

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
BETTER LAWN CARE 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 December 1, 1978
through August 31, 1981.

DECISION

Petitioner, Better Lawn Care Co., Inc., c/o Robert Bertuglia, Jr., 400 West Main Street, Babylon, New York 11702, 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 August 31, 1981 (File No. 42029).

A 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 June 4, 1985 at 1:15 P.M., with additional information to be submitted by September 1, 1985. Petitioner appeared by Daniel Turchin, Esq. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUES

Whether the Audit Division properly increased petitioner's sales subject to tax without allowing credit for any exempt sales.

FINDINGS OF FACT

1. On March 1, 1982, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Better Lawn Care Co., Inc., in the amount of \$4,866.91, plus penalty of \$923.34 and

interest of \$901.53, for a total due of \$6,691.78 for the period December 1, 1978 through August 31, 1981.

2. On or about November 25, 1981, petitioner notified the Audit Division of a bulk sale of its assets to take place on December 7, 1981. The business involved landscaping and lawn care and the selling price was reported to be \$23,000.00, including \$10,230.00 in furniture, fixtures, equipment and supplies.

3. On or about January 18, 1982, petitioner completed and filed a Bulk Sale Questionnaire indicating that \$741.68 in sales tax was to be collected from the purchaser on the sale of the furniture and equipment. The questionnaire also reported that petitioner's gross sales for the fiscal year ended November 30, 1979 were \$80,903.00 and for the fiscal year ended November 30, 1980 gross sales were \$85,398.00. An auditor reviewed petitioner's sales tax returns for the aforesaid fiscal years and found that petitioner reported gross sales of \$62,015.00 and \$54,263.00, respectively, for those two years. This represented unreported gross sales of \$18,888.00 for the year ended November 30, 1979 and \$31,135.00 for the year ended November 30, 1980. The difference between the combined totals for both years reflected a percentage increase over reported gross sales of 43 percent. The auditor increased reported gross sales by 43 percent to arrive at audited taxable sales. This amount was reduced by taxable sales reported to arrive at additional taxable sales. Three of the quarters were estimated because no returns were filed.

4. Petitioner maintained that it was not in business after November, 1980 and that it was not liable for tax for any periods thereafter. However, the bulk sale did not occur until December 7, 1981 and petitioner filed letters purporting to be sales tax returns indicating that sales took place at least

until August 31, 1981. Petitioner offered no proof that it was not in business after November, 1980.

5. Petitioner also argues that it had \$55,390.00 in exempt sales during the audit period. In support of this allegation, petitioner submitted four exempt organization certificates from customers with which it did business. Petitioner submitted ledger statements for two of the customers; however, neither statement indicated the year in which the transactions took place, making it impossible to determine whether the sales took place within the audit period. For a third customer, petitioner submitted evidence of sales, all of which occurred prior to the audit period and which would have no bearing on its liability for the period in issue. For the fourth customer, petitioner submitted no evidence of sales, only the exemption certificate. Petitioner asserted that it had \$18,000.00 in sales to a fifth exempt organization; however no documentation in any form was offered with respect to sales to that organization.

CONCLUSIONS OF LAW

A. That section 1132(c) of the Tax Law provides in part, that sales will be deemed taxable at retail unless the vendor takes from the purchaser a proper exemption certificate. Although this presumption may be overcome by sufficient evidence (see Matter of Ruemil Contract Interiors, Inc., State Tax Commission, September 9, 1983), merely stating that tax exempt sales occurred and that a certain amount of sales should be allocated as exempt is not sufficient evidence to overcome the presumption of taxability. In the absence of any evidence to the contrary, all sales must be deemed to be subject to tax.

B. That a "...vendor is obligated to maintain records of his sales for audit purposes (Tax Law, §1135), and the State, when conducting an audit, must

determine the amount of tax due 'from such information as may be available,' but 'if necessary, the tax may be estimated on the basis of external indices' (Tax Law, §1138, subd. [a])." Korba v. New York State Tax Commission, 84 A.D.2d 655. Exactness in determining the amount of sales tax liability is not required where it is the petitioner's own failure to maintain proper records which necessitates the use of external indices. Markowitz v. State Tax Commission, 54 A.D.2d 1023, aff'd 44 N.Y.2d 684.

C. That petitioner has failed to overcome its burden of proving that either it was out of business during 1981 or that it had exempt sales amounting to \$55,000.00. As discussed in Findings of Fact "4" and "5", petitioner offered very little proof to support either allegation and it was impossible to determine if the evidence it did submit was applicable to the period in issue.

D. That the petition of Better Lawn Care Co., Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 1, 1982 is sustained.

DATED: Albany, New York

FEB 18 1986

STATE TAX COMMISSION

Roderick W. Allen
PRESIDENT

Francis R. Koenig
COMMISSIONER

[Signature]
COMMISSIONER