

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

CENTRE FENCE CO., 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, 1974
through May 31, 1978.

Petitioner, Centre Fence Co., Inc., 2883 Miles Avenue, Bronx, New York 10465, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1974 through May 31, 1978 (File No. 24424).

A hearing was held before Frank Landers, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 28, 1984 at 1:15 P.M. The hearing was reopened and held before Arthur Johnson, Hearing Officer, at the same location on February 26, 1987 at 1:15 P.M., with additional evidence to be submitted by July 1, 1987. Petitioner appeared by Norman Heiman, Esq., on June 28, 1984 and by its president, Michael Carbone, on February 26, 1987. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel, on June 28, 1984, and Gary Palmer, Esq., of counsel, on February 26, 1987).

ISSUE

Whether the audit procedures and tests used by the Audit Division in an examination of petitioner's books and records were proper and whether the additional taxable sales and use taxes determined as a result thereof were correct.

FINDINGS OF FACT

1. Petitioner, Centre Fence Co., Inc., was engaged in the sale and installation of fences. Petitioner also sold uninstalled fence materials to other fence dealers.

2. On November 13, 1978, as the result of an audit, the Audit Division issued notices of determination and demands for payment of sales and use taxes due covering the periods March 1, 1974 through August 31, 1977 and September 1, 1977 through May 31, 1978 for taxes due of \$31,865.93 and \$5,914.10, respectively, plus penalty and interest.

3. Michael Carbone, president of petitioner corporation, executed consents extending the period of limitation for assessment of sales and use taxes for the period March 1, 1974 through August 31, 1977 to December 20, 1978.

4. The Audit Division found that petitioner did not maintain adequate books and records to verify taxable and nontaxable sales. On audit, the Audit Division examined sales invoices for June 1976 and found that sales for resale amounted to \$4,122.22, or 6.9 percent of gross sales for that month. This percentage was applied to gross sales of \$2,293,311.00 for the audit period to arrive at total sales for resale of \$158,238.00. Reported taxable sales of \$850,863.00 were added to resale sales for a total of \$1,009,101.00. This amount was deducted from gross sales, leaving reported capital improvement sales of \$1,284,210.00. Invoices for capital improvement work were reviewed for June 1976. The Audit Division disallowed 1.23 percent because no capital improvement certificates were on file. This percentage was applied to reported capital improvement sales of \$1,284,210.00, for a total disallowance of such sales amounting to \$15,796.00. Invoices were also reviewed for the period June 1975 through August 1975 which revealed that 1.9 percent of reported capital

improvement sales were actually repairs. This percentage was applied to capital improvement sales to determine additional taxable repair sales of \$24,400.00 for the audit period. The sales of \$15,796.00 and \$24,400.00 as computed above were combined with taxable sales of \$902,633.00 recorded in petitioner's books and records to determine adjusted taxable sales for the audit period of \$942,829.00. The reported taxable sales indicated above of \$850,863.00 were deducted from said amount leaving additional taxable sales of \$91,966.00 and tax due thereon of \$7,285.78.

5. Petitioner did not pay tax on purchases of materials and did not maintain records to show the cost of materials used in capital improvement work as opposed to those materials resold as such or as part of repair work. In order to determine the amount of tax due on materials used by petitioner in performing capital improvements, the Audit Division initially analyzed the sales invoices; however, the information contained thereon was insufficient to ascertain material cost. Consequently, the cost of materials was estimated as follows: the markups on materials sold as taxable retail sales and sales for resale were estimated at 33.3 percent and 13.3 percent, respectively. Based on these markup percentages, the Audit Division computed material purchases of \$707,299.00 for retail sales and \$139,663.00 for resale. These amounts were deducted from total purchases which resulted in a balance of \$698,168.00 in purchases used for capital improvements. Capital improvement sales of \$1,284,210.00 were adjusted to \$1,192,244.00 to reflect the sales that were disallowed. The cost of materials was 58.56 percent of the total sales of capital improvements (\$698,168.00 divided by \$1,192,244.00).

6. Sales invoices for the period March 1, 1974 through May 31, 1976 were analyzed to determine out-of-state sales and sales to tax exempt organizations.

Such sales amounted to \$283,027.00 for said period, or 23.73 percent of the sales. This percentage was applied to total gross sales of \$2,293,311.00 to determine capital improvement sales of \$544,203.00 for which the materials incorporated therein were nontaxable. These nontaxable sales were deducted from total capital improvement sales (\$1,192,244.00) to arrive at capital improvement sales of \$648,041.00 for which the materials were taxable. The cost of materials subject to tax (\$379,493.00) was determined by applying 58.56 percent to such sales. Petitioner had reported purchases subject to use tax of \$22,504.00 on sales tax returns filed for the periods after September 1, 1977¹. The additional taxable purchases amounted to \$356,989.00, with tax due thereon of \$28,162.45.

7. The analysis of sales invoices for June 1976 also disclosed that petitioner incorrectly charged sales tax for different local taxing jurisdictions for materials that were actually picked up by the customer at petitioner's place of business in the Bronx. This resulted in additional tax due of \$2,179.00.

8. Purchases of recurring expense items for June 1976 revealed that petitioner failed to pay sales or use tax on purchases of \$38.62, or 7.1 percent of total expense purchases for that month. This percentage was applied to purchases of \$27,355.00 for the audit period to arrive at additional taxable expense purchases of \$19,420.00 and tax due of \$153.20.

9. Petitioner argued that the test period procedures utilized by the Audit Division did not determine an accurate tax liability and that adequate books and records were available from which a more reasonable amount could have

¹ Petitioner started reporting taxable purchases after the audit had commenced and was advised of their taxability.

been determined. Petitioner also argued that the cost of materials used in capital improvement jobs was substantially less than the 58.56 percent calculated by the Audit Division, and that the amount of out-of-state sales allowed was insufficient. Petitioner offered no credible evidence to substantiate its arguments.

10. The hearing was concluded on June 28, 1984. By letter dated September 7, 1984, petitioner's new counsel, William Doonan, Esq., requested that the hearing be reopened for the purpose of producing documentary evidence that would establish a lower tax liability. This request was denied on October 18, 1984. A second request was made by Mr. Doonan on October 27, 1984 to reopen the hearing. The second request was granted and a hearing was scheduled for February 5, 1985. Petitioner obtained new counsel once again for the rescheduled hearing. The hearing was adjourned at the request of Seymour I. Hurwitz, Esq., so that new information could be reviewed by counsel for the Audit Division for purposes of effectuating a settlement. The information was not submitted for review within a reasonable period of time and a hearing was scheduled for June 20, 1986. The hearing was adjourned for a second time at petitioner's request under the condition that a definite date be set for the Audit Division to review the new information. A representative for the Audit Division met with petitioner's counsel on July 10, 1986, at which time the Department's auditor reviewed additional books and records; however, agreement as to liability could not be reached. The hearing was rescheduled for February 26, 1987. Mr. Hurwitz advised the Tax Appeals Bureau that he was no longer representing the petitioner and requested an adjournment on behalf of petitioner. Petitioner was advised on February 18, 1987 that the hearing was not adjourned.

11. At the reopened hearing held on February 26, 1987, the Audit Division conceded that based on the additional books and records reviewed on July 10, 1986, the amount of taxes due on additional taxable sales should be reduced to \$1,742.07 and the use tax on materials used in capital improvements to \$20,964.42. The other areas of the deficiency remained unchanged. The revised taxes due totalled \$25,038.28. Mr. Michael Carbone, president of the corporation, appeared at the hearing for petitioner. He produced no additional evidence. Subsequent to the hearing, petitioner requested until July 1, 1987 to submit more documentation. The request was granted and on June 29, 1987 a letter was received from Rogow, Star and Schuman, CPA's. The letter stated that petitioner's records were examined for the period March 1, 1974 through May 31, 1978 and it was determined that the amount of tax due is \$10,000.00.

CONCLUSIONS OF LAW

A. That petitioner provided inadequate books and records for purposes of verifying taxable sales and purchases subject to use tax. When books and records are inadequate or insufficient, it is the duty of the Audit Division to select a method of audit reasonably calculated to reflect taxes due and petitioner has the burden of showing that the method of audit or the amount of tax assessed was erroneous (Matter of Urban Liquors v. State Tax Commission, 90 AD2d 576).

B. That the audit procedures and tests adopted by the Audit Division were reasonable under the circumstances. When a taxpayer's recordkeeping is faulty, exactness is not required of the examiner's audit (Matter of Meyer v. State Tax Commission, 61 AD2d 223, lv denied 44 NY2d 645). Accordingly, the Audit Division properly determined petitioner's sales and use tax liability pursuant to section 1138(a) of the Tax Law and petitioner failed in its burden of showing error.

C. That the petition of Centre Fence Co., Inc. is granted to the extent that the amount of taxes due is reduced to \$25,038.28 (Finding of Fact "11"); the Audit Division is hereby directed to modify the notices of determination and demands for payment of sales and use taxes due issued November 13, 1978; and that, except as so granted, the petition is in all other respects denied.

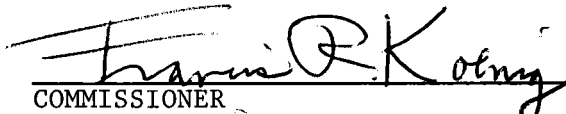
DATED: Albany, New York

STATE TAX COMMISSION


AUG 28 1987



PRESIDENT



COMMISSIONER



COMMISSIONER