

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

SERGIO GONZALES,
OFFICER OF CITYWIDE SUPERMARKETS, 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 September 1, 1976
through November 30, 1979.

Petitioner, Sergio Gonzales, officer of Citywide Supermarkets, Inc., 1705 Mansion Street, Bronx, New York 10460, 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 September 1, 1976 through November 30, 1979 (File No. 30919).

A hearing was commenced before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 7, 1983 at 1:15 P.M. and was continued to conclusion before Arthur Johnson, Hearing Officer, on October 10, 1985 at 9:30 A.M. Petitioner appeared by John J. Montes, Esq. The Audit Division appeared by John P. Dugan, Esq. (Lawrence Newman, Esq., of counsel).

ISSUES

I. Whether Sergio Gonzales is personally liable for sales taxes due from Citywide Supermarkets, Inc.

II. Whether the Audit Division properly estimated the tax liability of Citywide Supermarkets, Inc.

FINDINGS OF FACT

1. Citywide Supermarkets, Inc. ("Citywide") operated a large grocery store located at 630 East 169th Street, Bronx, New York.

2. On June 13, 1980, as the result of an audit of Citywide, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Sergio Gonzales, individually as an officer of Citywide, covering the period September 1, 1976 through November 30, 1979 for taxes due of \$140,014.34, plus penalty and interest of \$63,402.84, for a total of \$203,417.18.

3. Citywide provided the Audit Division with the following books and records for audit: general ledger, federal income tax returns for 1976 and 1977, cash receipts journal and cash disbursements journal. The Audit Division compared gross sales from the general ledger to the income tax returns and found that such sales in the general ledger exceeded those in the income tax returns by \$27,579.42. The sales tax returns showed gross sales greater than both the general ledger and the income tax returns. Purchases on the income tax return for 1976 were \$396,012.38 greater than those purchases recorded in the general ledger. For 1977, the purchases in the general ledger were \$13,626.94 greater than those on the income tax return. Citywide did not have any cash register tapes available. Because of the inconsistencies and omissions in the books and records, the Audit Division attempted to reconstruct taxable sales by determining the ratio of taxable purchases to total purchases and applying the applicable markup percentages. The months of June, 1977 and March, 1978 were selected as test periods; however, Citywide could not provide sufficient purchase invoices for these months or any other alternative months. Consequently,

the Audit Division estimated a taxable ratio of 50 percent based on its observation of large quantities of taxable items including beer, soda, paper products and pet food. The auditor also observed cash being taken from a cash register without being counted. Since Citywide reported gross sales by adding bank deposits and cash payouts, the auditor determined that the uncounted cash withdrawal he observed would result in unreported sales. Therefore, based on his observation, he increased gross sales 10 percent. This percentage was applied to gross sales reported on sales tax returns of \$4,498,276.00 to arrive at adjusted gross sales of \$4,948,103.60. The taxable percentage (50%) was applied to said amount to arrive at taxable sales of \$2,474,051.80 with tax due thereon of \$197,924.14. Citywide paid sales taxes of \$57,909.80, leaving a balance of \$140,014.34.

4. The Audit Division assessed petitioner individually for the taxes determined due from Citywide because he was listed as the treasurer and one-third stockholder of Citywide on the corporation tax return filed for the fiscal year ending June 30, 1977.

5. During the period at issue, petitioner operated Avanera Tropical Market which sold fruits and vegetables to several grocery stores and supermarkets, including Citywide. Citywide became indebted to petitioner for unpaid purchases of fruits and vegetables. In an attempt to guarantee payment, Citywide made petitioner a stockholder in the corporation. Thereafter, petitioner continued to operate his fruit and vegetable business, however, he spent more time than before at Citywide. Petitioner did not sign checks or prepare or sign tax returns. He was not involved in the day-to-day management or financial affairs of the business and received no compensation. Citywide went out of business in the latter part of 1979 and vacated the store. The landlord

offered the premises to petitioner. Petitioner took over the premises, made renovations and reopened the business as S & S Supermarket.

CONCLUSIONS OF LAW

A. That section 1133(a) of the Tax Law places personal liability for the taxes imposed, collected or required to be collected under Article 28 upon "every person required to collect any tax" imposed by said article. Section 1131, subdivision (1) furnishes the following definition of the term "persons required to collect tax":

"'Persons required to collect tax' or 'person required to collect any tax imposed by this article' shall include: every vendor of tangible personal property or services; every recipient of amusement charges; and every operator of a hotel. Said terms shall also include any officer or employee of a corporation or of a dissolved corporation who as such officer or employee is under a duty to act for such corporation in complying with any requirement of this article and any member of a partnership."

B. That resolution of the issue of personal liability for sales tax due turns upon a factual determination in each case (Vogel v. Dep't. of Taxation and Finance, 98 Misc.2d 222; Chevlowe v. Koerner, 95 Misc.2d 388). Relevant factors in making such determination include, inter alia, day-to-day responsibilities in the corporation, involvement in and knowledge of the corporation's financial affairs and its management, the identity of the person who prepared and signed tax returns and the authority to sign checks [Vogel, supra; see also 20 NYCRR 526.11(b)].

C. That petitioner had limited involvement with and knowledge of the financial affairs and management of Citywide. Accordingly, he was not a person under a duty to collect and pay over sales and use taxes within the meaning and intent of sections 1131(1) and 1133(a) of the Tax Law and thus bears no personal liability for the taxes due from Citywide.

D. That since petitioner is not personally liable for any taxes due from Citywide, Issue II is moot.

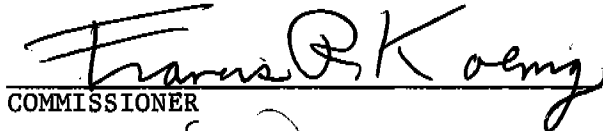
E. That the petition of Sergio Gonzales, officer of Citywide Supermarkets, Inc. is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued June 13, 1980 is cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

MAR 27 1986


PRESIDENT


COMMISSIONER


COMMISSIONER