

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
T. J. GULF, 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 March 1, 1978 :
through February 28, 1981. :

DECISION

Petitioner, T. J. Gulf, Inc., 240 West Main Street, Smithtown, New York 11787, 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, 1978 through February 28, 1981 (File No. 35612).

A formal 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 March 15, 1984 at 9:15 A.M. and was continued to conclusion on May 16, 1984 at 10:45 A.M., with all briefs to be submitted by September 5, 1984. Petitioner appeared by Francis M. Neary, Esq. The Audit Division appeared by John P. Dugan, Esq. (Michael Gitter, Esq., of counsel).

ISSUES

I. Whether the Audit Division notified petitioner, the purchaser in a bulk sale of business assets, of a possible claim for taxes due from the seller as provided in section 1141(c) of the Tax Law.

II. Whether the Audit Division properly determined the tax liability of Thomas Brusca d/b/a Smithtown Gulf Service Center based on an examination of available books and records.

FINDINGS OF FACT

1. On February 17, 1981, the Audit Division received a Notification of Sale, Transfer or Assignment in Bulk from petitioner, T. J. Gulf, Inc., regarding the impending purchase of a gasoline service station business operated by Thomas Brusca d/b/a Smithtown Gulf Service Center at 240 West Main Street, Smithtown, New York. Said notification indicated February 27, 1981 as the scheduled date of sale and listed the total sales price of the business as \$25,000.00.

The escrow agent was Greshin, Sloane & Ziegler and the amount of the escrow fund was \$7,500.00.

2. On February 18, 1981, the Audit Division prepared a Notice of Claim to Purchaser addressed to petitioner at 112 Oakside Drive, Smithtown, New York 11787 (address shown on notification of sale). The notice advised petitioner that a possible claim existed for unpaid taxes due from the seller of the business and not to distribute funds or property to the seller before certain conditions were met.

On the same date, a similar notice was prepared for the escrow agent and addressed to 199 East Main Street, Box 829, Smithtown, New York 11787 (the address given on notification of sale).

3. The actual closing on the sale of the business took place on March 2, 1981. At that time, petitioner transferred \$17,500.00 in cash to the seller. The balance of the sales price (\$7,500.00) is still held in escrow.

4. On May 8, 1981, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period March 1, 1978 through February 28, 1981 for taxes due of \$36,043.78, plus penalty and interest of \$12,761.07, for a total of \$48,804.85. The notice

stated that the taxes were determined due from Thomas Brusca d/b/a Smithtown Gulf Service Center and represented petitioner's liability, as purchaser, in accordance with section 1141(c) of the Tax Law. The notice, however, indicated that petitioner's liability was limited to \$25,000.00, the sales price of the business. Petitioner admitted receipt of this notice at the place of business.

Petitioner denied ever having received the Notice of Claim to Purchaser referred to in Finding of Fact "2". Petitioner took the position that since it timely notified the Audit Division of the bulk sale and the Audit Division failed to give notice of a possible claim for taxes due from the seller prior to the closing, it is not liable for such taxes thereafter determined due from the seller.

The Audit Division argued that it followed established mailing procedures for notices to purchasers and, as such, there arises a presumption of receipt by petitioner.

5. The mailing procedures established by the Audit Division for notices of claim to purchaser is as follows:

The notices are prepared by a typist in accordance with the information shown on the notification of sale. The notices are proofread by a clerk, dated, signed and the name and bulk sale number are added to a mailing list record. The notices are put in envelopes, counted and then the mailing record is banded around the envelopes. The banded envelopes are brought to the mailroom by the same individual that proofread the letters, put them in the envelopes and prepared the mailing list. The employee in the mailroom meters and seals the envelopes and takes a count of the number of envelopes as opposed to the number of names on the mailing list. The mailroom employee then signs the mailing record after verifying the correctness of the count of the mailing

pieces. The person who brought the envelopes to the mailroom witnesses the count and signs the mailing record. The envelopes are rebanded with the mailing record by the mailroom employee and brought to the registry room. Another employee picks up the envelopes and mailing record for delivery to the post office but does not count the number of pieces. Upon delivery to the post office, this employee signs the mailing record and returns it to the registry room. The mailing record is picked up the next day by the individual who brings the next day's notices to the mailroom.

6. Joel Ziegler, Esq., on behalf of the escrow agent, denied receipt of the Notice to Escrow Agent. These notices are prepared at the same time as the notices to purchaser, however they are sent regular mail and there is no official mailing record.

7. The Audit Division followed the normal office procedures outlined in Finding of Fact "5" when it mailed the notices of claim to purchaser on February 18, 1981, except that the individual who brought the envelopes to the mailroom signed the mailing record before such act was actually performed.

8. The copy of the Notice of Claim to Purchaser put in evidence at the hearing (Exhibit F) was unsigned.

9. Petitioner argued that the evidence presented by the Audit Division was insufficient to claim the benefit of evidentiary presumption of delivery and receipt of mail by the addressee.

10. The taxes determined due from Thomas Brusca d/b/a Smithtown Gulf Service Center ("Brusca") were based on a field audit of the books and records. On audit, the Audit Division determined the number of gallons of gasoline purchased from monthly statements issued by Gulf Oil Corp. During a period of thirty months, Brusca purchased 1,052,177 gallons. The monthly statements for

six months were missing; therefore, the monthly average for the thirty months was used to estimate purchases for the six months that were not available. Total gasoline purchases for the audit period amounted to 1,262,615 gallons. Brusca's records showed 1,011,280 gallons of gasoline sold. Based on this comparison, the Audit Division concluded that gasoline sales were underreported by 24.85 percent. This percentage was applied to reported gasoline sales for the audit period to arrive at taxable gasoline sales of \$962,952.49 (excluding state gasoline tax and sales tax).

Brusca's motor vehicle inspection records indicated that he was performing repair work; however, the books and records did not reflect any purchases of repair parts or report any repair sales. Therefore, repair sales were estimated based on the number of motor vehicle inspections. An audit of a similar gasoline service station had found repair sales of \$21,646.48 for the period June through August, 1974. For the same period, it performed 150 motor vehicle inspections. The Audit Division divided the two figures to arrive at \$144.31 in repair sales per inspection. Brusca purchased 2,080 inspection stickers for the audit period which resulted in estimated repair sales of \$300,164.00.

The Audit Division accepted the accuracy of reported sales of oil and accessories amounting to \$12,084.60. Total audited taxable sales were \$1,280,639.01 with tax due thereon of \$89,644.74. Brusca paid \$53,600.96, leaving additional tax due of \$36,043.78.

11. The books and records maintained by Brusca were incomplete and inadequate and, therefore, necessitated the use of the audit procedures described in Finding of Fact "10".

12. Petitioner took exception to the manner in which the Audit Division computed repair sales and the gasoline purchases for the six months during which the records were unavailable. Petitioner argued that such estimates were unreasonable. However, no evidence was offered to establish that the estimated sales and purchases were erroneous.

CONCLUSIONS OF LAW

A. That section 1147(a) of the Tax Law provides that any notice required under the provisions of Articles 28 and 29 may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed or application made. The statute further provides that the mailing of such notice is presumptive evidence of the receipt by the person to whom it is addressed.

B. That the Audit Division has established that the Notice of Claim to Purchaser was mailed to petitioner in a properly addressed and stamped envelope. Since mailing was shown, it is presumed that the notice was received by petitioner. The mere denial of receipt does not overcome this presumption.

Accordingly, the Audit Division has complied with the notification requirements of section 1141(c) of the Tax Law and petitioner is liable for the taxes determined due from Thomas Brusca d/b/a Smithtown Gulf Service Center.

C. That since the books and records of Thomas Brusca d/b/a Smithtown Gulf Service Center were incomplete and inadequate, the Audit Division properly determined additional taxes due from such information as was available and external indices in accordance with section 1138(a) of the Tax Law (Matter of George Korba v. State Tax Commission, 84 A.D.2d 655).

D. That, under the circumstances herein, the Audit Division reasonably calculated the tax liability of Thomas Brusca and petitioner has failed to

demonstrate by clear and convincing evidence that the audit method or the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. Tully, 84 A.D.2d 858).

E. That the petition of T. J. Gulf, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 8, 1981, limiting petitioner's liability to \$25,000.00, is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

MAY 29 1985

Roderica A. Clark
PRESIDENT

Francis R. Koening
COMMISSIONER

Mark J. [unclear]
COMMISSIONER