

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

HARRIS L. GORDON
SECRETARY OF DIVERSIFIED FLIGHT, 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 September 1, 1974 :
through May 31, 1978.

Petitioner, Harris L. Gordon, Secretary of Diversified Flight, Inc., P.O. Box 32, Monticello, New York 12701, 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 September 1, 1974 through May 31, 1978 (File No. 43412).

A hearing was commenced before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 9, 1985 at 9:15 A.M. and continued to conclusion on October 7, 1985 at 4:15 P.M., with all briefs to be filed by October 15, 1986. Petitioner appeared by Morris Turetzky, Esq. The Audit Division appeared by John P. Dugan, Esq. (Joseph W. Pinto, Jr., Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined the sales and use tax liability of Diversified Flight, Inc. for the period September 1, 1974 through May 31, 1978.

II. Whether petitioner, Harris L. Gordon, was a person required to collect tax within the meaning of section 1131(1) of the Tax Law and, therefore, could

be held personally liable for any taxes due from Diversified Flight, Inc. pursuant to section 1133(a) of the Tax Law.

FINDINGS OF FACT

1. During the period at issue, Diversified Flight, Inc. d/b/a Federal Carriers ("Diversified") operated as a fixed base operator with offices and mechanical facilities at the Sullivan County International Airport in White Lake, New York and at Stewart Airport in Newburgh, New York. Diversified's activities included the operation of a commercial airline with regularly scheduled flights to LaGuardia and Newark Airports, charter flights to cities along the eastern seaboard, an air taxi service, flying instructions, the lease of planes, jump services for skydivers, the sale of planes and the transport of cargo.

2. On March 20, 1979, after the conduct of a field audit, the Audit Division issued two notices of determination and demands for payment of sales and use taxes due against petitioner, Harris L. Gordon. The first notice covered the period September 1, 1974 through February 28, 1978 and asserted a tax due of \$40,764.96, plus penalty of \$9,550.16 and interest of \$11,891.62, for a total due of \$62,206.74. The second notice covered the quarterly period ended May 31, 1978 and asserted a tax due of \$4,474.19, plus penalty of \$581.64 and interest of \$402.68, for a total amount due of \$5,458.51. Therefore, the total amount of tax claimed on said notices to be due from petitioner was \$45,239.15 plus penalty and interest. The notices provided the following explanation:

"You are personally liable as officer of Diversified Flight Inc. d/b/a Federal Carriers under Sections 1131(1) and 1133 of the Tax Law for the following taxes determined to be due in accordance with Section 1138(a) of the Tax Law:".

3. Petitioner, **on** behalf of Diversified, executed consents extending the statute of limitations for issuing an assessment for sales and use taxes for the period September 1, 1974 through August 31, 1977 to March 20, 1979.

4. **On** August 10, 1977, an auditor from the White Plains District Office initiated an audit of Diversified's books and records. The auditor computed nontaxable sales for the audit period of \$547,283.00 by reducing gross sales per the cash receipts ledger of \$632,205.00 by taxable sales reported of \$84,922.00. Next, since Diversified's cash receipts ledger did not contain a breakdown of sales by category for the test period of April 1977, the auditor concluded that Diversified's books and records were incomplete and/or inadequate to determine Diversified's exact tax liability and, further, that all of Diversified's asserted nontaxable sales should be held as subject to tax. The auditor therefore computed additional sales tax due of \$37,909.77 on the asserted nontaxable sales of \$547,283.00. This determination was made notwithstanding the fact that a breakdown of sales by category could have been determined from other books and records maintained by Diversified and despite Diversified's extensive nontaxable sales activities.

5. The auditor next computed Diversified's use tax deficiency. The auditor totalled those expense purchases **on** which he felt Diversified should have paid sales tax at the time of purchase or accrued a use tax when filing its sales and use tax return, such as gasoline, office supplies and selling expenses. The total of these expense item purchases **of** \$97,100.00 was applied to gross sales reported per sales and use tax returns of \$502,668.00 yielding a ratio of 19.3 percent. This percentage was applied to gross sales reported on the individual sales and use tax returns resulting in additional purchases subject to use tax of \$104,754.00 (after subtracting purchases subject to use tax reported

by Diversified) and use tax due of \$7,329.38. The total sales and use taxes due from Diversified was determined to be \$45,239.15 (\$37,909.77 + \$7,329.38). It should be noted that according to the auditor's worksheets, Diversified's purchases of gasoline included sales tax. Further, it appears that purchases of items other than gasoline were made with proper payment of tax to suppliers or accrual and payment of tax directly by Diversified.

6. For the audit period, the books and records of Diversified were complete and adequate enough for the auditor to properly determine its sales and use tax liability.

7. Diversified was incorporated on December 1, 1973. Robert Sweet was the only stockholder, investor and/or individual who had any direct or indirect financial interest in the corporation. In the latter part of 1976, Mr. Sweet contemplated moving his business to Florida. Since Mr. Sweet would be splitting his time between New York and Florida, he needed someone with the proper flight training and experience to manage Diversified while he was in Florida. On November 8, 1976, petitioner became the secretary of Diversified and also assumed the duties associated with the titles of Director of Flight Operations and Chief Pilot. While at Diversified, petitioner routinely signed checks issued in payment of corporate expenses. He also signed New York State and local sales and use tax returns and State of New York corporation franchise tax reports.

8. On April 20, 1983, the Audit Division cancelled that part of the above notices relative to the quarterly periods ended prior to November 8, 1976. Petitioner is therefore contesting sales and use taxes totalling \$23,724.61 for the period September 1, 1976 through May 31, 1978.

CONCLUSIONS OF LAW

A. That although there is statutory authority for use of a test period to determine the amount of tax due, resort to such method of computing tax liability must be founded upon an insufficiency of record keeping which makes it virtually impossible to verify such liability and conduct a complete audit (Chartair, Inc. v. State Tax Commission, 65 AD2d 44).

B. That Diversified maintained adequate books and records from which the actual tax could have been determined. Therefore, the Audit Division's resort to the use of a test period to determine Diversified's sales tax liability is incorrect.

C. That since Diversified either paid tax to its suppliers on taxable purchases or accrued and remitted the tax directly, the use tax deficiency is cancelled.

D. That in view of the conclusions reached herein respecting the sales and use tax liability of Diversified, the issue as to whether petitioner Harris L. Gordon is a responsible officer of Diversified is moot.

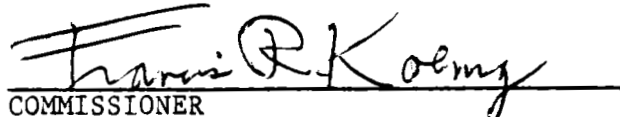
E. That the petition of Harris L. Gordon is granted and the notices of determination and demands for payment of sales and use taxes due issued on March 20, 1979 are cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 16 1987

PRESIDENT


COMMISSIONER


COMMISSIONER