALO AND CARLO MONTORO (DECEASED) :
d/b/a C & P AUTO REPAIRS :
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 December 1, 1978 :
through May 31, 1981. :

In the Matter of the Petition :
of :
PETER REGALO, PARTNER :
C & P AUTO REPAIRS :
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 December 1, 1978 :
through May 31, 1981. :

DECISION

In the Matter of the Petition :
of :
ESTATE OF CARLO MONTORO :
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 December 1, 1978 :
through May 31, 1981. :

Petitioners, Peter Regalo and Carlo Montoro (Deceased) d/b/a C & P Auto Repairs and Peter Regalo, Partner, C & P Auto Repairs, 475 Main Street, Malcolm Towers, Fort Lee, New Jersey 07024, and Estate of Carlo Montoro, c/o Anna Montoro, 33 Van Wardt Place, Tappan, New York 10983, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles

28 and 29 of the Tax Law for the period December 1, 1978 through May 31, 1981 (File Nos. 42544, 42545 and 42546).

A hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 6, 1985 at 1:15 P.M. Petitioners appeared by Milton S. Kestenbaum, P.A. and Theodore Mate, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether the Audit Division properly estimated the tax liability of petitioners on the basis of external indices.

FINDINGS OF FACT

1. Petitioners, Peter Regalo and Carlo Montoro (deceased), were partners in the operation of C & P Auto Repairs, an automobile repair business located at 279 East 148th Street, Bronx, New York. The business was discontinued on or about May 14, 1981.
2. On December 20, 1982, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Peter Regalo and Carlo Montoro d/b/a C & P Auto Repairs covering the period December 1, 1978 through May 31, 1981 for taxes due of \$4,636.16, plus interest of \$1,338.02, for a total of \$5,974.18. On the same date, notices were also issued to the individual partners for the same amounts.
3. At the hearing, counsel for the Audit Division conceded that the notices were not timely issued with respect to periods ending February 28, 1979, May 31, 1979 and August 31, 1979.

4. Petitioners produced the following books and records for audit: sales tax returns, federal and state income tax returns, cancelled checks and bank statements. Petitioners did not provide any sales invoices, cash receipts journal or any other records that could be used to verify the taxable sales reported. Because of the incomplete books and records, the Audit Division estimated that petitioners' sales were \$35,000.00 per year. The auditor based his estimate on prior audit experience with similar businesses and considered the size of the premises, neighborhood and the personal income tax returns of the partners. The total estimated taxable sales for the audit period were \$87,500.00 as compared to reported taxable sales of \$29,548.00, leaving additional taxable sales of \$57,952.00 and tax due thereon of \$4,636.16.

5. Petitioners sold the real property in which they operated the business for \$20,000.00. Peter Regalo worked four or five hours a day for five days a week. Carlo Montoro (now deceased) was seriously ill during the audit period and only worked a few hours a day. There were no other employees. The business was located in a low income, deteriorated neighborhood in the South Bronx. Petitioners took the position that, due to the foregoing factors, the sales estimated by the Audit Division were excessive.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law 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" and authorizes, where necessary, an estimate of tax due "on the basis of external indices".

B. That section 1135 of the Tax Law 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 petitioners maintained inadequate and incomplete books and records. When books and records are incomplete and unreliable, the use of external indices is permissible (Matter of Korba v. New York State Tax Commission, 84 A.D.2d 655). Accordingly, the Audit Division properly determined petitioners' tax liability pursuant to the provisions of section 1138(a) of the Tax Law.

D. That the estimate procedures adopted by the Audit Division were reasonable under the circumstances and petitioners failed to sustain their burden to demonstrate by clear and convincing evidence that the method of audit or the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. State Tax Commission, 85 A.D.2d 858).


E. That, in accordance with Finding of Fact "3", the notices issued on December 20, 1982 were issued beyond the statute of limitations provided in section 1147(b) of the Tax Law for the periods indicated. Therefore, the taxes assessed for said periods amounting to \$1,206.88 are cancelled.

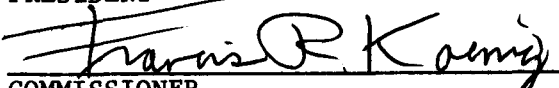
F. That the petitions of Peter Regalo and Carlo Montoro (deceased) d/b/a C & P Auto Repairs, and Peter Regalo as partner of C & P Auto Repairs, and Estate of Carlo Montoro are granted to the extent indicated in Conclusion of Law "E"; the Audit Division is hereby directed to modify the notices of determination and demand for payment of sales and use taxes due issued December 20, 1982; and that, except as so granted, the petitions are in all other respects denied.

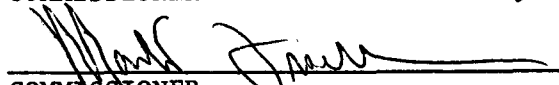
DATED: Albany, New York

NOV 07 1985

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

P 153 387 696

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1984-446-014

PS Form 3800, Feb. 1982

Sent to	<i>Estate of Carlo Montoro</i>	
Street and No.	<i>4100 Montoro</i>	
P.O., State and ZIP Code	<i>33 Van Wardt Rd.</i>	
Postage	<i>7appen 114 16983</i>	
Certified Fee		
Special Delivery Fee		
Restricted Delivery Fee		
Return Receipt Showing to whom and Date Delivered		
Return receipt showing to whom, Date, and Address of Delivery		
TOTAL Postage and Fees	\$	
Postmark or Date		

P 153 387 697

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1984-446-014

PS Form 3800, Feb. 1982

Sent to	<i>Peter R. R. Carlo Montoro (died)</i>	
Street and No.	<i>E & P Auto Repair</i>	
P.O., State and ZIP Code	<i>279 E. 148th St</i>	
Postage	<i>Blank NY 10437</i>	
Certified Fee		
Special Delivery Fee		
Restricted Delivery Fee		
Return Receipt Showing to whom and Date Delivered		
Return receipt showing to whom, Date, and Address of Delivery		
TOTAL Postage and Fees	\$	
Postmark or Date		

P 153 387 698

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1984-446-014

PS Form 3800, Feb. 1982

Sent to <i>Muller S. Kesteven</i>	
Street and No. <i>92 Highland Rd</i>	
P.O., State and ZIP Code <i>Brooklyn NY 10502</i>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return receipt showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

P 153 387 695

RECEIPT FOR CERTIFIED MAIL

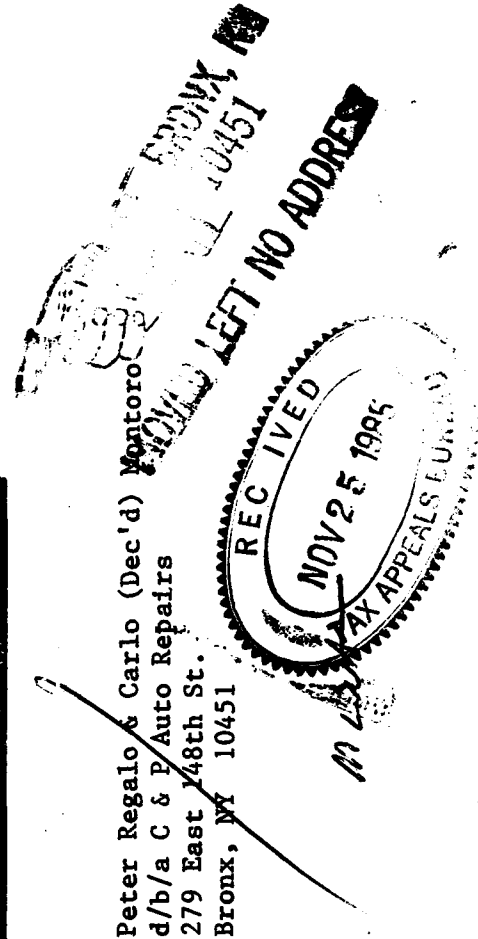
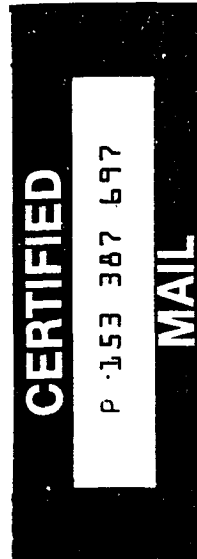
NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1984-446-014

PS Form 3800, Feb. 1982

Sent to <i>Peter Regalo</i>	
Street and No. <i>C & P Auto Repairs</i>	
P.O., State and ZIP Code <i>475 Main St</i>	
Postage	
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return receipt showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	



Peter Regalo & Carlo (Dec'd) Montoro
d/b/a C & P Auto Repairs
279 East 148th St.
Bronx, NY 10451

TA 26 (9-79)

STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N. Y. 12227

CLAIM CHECK NO. *711780*

☐ HOLD

DATE

1ST NOTICE

2ND NOTICE

RETURN

Detached for
PS Form 384
Oct. 1980

TA 26 (9-79)

STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N. Y. 12227

CERTIFIED

P 153 387 697

MAIL

Peter Regalo & Carlo (Dec'd) Montoro
d/b/a C & P Auto Repairs
279 East 148th St.
Bronx, NY 10451

RECEIVED

NOV 25 1985

IN 1514X

TAX APPEALS BUREAU

NO ADDRESS

REQUEST FOR BETTER ADDRESS

Requesting Bureau Room 107 - Bldg. #9 State Campus Albany, New York 12227	Unit Tax Appeals Bureau Room 107 - Bldg. #9 State Campus Albany, New York 12227	Date of Request 12/6/85
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Please find most recent address of taxpayer described below; return to person named above.

Social Security Number	Date of Petition Dec - 11/7/85
Name Peter Regala & Carlo (Dec'd) Montano	
Address d/b/a C+D Auto Repairs 279 East 148th St. Bronx, N.Y. 10451	

Results of search by Files

<input type="checkbox"/> New address:	RP 84-8342 no found 12/6/85
<input type="checkbox"/> Same as above, no better address	
<input type="checkbox"/> Other:	Monet left the address

Searched by	Section	Date of Search

PERMANENT RECORDFOR INSERTION IN TAXPAYER'S FOLDER

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

November 7, 1985

Peter Regalo & Carlo (Dec'd) Montoro
d/b/a C & P Auto Repairs
279 East 148th St.
Bronx, NY 10451

Dear Mr. Regalo:

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) 1138 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.

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Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Milton S. Kestenbaum
92 Heatherdell Road
Ardsley, NY 10502
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
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 PETER REGALO AND CARLO MONTORO (DECEASED) :
 d/b/a C & P AUTO REPAIRS :
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 for Revision of a Determination or for Refund :
 of Sales and Use Taxes under Articles 28 and 29 :
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In the Matter of the Petition :
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 PETER REGALO, PARTNER :
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 of Sales and Use Taxes under Articles 28 and 29 :
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DECISION

In the Matter of the Petition :
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 ESTATE OF CARLO MONTORO :
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 for Revision of a Determination or for Refund :
 of Sales and Use Taxes under Articles 28 and 29 :
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 through May 31, 1981. :
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Petitioners, Peter Regalo and Carlo Montoro (Deceased) d/b/a C & P Auto Repairs and Peter Regalo, Partner, C & P Auto Repairs, 475 Main Street, Malcolm Towers, Fort Lee, New Jersey 07024, and Estate of Carlo Montoro, c/o Anna Montoro, 33 Van Wardt Place, Tappan, New York 10983, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles

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A hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 6, 1985 at 1:15 P.M. Petitioners appeared by Milton S. Kestenbaum, P.A. and Theodore Mate, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether the Audit Division properly estimated the tax liability of petitioners on the basis of external indices.

FINDINGS OF FACT

1. Petitioners, Peter Regalo and Carlo Montoro (deceased), were partners in the operation of C & P Auto Repairs, an automobile repair business located at 279 East 148th Street, Bronx, New York. The business was discontinued on or about May 14, 1981.

2. On December 20, 1982, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Peter Regalo and Carlo Montoro d/b/a C & P Auto Repairs covering the period December 1, 1978 through May 31, 1981 for taxes due of \$4,636.16, plus interest of \$1,338.02, for a total of \$5,974.18. On the same date, notices were also issued to the individual partners for the same amounts.

3. At the hearing, counsel for the Audit Division conceded that the notices were not timely issued with respect to periods ending February 28, 1979, May 31, 1979 and August 31, 1979.

4. Petitioners produced the following books and records for audit: sales tax returns, federal and state income tax returns, cancelled checks and bank statements. Petitioners did not provide any sales invoices, cash receipts journal or any other records that could be used to verify the taxable sales reported. Because of the incomplete books and records, the Audit Division estimated that petitioners' sales were \$35,000.00 per year. The auditor based his estimate on prior audit experience with similar businesses and considered the size of the premises, neighborhood and the personal income tax returns of the partners. The total estimated taxable sales for the audit period were \$87,500.00 as compared to reported taxable sales of \$29,548.00, leaving additional taxable sales of \$57,952.00 and tax due thereon of \$4,636.16.

5. Petitioners sold the real property in which they operated the business for \$20,000.00. Peter Regalo worked four or five hours a day for five days a week. Carlo Montoro (now deceased) was seriously ill during the audit period and only worked a few hours a day. There were no other employees. The business was located in a low income, deteriorated neighborhood in the South Bronx. Petitioners took the position that, due to the foregoing factors, the sales estimated by the Audit Division were excessive.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law 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" and authorizes, where necessary, an estimate of tax due "on the basis of external indices".

B. That section 1135 of the Tax Law 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 petitioners maintained inadequate and incomplete books and records. When books and records are incomplete and unreliable, the use of external indices is permissible (Matter of Korba v. New York State Tax Commission, 84 A.D.2d 655). Accordingly, the Audit Division properly determined petitioners' tax liability pursuant to the provisions of section 1138(a) of the Tax Law.

D. That the estimate procedures adopted by the Audit Division were reasonable under the circumstances and petitioners failed to sustain their burden to demonstrate by clear and convincing evidence that the method of audit or the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. State Tax Commission, 85 A.D.2d 858).

E. That, in accordance with Finding of Fact "3", the notices issued on December 20, 1982 were issued beyond the statute of limitations provided in section 1147(b) of the Tax Law for the periods indicated. Therefore, the taxes assessed for said periods amounting to \$1,206.88 are cancelled.

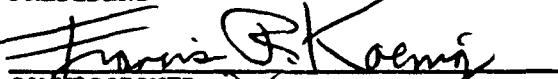
F. That the petitions of Peter Regalo and Carlo Montoro (deceased) d/b/a C & P Auto Repairs, and Peter Regalo as partner of C & P Auto Repairs, and Estate of Carlo Montoro are granted to the extent indicated in Conclusion of Law "E"; the Audit Division is hereby directed to modify the notices of determination and demand for payment of sales and use taxes due issued December 20, 1982; and that, except as so granted, the petitions are in all other respects denied.


DATED: Albany, New York

NOV 07 1985

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER