

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
WIXT-TV, INC.	:	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, 1986.	:	

Petitioner, WIXT-TV, Inc., 5904 Bridge Street, East Syracuse, New York 13057, filed an exception to the determination of the Administrative Law Judge issued on October 12, 1989, with respect to its 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, 1986 (File No. 805576). Petitioner appeared by Eric M. Robin, Esq. The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq. of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation submitted a responding brief to the exception. Oral argument, at the request of petitioner, was heard on March 13, 1990.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

- I. Whether petitioner filed a sales and use tax return for the quarter ending May 31, 1982.
- II. Whether the period of limitation for the determination of sales and use taxes due resulting from petitioner's purchase in bulk of the assets of WIXT-Television, Inc. expired prior to the issuance of the Notice of Determination and Demand for Sales and Use Taxes Due.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and such facts are stated below except that we modify finding of fact "8" as indicated below.

On March 13, 1987 the Division of Taxation issued to WIXT-TV, Inc. (hereinafter "petitioner") a Notice of Determination and Demand for Payment of Sales and Use Taxes Due which advised petitioner that, based on an audit of its records, additional tax in the amount of \$785,888.06 plus interest was due for the period March 1, 1982 through November 30, 1986.

The Division of Taxation conducted a field audit of petitioner's business operation. Inasmuch as the Division determined petitioner's records to be adequate, a detailed audit was performed except for those aspects for which petitioner elected to permit the use of a representative test period audit method by execution of an Audit Method Election (Form AU-377.12).

The audit findings were as follows:

<u>Category</u>	<u>Additional tax due</u>
Sales of master tapes	\$ 44,495.57
Recurring expenses	246,833.58
Bulk purchase	468,212.47
Other fixed asset purchases	<u>26,346.44</u>
Total tax due	<u>\$785,888.06</u>

On November 23, 1987, representatives of petitioner and the Division of Taxation participated in a conciliation conference conducted by the Department of Taxation and Finance, Bureau of Conciliation and Mediation Services. The conference resulted in the issuance of a Conciliation Order on February 19, 1988, which reduced the original determination by \$92,728.50 to \$693,159.56. The reduction reflects the cancellation of tax assessed on expenses incurred by petitioner for the receipt of satellite transmissions. The conferee sustained the original determination in all other respects.

Petitioner does not dispute the tax determined to be due on sales, expenses and acquisitions other than the initial purchase of the assets of WIXT-Television, Inc. on or about May 7, 1982. While denying liability, petitioner does not take issue with the computation of that amount. Thus, the dispute in this proceeding concerns liability for tax in the amount of \$468,212.47 plus interest.

On or about May 7, 1982 petitioner purchased the assets of WIXT-Television, Inc., a broadcast television station. Petitioner's operation of the station commenced immediately and continued throughout the audit period.

Among other activities, the station was involved with sale of production services and master tapes as well as the sale and barter of commercial air time.

Finding of fact "8" of the Administrative Law Judge's determination is modified to read as follows:

Although petitioner purchased the assets and began operation of the station in May of 1982, it did not apply for a certificate of authority or register as a sales tax vendor until some 18 months later, in November of 1983. Petitioner did not file a Notification of Sale, Transfer or Assignment in Bulk (form AU-196.10) at least ten days prior to the date of the transaction as required by Tax Law § 1141(c). Nor has petitioner ever filed such Notice. The Division issued a letter dated May 23, 1983 to Mr. Ron Johnson, Assistant Business Manager of the petitioner, enclosing a copy of the Notification of Sale form with a request "Please complete the attached forms and return them in the enclosed pre-addressed envelope." (Department exhibit L.) The letter indicated it was in response "to your letter of February 25, 1983 concerning a sale in May 1982." Petitioner's controller testified that petitioner did not fill out and return the forms (tr. page 75). Petitioner's controller testified (tr. page 81) that he was aware that when he received the notices of deficiency issued against petitioner's predecessor (ST-560's) that the forms had an entry to indicate whether sales tax had been paid on the sale of the business, that this did raise a question in his mind as to whether the tax had been paid, that he did not complete the questionnaire and that he did not make any inquiry concerning the issue. He indicated further that the reason for not doing so was that the sale had already occurred and that the form was late and that there was also a problem gathering information to properly fill out the form since he, the controller, was not privy to the transaction (tr. page 87).¹

1

Finding of fact "8" of the Administrative Law Judge's determination read as follows:

"Although petitioner purchased the assets and began operation of the station in May of 1982, it did not apply for a certificate of authority or register as a sales tax vendor until some 18 months later, in November of 1983. Petitioner has not filed with the Division of Taxation a Notification of Sale,

On September 20, 1983, petitioner filed sales and use tax returns (form ST-100) for the quarters ending August 31, 1982, November 30, 1982, February 28, 1983 and August 31, 1983. On October 4, 1983 petitioner filed a Sales and Use Tax Return for the quarter ending May 31, 1983. Each of these documents had a preprinted label affixed containing the corporate name and identification number of WIXT-Television, Inc.. A single line was drawn through the preprinted name and identification number. The name and Federal identification number of petitioner was entered in the area of the return reserved for corrections of the preprinted label.

When the Division of Taxation receives returns or payments from vendors which are not registered, they are held in a separate unit of the Division. Processing is suspended until such time as the payments or returns can be associated with a registered vendor.

Neither party could produce a copy of a return filed for the quarter ending May 31, 1982. However, the person who was the controller of both petitioner and the predecessor corporation credibly testified with regard to the circumstances surrounding a filing for that period of time. Specifically, this testimony established that the controller's office prepared and filed a sales and use tax return for the quarter ending May 31, 1982; that the return included taxes due from both WIXT-Television, Inc. and WIXT-TV, Inc. (petitioner); that payment of \$13,852.80 was made with the return by check drawn on WIXT-TV, Inc. (petitioner); that the return had a preprinted label affixed containing the corporate name and identification number of WIXT-Television, Inc. (the predecessor corporation) and that, unlike the returns filed in 1983, the name and identification number of petitioner were not entered on the form in any fashion.

On at least three occasions during 1982 and 1983 notice of determination and demand documents (form ST-560) were issued to the predecessor corporation indicating that sales tax returns had not been received. While setting forth estimated taxes due, the notices also provided that "if a return is not required, please complete the reverse side of this form."

Transfer or Assignment in Bulk (form AU-196.10) regarding the purchase."

The original finding of the Administrative Law Judge has been modified to more fully reflect the record.

At hearing, petitioner offered office copies of the aforesaid notices. On two of the three documents the notation was made on the reverse that the business had been sold on May 6, 1982 and that the new business name and address was "WIXT TV, INC. 1111 Third Avenue Seattle, WA 98101". The form also included a space for marking yes or no after the question "Was Sales tax collected on sale of business?". Neither box was checked on the copies offered by petitioner.

OPINION

The Administrative Law Judge determined that (1) petitioner as purchaser was responsible for taxes due on the tangible personal property transferred in the bulk sale; (2) there was no proof that petitioner paid the taxes to the seller nor did petitioner claim that it paid the taxes directly to the former State Tax Commission; (3) the return filed for the quarter ending May 31, 1982 was intended to be and had the legal effect of being a return for the predecessor corporation (seller) not the petitioner; (4) petitioner did not file a return for the quarter ending May 31, 1982 pursuant to Tax Law § 1136; (5) petitioner did not file a return as a customer pursuant to Tax Law § 1133(b); (6) the deficiency was not barred by the three year statute of limitations in Tax Law § 1147(b); and (7) the filing of returns for the quarters subsequent to May 31, 1982 did not satisfy petitioner's filing requirement. Accordingly, the Administrative Law Judge concluded that petitioner, as purchaser, was liable for the tax pursuant to Tax Law § 1133(b).

Petitioner asserts that (1) the acceptance by the Division of payment of \$13,852.80 made by a check drawn on petitioner's account accompanied by a return for the quarter ending May 31, 1982 is conclusive evidence of the timely filing of a return for that quarter and (2) the returns it late filed in September 1983 for the quarters ending August 31, 1982, November 30, 1982, February 28, 1983 and August 31, 1983 and the return filed in October 1983 for the quarter ending May 31, 1983, coupled with several telephone conversations with Division personnel concerning the Notices of Determination and Demand mailed to the predecessor corporation,

provided the Division with actual notice that petitioner had acquired the business from its predecessor. Accordingly, petitioner asserts that the deficiency asserted against it by the Division on March 13, 1987 was barred by the three year statute of limitations in Tax Law § 1147(b).

The Division asserts that (1) petitioner did not file a return for the period ending May 31, 1982 and that its March 13, 1987 Notice was therefore timely issued and (2) the late filed returns for quarters subsequent to May 31, 1982 did not have the effect of triggering the three year statute of limitations in Tax Law § 1147(b).

We affirm the determination of the Administrative Law Judge.

Tax Law § 1133(b) provides that "[w]here any customer has failed to pay a tax imposed by this article to the person required to collect the same, then in addition to all other rights, obligations and remedies provided, such tax shall be payable by the customer directly to the [Commissioner of Taxation] and it shall be the duty of the customer to file a return with the [Commissioner] and to pay the tax to the [Commissioner] within twenty days of the date the tax was required to be paid."

The liability asserted against petitioner here is as a purchaser of tangible personal property, i.e., the assets of the television station it purchased.

A purchaser is a person who purchases property or to whom services are rendered (Tax Law § 1101[b][2]) and includes not only the recipient of individual goods and services, but also the transferee in a bulk sale (20 NYCRR 537.1[e]).

Where there is no conclusive proof that a vendor ever collected sales tax on the sale of tangible personal property recourse may be had directly against the purchaser (Matter of Food Concepts v. State Tax Commn., 122 AD2d 371, 503 NYS2d 928; see also, Fifth Ave. Bldg. Co. v. Joseph, 297 NY 278 [where the Court of Appeals, interpreting a provision of the New York City Sales Tax statute similar to § 1133[b], reached a similar conclusion, i.e., the City may collect from a purchaser if he has not paid the tax to the vendor]).

We deal first with whether petitioner paid the tax to the seller. The Administrative Law Judge determined that there was no proof or even argument that petitioner paid the tax to the seller. Our review of the record supports the determination of the Administrative Law Judge on this point.

Petitioner asserts that the contract of sale between petitioner and the seller provided that the seller would pay the tax. However, the contract was not introduced into evidence and is not in the record before us. In fact, there is no evidence in the record before us that petitioner paid the tax to the seller. Accordingly, we can only conclude that petitioner did not pay the tax to the seller.

Our next consideration is whether petitioner complied with Tax Law § 1133(b) by paying the tax directly to the Commissioner of Taxation.²

The record before us contains no evidence that petitioner paid the tax to the Commissioner of Taxation as required by Tax Law § 1133(b).

We deal next with petitioner's assertion that it filed a return for the period ending May 31, 1982 and that such return started the three year statute of limitations in Tax Law § 1147(b) running.

The Administrative Law Judge found that the person who was the controller for both the seller and the purchaser credibly testified that the controller's office prepared and filed a sales and use tax return for the quarter ending May 31, 1982; that the return included taxes due from both the seller and petitioner; that payment of \$13,852.80 was made with the return by check drawn on petitioner; that the return had a preprinted label affixed containing the corporate name and identification number of petitioner's predecessor and that unlike the returns late filed in September 1983, the name and identification number of petitioner were not entered on the form

²We also note that where a return required to be filed pursuant to the sales tax law (Article 28 of the Tax Law) is not filed or is incorrectly filed, the Division of Taxation may issue a notice of determination to the "person liable for the collection or payment of the tax" (Tax Law § 1138[a]).

in any fashion. The Administrative Law Judge determined that this return was for petitioner's predecessor, not petitioner.

Petitioner, relying on Zellerbach Paper Co. et v. Helvering (293 US 172, 35-1 USTC ¶ 9003) asserts, in effect, that this is a single "combined" return for both entities, it purports to be petitioner's return, is sworn to as such and evinces an honest and genuine endeavor to satisfy the law and, therefore, it should suffice for petitioner's return. We cannot agree. We note in this regard that a copy of the return could not be provided by either party and we find nothing in the record to establish that the return for the quarter ending May 31, 1982 could function as the return of petitioner. The fact that petitioner wrote the check that accompanied the return is not, in itself, enough to establish that the return was petitioner's. Thus, we find no basis in fact to support petitioner's thesis for a "combined return." We conclude that petitioner did not file a return for the period ending May 31, 1982 or any other return that could satisfy the requirement of § 1133(b) of the Tax Law. Accordingly, the Division, pursuant to § 1147(b) of the Tax Law, could assess the tax at any time and the assessment issued to petitioner was timely.

While the foregoing is dispositive of the issue before us, we will deal with other assertions raised by petitioner. We deal first with petitioner's assertion that the returns late filed in September and October 1983, gave the Division actual notice that petitioner had acquired the assets and that the statute of limitations ran from that period forward.

The gist of petitioner's assertion apparently is that its subsequent correct filings undo its failure to file a return for the period ending May 31, 1982, the period in which the transaction occurred. We do not agree. The filing of returns for subsequent quarters does not have the effect of reinstating the period of limitations for the period in issue (see, e.g., Badaracco, Sr. v. Commr., 464 US 386, 84-1 USTC ¶ 9150, [wherein the Supreme Court determined that subsequent filing of correct returns does not undo the original filing of fraudulent returns by the taxpayer so as to prevent the Commissioner from assessing "at any time" the tax for a year in which the taxpayer filed a false or fraudulent return]).

In light of petitioner's assertions that the Division's inactivity is at the root of petitioner's problems here, we believe it appropriate and instructive to discuss briefly the consequences of petitioner's failure to carry out its obligations under the law as a vendor of taxable goods and services and as a purchaser in bulk of the assets of its business.

Petitioner, as the purchaser in a bulk sale, was required to file a notice of sale with the Division at least ten days prior to taking possession of the business (Tax Law § 1141[c]).

The purpose of such notification is (1) to provide the Division with adequate time, prior to the consummation of the sale, to determine whether there are any taxes due the State from the seller of a business and (2) to preserve the Division's ability to collect any of the seller's liability from the consideration for the assets of the business being transferred. Filing of the notice as required by the statute also serves to protect the purchaser from personal liability for any outstanding sales tax obligations of the seller. Finally, the filing of the notification of sale puts the Division on notice with regard to sales tax which may be due on the sale in bulk of business assets.

Petitioner here did not provide the notice required by Tax Law § 1141(c). Thus, the Division was not aware of the transfer of the business assets on May 7, 1982 and was prevented from timely determining any outstanding sales tax liability of the seller. More importantly as it relates to this issue in this case, the Division was precluded from timely identifying and dealing with the issue before us now, i.e., the liability for the sales tax due on the sale of the assets of the business.

We also point out that petitioner as the purchaser of business assets in a bulk sale was required to register with the Division and apply for a certificate of authority to collect sales tax at least twenty days prior to its taking possession of its business (Tax Law § 1134).

Every person who is required to register is also then required to file returns in a form prescribed by the Division (Tax Law § 1136).

The registration provides the Division with information relative to the business necessary to allow the Division to properly administer the tax law and to ensure the proper filing of returns and remission of sales tax liability by the correct party.

Petitioner did not timely register with the Division. On at least three occasions during 1982 and 1983 notice and determination and demand documents were issued to the predecessor corporation. Petitioner's controller testified (Tr. p. 81) that he was aware that when he received the notices of determination issued against petitioner's predecessor (ST-560's) that the forms had an entry to indicate whether sales tax had been paid on the sale of the business, that this did raise a question in his mind as to whether the tax had been paid, that he did not complete the questionnaire and that he did not make any inquiry concerning the issue. Nor did he apparently make any inquiry when in May 1983 he received the bulk sales forms from the Division in response to a letter from petitioner's Assistant Business Manager. Petitioner refused to fill out the bulk sales forms mailed to it in May of 1983.

Petitioner filed returns late for the periods ending August 31, 1982, November 30, 1982, February 28, 1982 and August 31, 1983 on September 20, 1983. Petitioner also filed its return for the period ending May 31, 1983 late, on October 4, 1983. The returns so late filed had a preprinted label affixed containing the corporate name and identification number of petitioner's predecessor. A single line was drawn through the preprinted name and identification number. The name and federal identification number of petitioner were entered in the area of the return reserved for corrections of the preprinted label.

It is clear to this Tribunal that petitioner's failure to carry out its obligations under the above provisions of law are in large part the reason for petitioner's current problems. The Division was not aware of the fact that petitioner was operating its business. Petitioner's assertion that it was the Division's ineptitude that led to petitioner's problems are ludicrous under these circumstances.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of WIXT-TV, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of WIXT-TV, Inc. is denied; and
4. The Notice of Determination dated March 13, 1987, as recomputed by the Conciliation Order dated February 19, 1988, is sustained.

DATED: Troy, New York
August 2, 1990

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner