

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
CHARLES GINGOLD, AS PRESIDENT
OF C & M FIREPLACES, INC.

DECISION

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, 1977
through February 28, 1981.

Petitioner, Charles Gingold, 95 Cedar Drive, West Plainview, New York 11803, 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 periods June 1, 1977 through February 28, 1981 (File No. 42091).

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 May 7, 1985 at 1:15 P.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Joseph W. Pinto, Esq., of counsel).

ISSUE

Whether petitioner, as corporate president, is personally liable for both sales and use taxes due from C & M Fireplaces, Inc.

FINDINGS OF FACT

1. C & M Fireplaces, Inc. ("C & M") was a New York corporation organized by petitioner, Charles Gingold, and was engaged in the business of repairing, selling and installing woodburning stoves and fireplaces.

2. An audit of the books and records of C & M disclosed additional sales and use taxes due as follows:

audited taxable sales	\$1,706,954.00 @ 7%	\$119,487.00
materials used in capital improvements		20,643.00
additional taxable sales based on unaccounted for purchases	\$59,968.00 @ 7%	4,128.00
expense purchases		<u>363.16</u>
total audited tax due		\$144,621.16
tax paid		<u>112,523.80</u>
additional taxes due		\$ 32,097.36

On December 11, 1981, petitioner, on behalf of C & M, executed a consent to fixing of tax whereby he agreed to the above liability for C & M. At the time petitioner signed the consent, he was aware of the manner in which the taxes were determined and believed the amount to be correct.

Petitioner had previously executed consents extending the period of limitation for assessment of sales and use taxes for the period June 1, 1977 through May 31, 1980 to February 28, 1982.

3. On February 19, 1982, in accordance with the consent to fixing of tax, the Audit Division issued to C & M two Notice and Demand for Payment of Sales and Use Taxes Due documents which, taken together, assessed the total tax liability of \$32,097.36 plus minimum statutory interest for the period June 1, 1977 through February 28, 1981. A Notice and Demand for Sales and Use Taxes Due for the same amount was issued on November 20, 1982 to petitioner, Charles Gingold, asserting his personal liability as an officer of C & M for taxes due from the corporation.

4. Petitioner had signed a prior consent to fixing of tax on December 10, 1980 which covered the period June 1, 1977 through May 31, 1980 and was in the amount of \$28,381.99. This consent, however, was rejected by the Audit Division since the audit period was updated to include the period June 1, 1980 through February 28, 1981.

5. Mr. Gingold contends that as a corporate officer his personal liability is limited to the amount of sales tax which C & M failed to collect or collected

and failed to report, an amount he estimated to be \$10,298.00, and that his personal liability does not extend to use tax due and owing by the corporation. He argued that the consent to fixing taxes which he executed fixed the liability of C & M, not his own personal liability.

6. Mr. Gingold was the sole stockholder, president and manager of C & M. He maintained all of the corporation's books and records and prepared and signed its tax returns.

7. The sum of \$1,380.77 was realized from the forced sale at auction of C & M's entire inventory. The Audit Division conceded that this amount should be applied against the assessment in issue.

CONCLUSIONS OF LAW

A. That section 1133(a) of the Tax Law provides that "every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article" (emphasis added).

B. That petitioner, Charles Gingold, was a person required to collect tax within the meaning and intent of section 1131(1) of the Tax Law and, therefore, is personally liable for both the sales and the use taxes due from C & M in accordance with section 1133(a) of the Tax Law (Matter of A-1 Fence Company, Inc., New York State Tax Commission, August 7, 1981).

C. That the \$1,380.77 received by the Tax Department from the sale of inventory of C & M shall be applied against the assessment in issue.

D. That the petition of Charles Gingold is granted to the extent indicated in Conclusion of Law "C"; that the Audit Division is directed to modify the Notice and Demand for Payment of Sales and Use Taxes Due issued November 20,

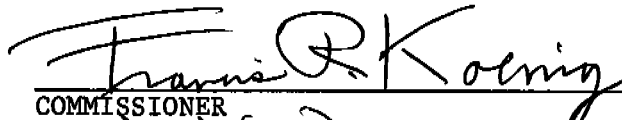
1982; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

JAN 17 1986


PRESIDENT


COMMISSIONER


COMMISSIONER