

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
ADIRONDACK STEEL CASTING CO., 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, 1978
through February 28, 1981.

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DECISION

Petitioner, Adirondack Steel Casting Co., Inc., Shaker Road, Watervliet, New York 12189, 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 June 1, 1978 through February 28, 1981 (File No. 40217).

A formal hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Office Campus, Albany, New York on March 14, 1984 at 1:15 P.M., with all briefs to be filed by June 15, 1984. Petitioner appeared at the hearing by Edward L. Wilkinson, Esq., and on its brief by Thomas E. Sise, Esq. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether petitioner's tax liability for the captioned period was irrevocably fixed when petitioner filed a signed Statement of Proposed Audit Adjustment together with payment of the additional amount of taxes and interest claimed due thereon.

FINDINGS OF FACT

1. During late 1981 and early 1982, the Audit Division conducted a field audit of the books and records of petitioner, Adirondack Steel Casting Co.,

Inc. ("Adirondack"), the result of which was that certain sales and use tax liabilities were found to exist for the quarterly periods ended May 31, 1978 through February 28, 1981.

2. Following the audit, petitioner's accountants and the Audit Division's auditors met in conferences to discuss the results of the audit. Thereafter, a Statement of Proposed Audit Adjustment dated April 14, 1982 was delivered to petitioner. This Statement reflected additional sales and use taxes due in the aggregate amount of \$8,265.94 (with the amounts due or overpaid for each of the quarterly periods ended May 31, 1978 through February 28, 1981 individually specified thereon), plus interest of \$1,821.00, for a total amount due of \$10,086.94. The cover letter sent to petitioner with the Statement of Proposed Audit Adjustment provided as follows:

"Enclosed is the "Statement of Proposed Audit Adjustments" (DO-1608) showing additional Sales and Use Tax due of \$8,265.94.

All schedules are also enclosed for your review.

Please follow the instructions on the DO-1608. Essentially, it allows you 30 days to review the audit results and decide whether you agree or disagree.

The additional Sales and Use Tax due is subject to simple interest.

Please contact me if you have any questions."

3. The aforementioned Statement of Proposed Audit Adjustment listed on its face the three following alternative courses of action open to petitioner:

"a) This Statement of Proposed Audit Adjustment is based on the information indicated by the box checked above (audit of records). If you AGREE with this statement sign one copy of this adjustment and return it to this office within 30 days. Unless a full remittance accompanies this form within 30 days of the statement date above, penalty and/or interest will continue to accrue on the unpaid balance of tax due.

- b) If you DISAGREE with this statement, return one copy of this adjustment with a precise explanation of your disagreement to this office within 30 days.
- c) Failure to either agree or disagree to this Statement of Proposed Audit Adjustment within 30 days will result in the issuance of a Notice of Determination for Sales and Use Taxes Due."

The Statement further provided, directly above the signature box, as follows:

"The Tax Law provides that a taxpayer is entitled to have tax due finally and irrevocably fixed by filing a signed consent with the State Tax Commission. Such consent, subject to approval of the State Tax Commission, waives the ninety (90) day period for fixing tax due but does not waive the taxpayer's right to apply for a credit or refund within the time limit set forth in the statute (sic)."

4. Petitioner complied with the provisions of the first listed alternative (Finding of Fact "3-a") by returning a copy of the Statement of Proposed Audit Adjustment, signed by petitioner's chief accountant, Ernest D. Riberdy, and dated April 22, 1982, together with a check in the noted amount due of \$10,086.94.

5. The Audit Division thereafter issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated June 4, 1982, assessing additional sales and use taxes due in the aggregate amount of \$4,197.54, plus interest. Taxes due or overpaid for each of the quarterly periods ended August 31, 1978 through February 28, 1981 were specified on this Notice, which pertained to the audit period at issue herein (i.e. the quarterly periods ended May 31, 1978 through February 28, 1981).

6. The additional tax assessed via the Notice of Determination (\$4,197.54) was tax reflected on three audit workpaper schedules referred to as schedules "I", "J" and "K".¹ According to testimony by Sheldon Lippman, who together with John Mazzariello conducted the audit of petitioner, the additional amount

¹ The three particular workpaper schedules were not offered in evidence.

assessed was omitted from the Statement of Proposed Audit Adjustment under circumstances as follows:

"[t]he assembling of the dollars of tax due on the proposed audit adjustment schedule was made by Mr. Mazzariello. In assembling those total dollars, he left off the total for schedules I, J and K. These schedules that were not listed were discovered upon our finalizing our paperwork in the office for final closing out of the case."

This discovery was made after payment had been received from petitioner in the amount reflected on the Statement of Proposed Audit Adjustment.

7. Petitioner asserts that signing and filing the Statement of Proposed Audit Adjustment, together with remittance of the tax and interest reflected as due thereon, irrevocably fixed petitioner's tax liability, that petitioner is entitled to rely on such action as finalizing its liability for the period at issue and thus the subsequent Notice of Determination should be dismissed.

8. The Audit Division asserts, by contrast, that the matter involves a mistake whereby the additional tax indicated on three audit workpapers was inadvertantly excluded from the Statement of Proposed Audit Adjustment, and further maintains that the Statement of Proposed Audit Adjustment is not an agreement entered into between petitioner and the State Tax Commission.

CONCLUSIONS OF LAW

A. That subdivision (c) of section 1138 of the Tax Law provides as follows:

"[a] person liable for collection or payment of tax (whether or not a determination assessing a tax pursuant to subdivision (a) of this section has been issued) shall be entitled to have a tax due finally and irrevocably fixed prior to the ninety-day period referred to in subdivision (a) of this section, by filing with the tax commission a signed statement in writing, in such form as the tax commission shall prescribe, consenting thereto."

B. That the language contained on the face of the Statement of Proposed Audit Adjustment directly above the signature box (see Finding of Fact "3") is

essentially the same language of consent as is contained in Tax Law section 1138(c). Accordingly, such Statement is [although not labelled a "Consent to Fixing of Tax Not Previously Determined and Assessed" (Form ST-580)], in the context presented, a consent document within the purview of Tax Law section 1138(c).


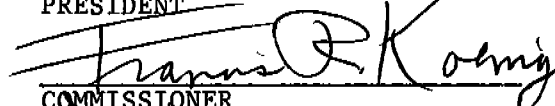
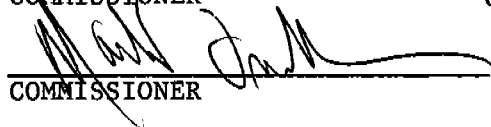
C. Petitioner complied with the instructions on the Statement, timely remitted the amount claimed as due thereon and thus consented to the liability reflected on the face of the consent. However, the language on the face of the consent document clearly states that it is "subject to approval", and the Commission has held that such consents are "...subject to review for any error." (Matter of Idris Sari d/b/a Corner Luncheonette, State Tax Comm., September 9, 1983). Here, upon review in closing the case, the described error was discovered and the petitioner was notified thereof within a reasonable period of time. Accordingly, the consent did not serve to preclude the Audit Division from assessing the amounts erroneously omitted therefrom.

D. That the petition of Adirondack Steel Casting Co., Inc. is hereby denied and the Notice of Determination dated June 4, 1982 is sustained.

DATED: Albany, New York

MAY 08 1985

STATE TAX COMMISSION


PRESIDENT

COMMISSIONER

COMMISSIONER