

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
HULDAN ODEMIS, :
PRESIDENT OF K & E SERVICE STATION, 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, 1979 :
through January 31, 1982. :
:

DECISION

Petitioner, Huldán Odemis, president of K & E Service Station, Inc., c/o William T. Barbera, 111 Wolf's Lane, Pelham, New York 10803, 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, 1979 through January 31, 1982 (File No. 45164).

A hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 5, 1986 at 10:45 A.M., with all briefs to be submitted by April 20, 1986. Petitioner appeared by William T. Barbera, Esq. The Audit Division appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUES

I. Whether petitioner is personally liable for payment of taxes determined to be due from K & E Service Station, Inc.

II. Whether it was proper for the Audit Division to estimate the number of gallons of gasoline purchased, and subsequently sold, by K & E Service Station, Inc. during the months of November, 1981, December, 1981 and January, 1982.

FINDINGS OF FACT

1. On March 20, 1983, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner Huldán Odemis as president of K & E Service Station, Inc. Said notice, which encompassed the period December 1, 1979 through January 31, 1982, determined additional sales tax due of \$126,771.22, plus penalty of \$30,494.28 and interest of \$35,682.45, for a total amount due of \$192,947.95. The notice also contained the following explanation:

"You are personally liable as officer of K & E Service Station, Inc. 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."

2. At some unknown date the sales and use tax returns filed by K & E Service Station, Inc. (hereinafter "K & E") were selected by the Audit Division for examination. On July 16, 1982, an auditor from the White Plains District Office visited the business premises of K & E at 190 Aqueduct Road, Greenburg, New York. Upon his arrival at the gas station, the auditor was informed that K & E no longer leased and/or operated said station. The auditor thereafter examined the new vendor's Certificate of Authority, which was validated effective February 2, 1982.

3. Upon his return to the White Plains District Office, the auditor searched through office records and located the Certificate of Registration filed by K & E. The Certificate of Registration indicated that Huldán Odemis was president of K & E. Mrs. Odemis was the only officer listed on the Certificate and, furthermore, there were no signatures contained on said Certificate.

4. The auditor next sent a letter to Mrs. Odemis, however, it was returned as undeliverable. The auditor was never furnished, and therefore did not examine, the books and records of K & E and, since he was unable to contact

Mrs. Odemis, he never discussed with petitioner her duties and responsibilities as president of K & E. The sole basis for the issuance of an assessment against petitioner individually is the fact that she was listed as president of K & E on the Certificate of Registration (see Finding of Fact "3", supra).

5. The tax determined to be due from K & E, and from petitioner as an alleged responsible officer, was based on information received by the Audit Division from K & E's supplier of gasoline. Said information, which was capsulized by the Audit Division via a computer printout, detailed the number of gallons of gasoline purchased by K & E from March, 1980 through October, 1981. To determine taxable sales, the auditor used an average taxable selling price. Since K & E's successor had a Certificate of Authority validated February 2, 1982, the auditor determined that K & E ceased business operations effective January 31, 1982. Furthermore, since K & E's supplier did not furnish information for periods subsequent to October, 1981, the auditor estimated the number of gallons of gasoline purchased, and subsequently sold, by K & E for the period November 1, 1981 through January 31, 1982. Petitioner does not contest the computation of tax due from K & E for the period December 1, 1979 through October 31, 1981, however, she does argue that it was improper to estimate the gallons of gasoline purchased and sold after October 31, 1981.

6. Petitioner did not appear at the hearing held herein to offer her testimony. The only evidence submitted on petitioner's behalf was a lease agreement and a retail dealer contract between Kenan I. Odemis (presumably petitioner's spouse) and Power Test Petroleum Distributors, Inc. No evidence was adduced to show the date that K & E ceased its business operations.

CONCLUSIONS OF LAW

A. That section 1133(a) of the Tax Law places personal liability for the taxes imposed, collected or required to be collected under Article 28 upon "every person required to collect any tax" imposed by said article. Section 1131(1) furnishes the following definition for the term "persons required to collect tax":

"'Persons required to collect tax' or 'person required to collect any tax imposed by this article' shall include: every vendor of tangible personal property or services; every recipient of amusement charges; and every operator of a hotel. Said terms shall also include any officer or employee of a corporation or of a dissolved corporation who as such officer or employee is under a duty to act for such corporation in complying with any requirement of this article and any member of a partnership." (Emphasis supplied).

B. That petitioner has failed to present any evidence to show that she was not a person under a duty to collect, truthfully account for and pay over the sales tax due from K & E (20 NYCRR 526.11). Accordingly, petitioner is personally liable, pursuant to Tax Law §§1131(1) and 1133(a), for payment of said sales tax.

C. That section 1135 of the Tax Law provides that every person required to collect tax shall keep records of every sale and all amounts paid, charged or due thereon and of the tax payable thereon. Such records shall include a true copy of each sales slip, invoice, receipt or statement.

D. That section 1138(a) of the Tax Law provides that "if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available" and authorizes, where necessary, an estimate of tax due "on the basis of external indices". Since no books and records were submitted by K & E for examination, it was proper for the Audit Division to use external indices to determine K & E's sales tax liability (See: Matter of Korba v. New York State Tax Commission, 84

A.D.2d 655). Furthermore, the record is devoid of any evidence to show the date that K & E ceased its business operations. Accordingly, it was proper for the Audit Division to estimate the number of gallons of gasoline purchased and sold by K & E for the period November 1, 1981 through January 31, 1982.

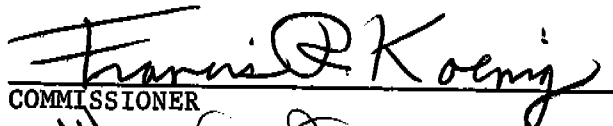
E. That the petition of Huldun Odemis, president of K & E Service Station, Inc., is denied in its entirety and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated March 20, 1983 is sustained, together with such additional penalty and interest as may be lawfully due and owing.

DATED: Albany, New York

STATE TAX COMMISSION

SEP 15 1986


PRESIDENT


COMMISSIONER


COMMISSIONER