

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of :

GUN HILL PLUMBING SUPPLY CO., INC.

for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 & 29
of the Tax Law for the Period December 1, 1978 :
through February 28, 1981.

In the Matter of the Petition

of

GUN HILL PLUMBING SUPPLY CO., INC.

for Redetermination of a Deficiency or for
Refund of Corporation Franchise Tax under
Article 9-A of the Tax Law for the Years 1979 :
and 1980.

DECISION

In the Matter of the Petition

of :

FRANK SALZANO and LYDIA SALZANO

for Redetermination of a Deficiency or for
Refund of Personal Income Tax under Article 22
of the Tax Law for the Years 1979 and 1980.

Petitioner, Gun Hill Plumbing Supply Co., Inc., 3463 White Plains Road, Bronx, New York 10467, 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 December 1, 1978 through February 28, 1981 and a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the years 1979 and 1980 (File No. 41310).

Petitioners, Frank Salzano and Lydia Salzano, 32 Hillcrest Road, Mt. Vernon, New York 10552, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1979 and 1980 (File No. 41400).

A hearing was commenced before Sandra Heck, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 15, 1986 at 9:15 A.M. and continued to conclusion on June 10, 1986 at 10:00 A.M. Petitioners appeared by Murray Appleman, Esq. The Audit Division appeared by John P. Dugan, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUES

I. Whether petitioners Frank Salzano and Lydia Salzano are liable for additional personal income tax for the tax years 1979 and 1980.

II. Whether petitioner Gun Hill Plumbing Supply Co., Inc. is liable for additional sales tax based upon the cash availability audit method utilized in the personal income tax audit of Frank Salzano and Lydia Salzano.

III. Whether petitioner Gun Hill Plumbing Supply Co., Inc., timely filed a petition protesting the notice of deficiency of franchise tax pursuant to Article 9-A of the Tax Law.

FINDINGS OF FACT

1. On October 7, 1982, the Audit Division issued a Notice of Deficiency to petitioners Frank Salzano and Lydia Salzano asserting liability for additional personal income taxes for tax years 1979 and 1980 in the amount of \$9,981.71 plus penalty of \$499.09 and interest of \$2,204.10 for a total due of \$12,684.90.

2. The petitioners timely filed New York State income tax returns for the tax years 1979 and 1980, indicating on each said return that substantially all

of their income was derived from Frank Salzano's wages and distributions from his plumbing supply business, petitioner Gun Hill Plumbing Supply Co., Inc. ("the corporation").

3. Petitioners were subjected to a field audit by the Audit Division which implemented a cash availability audit method after an inspection of petitioners' books and records indicated more income than that reported on petitioners' income tax returns.

4. Upon examination by the auditor, it was determined from the New York personal income tax return that for the year 1979, petitioners' wages, exclusive of all taxes and social security withholding, were \$17,697.26.

5. Petitioners' total cash disbursements for 1979, including deposits to savings and checking accounts, itemized deductions, food and cash out-of-pocket, was calculated to be \$48,937.26, or \$31,240.00 in excess of net wages.

6. For the year 1980, petitioners' net wages were \$19,255.60.

7. Petitioners' cash disbursements for 1980, including the same items listed for 1979, with the exception of a deduction of \$600.00 for a check made out to cash used for living expenses, was calculated to be \$60,167.06, or \$40,911.46 in excess of net wages.

8. In chart form, the cash availability appears as follows:

| | <u>1979</u> | <u>1980</u> |
|-------------------------------|-------------|-------------|
| Cash In: | | |
| Net Wages | \$17,697.26 | \$19,255.60 |
| Cash Out: | | |
| Deposits to Savings | \$ 7,144.10 | \$15,876.88 |
| Deposits to Personal Checking | 31,023.01 | 35,211.18 |

| | | |
|-------------------------------|------------------|------------------------------------|
| Itemized Deductions | | |
| Medical | 1,655.00 | -0- |
| Paid thru checking | (614.50) | -0- |
| Contributions | 385.00 | 329.00 |
| Paid thru checking | (15.35) | (10.00) |
| | | |
| Food \$30 per week x 5 people | | |
| x 52 weeks | 7,800.00 | 7,800.00 |
| Cash out of pocket | 1,560.00 | 1,560.00 |
| | | |
| | <u>48,937.26</u> | |
| | | |
| Less checks made out to | | |
| cash for living expenses | | <u>(600.00)</u> <u>\$60,167.06</u> |
| | | |
| Difference | \$31,240.00 | \$40,911.46 |

9. All other living expenses not listed above were paid through personal checking and therefore were included in "cash out" as deposits to personal checking.

10. The Audit Division increased petitioners' taxable income for 1979 by \$31,240.00 and arrived at the tax on corrected taxable income of \$6,390.76.

11. Likewise, the Audit Division increased the taxable income for 1980 by \$40,911.46 and arrived at the tax on corrected taxable income of \$6,669.98.

12. Petitioners offered a closing statement and the testimony of Mr. Nicholas Napolitano, father of Lydia Salzano, as to the sale of his business in 1977, two years prior to the period in issue, wherein he gave his daughter \$3,158.00 in cash and assigned to her the proceeds of 40 promissory notes, each in the sum of \$300.00, plus seven percent interest.

13. Lydia Salzano testified that she used money from the notes for living expenses for herself, her spouse and three children, but she produced no cancelled checks, copies of checks or other proof of receipt.

14. Petitioners presented a letter from Mrs. J.C. Salzano, an aunt, dated June 28, 1982, which attested to the fact that her husband, petitioners' Uncle

Nicholas, gave each member of petitioners' family \$3,000.00 or a total amount of \$15,000.00, but without mention of the date of the gifts or any substantiating documentation of the gifts.

15. Petitioners also submitted a letter, dated June 28, 1982, addressed to their accountant, Mr. Zimmerman, in which Lydia Salzano stated that she saved over \$20,000 in her house during the years of her marriage which she used to pay living expenses in the years 1979 and 1980.

16. Lydia Salzano's letter and Frank Salzano's testimony alleged that Frank Salzano's father deposited funds into accounts for each of his children during the years 1979 and 1980, but the account bank book for Frank Salzano was not introduced.

17. Frank Salzano's father allegedly established an account for Frank Salzano at Manufacturers Hanover Trust Co., account number 034-5515961-01, but the title of the account and, therefore control, is in petitioner Frank Salzano in trust for his wife, Lydia Salzano.

18. Petitioner Lydia Salzano won approximately \$7,000.00 in cash at Yonkers raceway in 1977 which she allegedly kept at home and used for living expenses in 1979 and 1980.

19. Using the additional taxable income determined for personal income tax purposes, the Audit Division calculated additional taxable sales of the corporation for the period January 1, 1979 through December 31, 1980:

| | |
|---|------------------|
| 1978 - Additional taxable sales per income tax audit: | \$31,240.00 |
| 1980 - Additional taxable sales per income tax audit: | <u>40,911.00</u> |
| 1979/1980 <u>TOTAL</u> | \$72,151.00 |
| x Tax Rate of 8% | \$5,772.08 |

20. On October 5, 1982, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner Gun Hill

Plumbing Supply Co. Inc. ascertaining liability for additional sales and use taxes due for the period December 1, 1978 through February 28, 1981 in the amount of \$5,772.08 and interest of \$1,582.18 for a total due of \$7,354.26.

21. With the exception of sales tax returns filed by the corporation for the audit period, December 1, 1978 through February 28, 1981, the Audit Division did not examine any books or records of the corporation with respect to sales tax.

22. The Audit Division issued notices of deficiency for corporation franchise tax under Article 9-A of the Tax Law for the years 1979 and 1980 dated September 6, 1982 and provided proof of certified mailing validated by the United States Post Office on September 15, 1982.

23. Petitioners, through their representative, filed a petition in response to said notices of deficiency which was dated December 22, 1982 and received by the Tax Appeals Bureau on December 28, 1982.

CONCLUSIONS OF LAW

A. That the cash availability audit method was a valid means of reconstructing petitioners' income for the audit period, tax years 1979 and 1980. (Matter of William Lasky and Ruth Lasky, State Tax Commission, July 18, 1984.)

B. That Tax Law § 689(e) places the burden of proof upon the petitioner in any case before the Tax Commission, except in three specifically enumerated instances, none of which is applicable herein.

C. That petitioners have not sustained their burden of proving that the cash availability audit method employed herein was either erroneous or improper.

D. That the Audit Division erred in assessing petitioner Gun Hill Plumbing Supply Co., Inc. for additional sales and use taxes based upon increased personal income tax of one officer of the corporation, without reviewing the

books and records of the corporation for their adequacy, and thereby estimated taxes without justification. (Tax Law § 1138[a]; Chartair, Inc. v. State Tax Commission, 65 AD2d 44.)

E. That petitioner, Gun ~~Hill~~ Plumbing Supply Co., Inc., did not timely file a petition within 90 days of issuance of the notices of deficiency for corporation franchise taxes due for the tax periods ending December 31, 1979 and December 31, 1980 and the application for a hearing is therefore denied (Tax Law § 1081[b]; § 1089[b])

F. That the petition of Prank Salzano and Lydia Salzano is denied and the Notice of Deficiency dated October 7, 1982 is hereby sustained together with applicable penalty and such additional interest as may be lawfully owing.

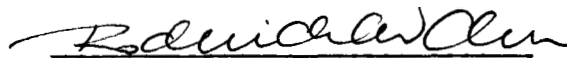
G. That the petition of Gun Hill Plumbing Supply Co., Inc. with regard to the assessment for additional corporation franchise tax is hereby denied, and the notices of deficiency dated September 6, 1982 are sustained together with such additional interest as may be lawfully owing.

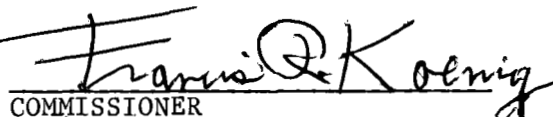
H. That the petition of Gun ~~Hill~~ Plumbing Supply Co., Inc. with regard to the assessment for additional sales and use taxes is hereby granted in accordance with Conclusion of Law "D" and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued October 5, 1982 is cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

MAR 13 1987


PRESIDENT


COMMISSIONER


COMMISSIONER