

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of

GARY WESTON 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, 1981
through November 30, 1982.

Petitioner, Gary Weston, 309 Robble Avenue, Endicott, New York 13760,
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 June 1, 1981
through November 30, 1982 (File No. 45913).

A hearing **was** commenced before James J. Morris, Jr., Hearing Officer, at
the offices of the State Tax Commission, 164 Hawley Street, Binghamton, New
York, on ~~May~~ 23, 1985 at 3:20 P.M. and concluded before Timothy J. Alston,
Hearing Officer, at the ~~same~~ location on June 19, 1986 at 1:15 P.M., with all
briefs to be submitted by October 14, 1986. Petitioner appeared by Becker,
Card & Levy, P.C. (Bruce O. Becker, Esq., of counsel). The Audit Division
appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUES

I. Whether the notice of determination herein was premised upon a factual
basis.

11. Whether petitioner was a "vendor" within the meaning of section
1101(b)(8) of the Tax Law during the audit period, and therefore a "person
required to collect tax" pursuant to section 1131(1) of the Tax Law.

III. Whether, assuming petitioner was a "person required to collect tax", the Audit Division's determination of additional sales tax due from petitioner was proper.

FINDINGS OF FACT

1. On July 6, 1983, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner, Gary Weston, asserting \$6,973.75 in additional sales tax, together with interest and penalty of \$2,525.87, for a total of \$9,499.62 due for the period June 1, 1981 through November 30, 1982. The sales tax asserted herein was premised upon the results of an audit of sales of motor vehicles purportedly made by petitioner during the audit period.

2. On June 21, 1982, the Audit Division was contacted by a Mr. Richard Mallinson regarding his purchase of a 1978 Plymouth Horizon automobile from the petitioner, Gary Weston. Mr. Mallinson purchased the automobile on June 8, 1982 at 808 Hill Avenue, Endicott, New York. The total price of the vehicle as agreed to by Mr. **Mallinson** and petitioner was \$2,750.00. In payment for the vehicle, **Mr.** Mallinson paid petitioner by check of \$100.00 on May 26, 1982 as a deposit. On June 8, 1982, Mr. Mallinson paid petitioner by check in the amount of \$950.00 with the balance of \$1,700.00 in cash and took possession of the vehicle. Mr. Mallinson and petitioner agreed to structure the transaction in the foregoing manner to avoid payment of sales tax on the actual purchase price. Accordingly, the parties to the transaction also executed and filed documents required by the Departments of Taxation and Finance and Motor Vehicles which indicated that the price of the vehicle sold was \$1,050.00. Upon registration of the vehicle, Mr. Mallinson paid sales tax on the purported purchase price of \$1,050.00.

3. Subsequent to his purchase of the vehicle, Mr. Mallinson became dissatisfied with the vehicle and attempted to persuade petitioner to refund his money. When petitioner refused to refund Mr. Mallinson's money, Mr. Mallinson attempted to put pressure on petitioner by contacting the Audit Division on June 21, 1982 with information regarding the improprieties connected with his transaction with petitioner. At that time, Mr. Mallinson paid the balance of sales tax due on the vehicle. Mr. Mallinson also provided the Audit Division with photocopies of approximately 30 classified advertisements which offered to sell used cars and which were purportedly placed in Binghamton-area newspapers by petitioner.

4. Using the information provided by Mr. Mallinson, the Audit Division commenced an audit of petitioner. The Audit Division found eight additional advertisements for used cars bearing the same telephone number as the advertisements supplied by Mr. Mallinson. The Audit Division attempted to confirm if, in fact, petitioner had paid for the advertisements by contacting the offices of the Binghamton Sun-Bulletin and the Binghamton Evening Press. Efforts to obtain such information were fruitless as personnel at the offices of the newspapers failed to provide the requested information. Prior to issuance of the notice of determination, the Audit Division made no attempt to subpoena the newspapers' personnel to obtain the requested information.

5. The Audit Division visited petitioner's premises at 808 Hill Avenue in Endicott, New York prior to the issuance of the notice of determination herein, but found no one home.

6. By letter dated February 8, 1983, the Audit Division made another attempt to contact petitioner. Said letter was mailed to petitioner at the 808

Hill Avenue address and did not reach petitioner.

him responsible for the collection of sales tax on his sales of motor vehicles, and further requested an opportunity to examine petitioner's records to determine whether petitioner had any outstanding tax liability with respect to any such sales.

7. Petitioner did not deny receiving the letter dated February 8, 1983, and no evidence was introduced at hearing tending to show that said letter was not received by petitioner.

8. Having received no reply from petitioner, the Audit Division mailed a Statement of Proposed Audit Adjustment to petitioner on April 19, 1983 at the 808 Hill Avenue address. The statement was returned to the Audit Division marked "moved, left no address".

9. The Audit Division subsequently determined from petitioner's 1982 personal income tax return that petitioner's new address was 309 Robble Avenue, Endicott, New York and, on July 6, 1983, mailed the notice of determination at issue herein to petitioner at that address.

10. In calculating the tax asserted due in the notice of determination, the Audit Division presumed that the advertised vehicles were sold at their advertised prices. The advertised prices were totalled to determine gross sales during the audit period with the tax asserted due being calculated from this total. The vehicles were presumed sold in the sales tax quarter in which the advertisements appeared in the newspaper.

11. Subsequent to the issuance of the notice of determination herein, the Audit Division was advised by the Binghamton Press Company, owner of the newspapers wherein the classified advertisements discussed herein were placed, that it had records of 45 paid bills for the classified advertisements and that

or Paul Weston. **Also** subsequent to the issuance **of** the notice, the New York Telephone Co. advised the Audit Division that the telephone number in question was, during the period at issue, registered to petitioner's wife, Julie Weston.

12. Petitioner produced no evidence to refute the results of the audit.

13. Petitioner was not registered as a vendor for sales tax purposes at any time during the audit period and filed no sales tax returns during said period.

14. Petitioner was also not registered with the Department **of** Motor Vehicles as a dealer of motor vehicles at any time during the audit period.

15. Petitioner argued that whether he was a vendor required to register for sales tax purposes was not properly at issue. Petitioner took the position that at issue was whether any sales tax was due and owing to the state. Petitioner argued that because he was not registered as a dealer **of** motor vehicles, any transactions in which he might have been involved would have required payment of sales tax upon registration of the vehicle by the purchaser. Consequently, petitioner took the position that even if he should have been registered as a vendor for sales tax purposes, he nonetheless should bear no liability herein because all taxable sales which he might have made would have required payment **of** sales tax to the County Clerk before any such vehicles could be registered. Petitioner therefore argued that sales tax would have been paid on each such transaction and that to sustain the notice of determination herein would put the Audit Division in a position of double recovery.

CONCLUSIONS OF LAW

A. That the issuance **of** a notice of determination must be premised upon a factual basis (see Matter of A & Victor Manufacturing Co., Inc., State Tax

when conducting an audit, must determine the amount of tax due from such information as may be available. If necessary, the tax may be estimated on the basis of external indices (Tax Law § 1138[a]; Matter of Korba v. New York State Tax Commn., 84 AD2d 655, lv denied 56 NY2d 502). However, the audit method selected must be reasonably calculated to reflect the taxes due (Matter of Grant Co. v. Joseph, 2 NY2d 196, 206, cert denied 355 US 869).

B. That the Audit Division's issuance of the notice of determination at issue herein was premised upon a factual basis. Based upon the information and classified advertisements provided by Mr. Mallinson, together with additional advertisements discovered by the Audit Division, the Audit Division clearly had a factual basis upon which to determine that petitioner was "[a] person making sales **of** tangible personal property" (Tax Law § 1101[b][8]) and therefore a person required to collect tax pursuant to sections 1131(1) and 1132(a) of the Tax Law.

C. That in view of petitioner's failure to respond to the Audit Division's February 8, 1983 letter and the Audit Division's efforts to contact petitioner prior to the issuance of the notice of determination (Findings **of** Fact "5" and "6"), the Audit Division's resort to the audit method **as** described **in** Finding of Fact "10" was in all respects reasonable.

D. That in view of Finding of Fact "11" petitioner was a person required to collect tax within the meaning of sections 1132(a) and 1133(a) of the Tax Law. Petitioner has failed to sustain his burden of proof to establish that he was not such a person.

E. That petitioner has failed to show wherein the results of the audit were in error. It **is** undisputed that petitioner did not collect any sales tax

sales tax was paid on each sale at issue herein, petitioner bore the burden of proof to show where such taxes were paid with respect to these specific transactions. Petitioner introduced no such evidence of sales tax paid on specific transactions herein. Until it **is** proven that the sales tax was paid, petitioner **is not relieved of his duty to collect the tax** (see Matter of Burger, State Tax Commission, October 7, 1986).


F. That the petition of Gary Weston **is** in all respects denied **and** the Notice of Determination and Demand **for** Payment **of** Sales and Use Taxes Due dated July 6, 1983 **is** in all respects sustained.

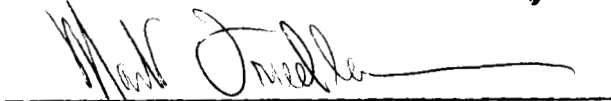
DATED: Albany, New York

STATE TAX COMMISSION

MAR 13 1987


PRESIDENT


COMMISSIONER


COMMISSIONER