

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
DONALD MAMMOSER	:	
D/B/A DON'S AUTO	:	
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, 1977	:	
through May 31, 1979.	:	
	:	DECISION
In the Matter of the Petition	:	
of	:	
SOUTHGATE OIL COMPANY, INC.	:	
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, 1979.	:	

Petitioners, Donald Mammoser d/b/a/ Don's Auto, 1440 Electric Avenue, Lackawanna, New York 14218 and Southgate Oil Company, Inc., 70 Ransier Drive, West Seneca, New York 14224, filed petitions for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods March 1, 1977 through May 31, 1979 and June 1, 1976 through May 31, 1979, respectively (File Nos. 33037 and 30918).

A formal hearing in the matter of petitioner Southgate Oil Company, Inc. was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on July 14, 1982 at 9:15 A.M. Petitioner appeared by Gerald Greenan, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Patricia Brumbaugh, Esq., of counsel).

A formal hearing in the matter of petitioner Donald Mammoser d/b/a Don's Auto was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on March 7, 1983 at 1:15 P.M. and continued on March 9, 1983 at 9:15 A.M., April 18, 1983 at 1:15 P.M. and continued to conclusion on April 19, 1983 at 10:30 A.M. Petitioner appeared by Norman A. LeBlanc, Jr., Esq. The Audit Division appeared by John P. Dugan, Esq. (Patricia Brumbaugh, Esq., of counsel).

On August 15, 1983 petitioners in both matters entered into a stipulation with the Audit Division wherein, in recognition of the similar fact patterns and legal issues involved, it was agreed that the matters would be consolidated and a decision would be issued based upon the consolidated record, with all briefs to be submitted by April 18, 1984.

ISSUES

I. Whether petitioners were vendors required to collect sales tax, file sales tax returns and pay over sales tax on taxable sales of gasoline.

II. Whether sales of fuel oil made by petitioner Southgate Oil Company, Inc. in connection with two transactions were exempt from sales tax as sales for an exempt use or sales for incorporation into a project for an exempt organization.

FINDINGS OF FACT

1. On April 10, 1980, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner Southgate Oil Company, Inc. ("Southgate") in the amount of \$114,480.97, plus interest of \$20,070.80 for a total due of \$134,551.77 for the period June 1, 1976 through May 31, 1979. On December 15, 1980, as the result of a field audit, the Audit Division issued a Notice of Determination

and Demand for Payment of Sales and Use Taxes Due against petitioner Donald Mammoser d/b/a Don's Auto in the amount of \$90,956.89, plus interest of \$20,408.49, for a total due of \$111,365.38 for the period March 1, 1977 through May 31, 1979.

2. On November 13, 1979, petitioner Southgate, by its president, James K. Canfield, executed a consent extending the period of limitation for assessment of sales and use taxes due for the period June 1, 1976 through May 31, 1979 to December 20, 1980. On May 27, 1980, petitioner Donald Mammoser executed a consent extending the period of limitation for assessment of sales and use taxes due for the period March 1, 1977 through May 31, 1979 to December 20, 1980.

3. In 1976, Mr. Mammoser, a school teacher, was looking for an opportunity to perform repair services on automobiles. In or about October, 1976, in response to a newspaper advertisement, Mr. Mammoser inquired about making arrangements for the leasing of a service station so that he could use the bay space to service automobiles. Mr. Mammoser's inquiries resulted in a meeting with Mr. Gerald Hanny, the general manager of Geiger Enterprises, Inc. Geiger Enterprises was a group of eight or nine companies owned or controlled by Harold Geiger, including Auto Stop, Geiger Enterprises, Budget Gas, Oil Atomic, Willie the Whale and Reddco Petroleum. Geiger Enterprises owned or controlled numerous gas station properties in the Buffalo area which were rented to retail operators who purchased their gasoline from one or more of the Geiger companies. Mr. Geiger apparently changed the names of his companies frequently so that at any given time the distributor to the retailers could be named Budget Gas, Willie the Whale or any of the other names used.

4. In order for Mr. Mammoser to rent the gas station, he had to agree to certain conditions insisted upon by Mr. Hanny. Among the conditions were the following:

a. The prices charged at the pumps for the retail sale of gasoline were established by Geiger Enterprises.

b. Geiger set the hours of operation of the station.

c. Geiger Enterprises supplied all the gasoline sold by petitioner and sales taxes on gasoline delivered to the station were included in the tank truck price to petitioner and would be prepaid to Geiger at the time of delivery. Geiger Enterprises was to collect the sales tax and make payments to the Department of Taxation and Finance.

d. In return for selling gas at the station, petitioner received a fee from Geiger Enterprises of two to three cents for each gallon of gasoline sold. Upon delivery of the gasoline, petitioner would pay the driver the retail pump price per gallon less the fee and less any credit card sales collected by petitioner. Credit sales were made through Amoco credit cards using Geiger's account. Geiger collected on all credit sales directly from Amoco.

e. Petitioner was required to use the services of an accountant selected by Mr. Geiger for sales tax accounting on gasoline sales, and to pay a fee to the accountant for the service.

f. Petitioner had no option to reject any of the conditions imposed by Geiger Enterprises. If all of the conditions were not met, Geiger Enterprises would not enter into the leasing arrangement and if the conditions were not adhered to during station operations, Geiger could terminate the lease immediately.

5. In addition to selling gasoline, Mr. Mammoser performed automobile repair work and sold tires, batteries and accessories. The repair work and accessory sales were completely unrelated to the Geiger gasoline sales. Mr. Mammoser applied for and received his own sales tax Certificate of Authority so that he could collect tax and file returns on his non-gasoline sales. Mr. Mammoser employed his own accountant to maintain his books and records with respect to non-gasoline sales and to prepare sales tax returns for such sales. Mr. Mammoser filed sales tax returns for non-gasoline sales only and did not file returns for gasoline sales until June, 1979, at which time Geiger allowed him to set his own prices for gasoline sales and report and pay sales tax on such sales using his own sales tax returns. Mr. Mammoser timely and accurately reported all sales taxes due on non-gasoline sales for the entire audit period.

6. Petitioner Southgate is engaged in the business of sales of fuel oil and petroleum products to commercial accounts. Southgate also leased service station property from Geiger Enterprises to enable it to carry on its fuel oil business. As a condition of the lease, Southgate was required to make retail sales of gasoline at the leased property. As with Mr. Mammoser, the property was owned by Geiger Enterprises and was leased to Southgate upon an oral agreement with terms identical to the lease arrangement entered into by Mr. Mammoser. Southgate also filed its own returns and made payments of sales tax on its commercial fuel oil sales. Both agreements in these cases were oral because this was the only method by which Harold Geiger would conduct business. Mr. Geiger owned some 125 service stations at various times in the Buffalo area, most of which had leasing arrangements similar to petitioners' agreements. Mr. Mammoser's attorney reduced most of the terms of the agreement to writing in a letter of confirmation to Mr. Hanny.

7. Both petitioners were told by Mr. Hanny that the delivery truck prices would include sales tax which was to be prepaid to Geiger Enterprises. Mr. Hanny also informed petitioners that Geiger would be responsible for reporting and paying the sales taxes due for the gasoline sales. When the delivery truck delivered gasoline, it charged petitioners two or three cents per gallon less than the current pump price. Since the pump price included sales tax and the two or three cent reduction was petitioners' fee for selling gas, the amount turned over to Geiger Enterprises contained the sales tax. Some, but not all, of Mr. Mammoser's delivery tickets were marked "sales tax included". All of the checks for payment from Southgate were marked "all sales taxes included". Petitioners were to submit monthly gasoline sales reports to an accountant selected by Mr. Geiger. The accountant would review the reports and compute the sales tax due. He then sent the tax information on all the Geiger stations to Geiger Enterprises' certified public accountant who was to prepare the sales tax returns and provide for their filing and payment out of the funds previously collected from the individual station operators.

8. When petitioners questioned Geiger's method of collecting sales tax, Mr. Hanny informed them that Geiger Enterprises had an arrangement with the Department of Taxation and Finance whereby Geiger Enterprises would collect and pay over sales tax on a consolidated basis for all its stations. In fact, Geiger Enterprises, operating under the name Budget Gas, Inc., had applied for and had been issued a multiple location Certificate of Authority to collect sales tax. Some of the Geiger stations had been late in paying sales taxes due and Mr. Geiger had set up a payment schedule and requested authority to file sales tax returns on a consolidated basis. The result was the aforesaid Certificate of Authority which authorized Budget Gas, Inc. to file sales tax

returns on behalf of 32 service stations named on a list attached to the certificate. It was to be the responsibility of Budget Gas, Inc. to add names to or delete names from the list when new stations opened or old stations closed.

9. Neither petitioner was named on the aforesaid list and it does not appear that Mr. Geiger or Mr. Hanny ever notified the Department of Taxation and Finance that Don's Auto or Southgate were to be added to the list of stations for which Geiger Enterprises was collecting sales taxes. In fact, there is no indication anywhere in the record that Mr. Geiger ever amended the original 32 station list despite the fact that his companies supplied many more stations under similar arrangements to collect sales tax during the periods in issue. Moreover, it is unclear whether Geiger Enterprises paid over any of the sales taxes it collected from its stations since its records had been subpoenaed by a Federal grand jury.

10. The assessment issued against petitioner Southgate also contained additional tax due as a result of sales claimed to be exempt for which no exemption certificates were available. On audit, the auditor had taken a statistical sample of Southgate's commercial fuel sales for the entire audit period. Additional tax due based on the sample amounted to \$294.97. This figure was separated into \$58.21 in tax due agreed to by Southgate and \$236.76 in disagreed tax due. Each figure was divided by total commercial fuel sales per sample of \$285,515.92 resulting in projection rates of .02 percent for agreed tax and .083 percent for disagreed tax. The auditor applied each projection rate to total commercial sales for the audit period of \$4,008,746.00 which resulted in \$801.75 in additional tax which Southgate agreed was due and \$3,327.26 in additional tax which Southgate did not agree was due.

11. The disagreed amount was based on two sales which Southgate maintained were exempt from sales tax. The first transaction involved the sale of diesel fuel to a trucking company which Southgate's president thought was to be used for tax exempt purposes. However, the purchaser of the fuel did not supply Southgate with an exemption certificate and Southgate was unable to show to what use the fuel was put. The tax due on said sale was \$194.55. The second transaction involved the sale of gasoline to a contractor who issued a Contractor Exempt Purchase Certificate which stated that the gasoline purchase was exempt from sales tax because "the tangible personal property is for incorporation into the above project for an exempt organization". The certificate indicated that the fuel was for use in a paving contract for a school district. Petitioner's president was unsure of precisely how the fuel was used in the project, although he surmised that it might have been used to weigh down a fuel tank underground to keep the tank from coming to the surface prior to the excavation being covered over. The tax due on the latter sale was \$42.21.

CONCLUSIONS OF LAW

A. That section 1133(a) of the Tax Law provides, in part, that "every person required to collect any tax imposed by [Article 28] shall be personally liable for the tax imposed, collected or required to be collected under this article". Section 1131(1) of the Tax Law includes within the term "person required to collect tax", "every vendor of tangible personal property or services...". Section 1101(b)(8)(i) defines the term vendor, in part, as "a person making sales of tangible personal property or services, the receipts from which are taxed by this article...".

B. That both petitioners were vendors within the meaning and intent of section 1101(b)(8)(i) of the Tax Law and thus were required to collect sales tax, file sales tax returns and pay over sales tax on taxable sales of gasoline. They were independent businesses which entered into an arrangement with Geiger Enterprises in order to operate service stations for a profit on gasoline sales. At the time of entering into the agreement with Geiger, petitioners were informed that Geiger would be responsible for reporting and paying the sales tax due for the gasoline sales. It was the petitioners' responsibility to verify that their sales tax payments to Geiger were authorized by the New York State Department of Taxation and Finance. Absent such authorization, neither petitioner exercised their duty to ascertain if this method of payment, which was contrary to the statutory scheme of the New York State Sales Tax Law, had been approved by the Department of Taxation and Finance.

C. That although Geiger, operating under the name Budget Gas, Inc., had been issued a multiple location Certificate of Authority to collect sales tax, neither petitioner was named on the list attached to the Certificate. At the time of renting the gas stations, neither petitioner made any effort to confirm any alleged agreement between Geiger and the Department of Taxation and Finance and only eventually learned of the multiple location Certificate of Authority after the Notices of Determination had been issued. The petitioners did not exercise reasonable care to ensure that the taxes were paid over to the State of New York.

D. That section 1132(c) of the Tax Law provides that all sales of property or services subject to the sales tax shall be deemed taxable sales at retail unless:

"a vendor shall have taken from the purchaser a certificate in such form as the tax commission may prescribe...to the effect that the property or service was purchased for resale or for some use by reason of which the sale is exempt from tax..."

E. That petitioner Southgate had no exemption certificate covering its sale of diesel fuel to the trucking company as described in Finding of Fact "14" and could not otherwise prove that such sale was exempt for any reason and such sale was properly deemed taxable by the Audit Division. With respect to the sale of fuel to the contractor performing a paving contract for a school district, Southgate received a valid Contractor Exempt Purchase Certificate. Whether the contractor actually put the fuel to an exempt use is unclear from the record, however, it was not Southgate's responsibility "to police or investigate [its] customers" once it received a valid certificate (Saf-Tee Plumbing Corporation v. Tully, 77 A.D.2d 1). Therefore, the \$42.21 sales tax due on said transaction should not have been included in the disagreed projection rates as determined by the auditors. Southgate's additional tax due is to be determined as follows:

Disagreed tax from sample	\$236.76
Less: tax on exempt purchase	<u>42.21</u>
Modified disagreed tax	\$194.55
Disagreed tax	\$ 194.55
Commercial sales per sample	<u>\$285,515.92</u> = .068%
Total commercial sales	\$4,008,746.00
Modified projection rate	<u>x .068%</u>
Additional tax due	\$ 2,725.95

F. That the petition of Donald Mammoser d/b/a Don's Auto is denied.

G. That the petition of Southgate Oil Company, Inc. is granted to the extent indicated in Conclusion of Law "E"; that the Audit Division is directed


to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued April 10, 1980 accordingly; and that, except as so granted the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

AUG 06 1985


PRESIDENT


COMMISSIONER


COMMISSIONER