

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

SPONSKI CO., 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, 1980  
through August 31, 1981,

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Petitioner, Sponski Co., Inc., 644 Jerusalem Avenue, Uniondale, New York 11553, 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, 1980 through August 31, 1981 (File No. 46804).

A hearing was commenced before Jean Corigliano, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on March 19, 1986 at 11:15 A.M. and was continued to completion on May 21, 1986 at 10:45 A.M., with all briefs to be submitted by November 6, 1986. Petitioner appeared by Burton Rothbard, Esq. The Audit Division appeared by John P. Dugan, Esq. (Joseph W. Pinto, Esq., of counsel).

#### ISSUES

I. Whether the surrender of a lease for consideration and the transfer of a service station business constituted a bulk sale within the meaning of the Tax Law.

II. Whether, if a bulk sale did occur, petitioner may be charged, as a purchaser, with liability for sales tax alleged to be due from the previous operators of the service station.

III. Whether the State Tax Commission failed to give petitioner timely

IV. Whether the Audit Division properly estimated sales tax due from the previous service station operator.

V. Whether the Audit Division properly estimated sales tax due from the alleged sale of tangible personal property to petitioner from the previous service station operator.

#### FINDINGS OF FACT

1. On July 20, 1983, the Audit Division issued to petitioner, Sponski Co., Inc. ("Sponski"), a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, assessing sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1980 through August 31, 1981 in the amount of \$14,199.54 plus interest. The notice stated, in part, that the tax was "determined to be due from Sodarama Co. Inc. and represents your liability as purchaser in accordance with Section 114 (c) [sic] of Sales Tax Law."

2. Sodarama Co., Inc. ("Sodarama") was a New York corporation which operated a gasoline service station in Uniondale, New York. Frank Lapinsky, president of Sodarama, executed a lease with Mobil Oil Corporation ("Mobil") on September 30, 1977 for a term of five years.

3. In 1981, Michael Spontak, who worked for Sodarama as the station manager, was aware that there was some disagreement between Lapinsky and Mobil over the terms of the lease agreement and the manner in which Lapinsky was operating the Uniondale station. Spontak decided he would like to take over the operation of the station, and toward that end he entered negotiations with Lapinsky.

4. In September 1981, Lapinsky agreed to surrender his lease with Mobil in consideration for Spontak's execution of thirty promissory notes, each in

exact terms are unclear. Apparently, Lapinsky attempted to assign his lease to Spontak, but Mobil refused to allow it under the terms of his lease agreement. A letter from Lapinsky's attorney to Spontak characterizing the transaction reads as follows:

"When the Mobil Co. refused to allow Mr. Lapinsky to assign the lease to you, Mr. Lapinsky had nothing to sell you. In as much [sic] as the station had been operated for some time by Sodarama Co., Inc., there was nothing in the way of inventory or equipment to be conveyed by Mr. Lapinsky.

The sums you agreed to pay Mr. Lapinsky was [sic] for his releasing the lease he had with the Mobil Co. on the premises."

5. Lapinsky surrendered his lease with Mobil as of September 30, 1981. Over a period of approximately one month prior to that, he removed from the station whatever tools and equipment he or Sodarama owned.

6. Sponski was incorporated in New York State in June 1981 and began doing business as the operator of the Uniondale station on October 1, 1981. Spontak was president of Sponski and its sole shareholder. On October 26, 1981, Spontak executed a one year trial franchise lease with Mobil for the Uniondale station.

7. On or about October 23, 1981, the Audit Division began an audit of Sodarama for the period beginning June 1, 1979. On that date, an auditor visited the Uniondale station. He met Spontak who identified himself as the station manager and informed the auditor that the station was operated by Sodarama. The auditor observed cars under repair, several repair bays, tools, parts and accessories. He also noticed a large stock of cigarettes on the premises.

8. The auditor contacted Lapinsky and spoke with him and Sodarama's accountant in order to obtain books and records.

audit. The only records made available were some invoices from Mobil and a checkbook showing cash deposits and disbursements for September, October and November 1980. These were deemed inadequate to verify reported taxable sales for the audit period.

9. The auditor made a second visit to the station in December 1981. At that time, Spontak told the auditor that he had taken over the station's operation. The auditor noted that the new owner appeared to be operating the station in the same manner as Sodarama had been operating it.

10. On August 16, 1982, Lapinsky, as president of Sodarama, executed a consent extending the period of limitation for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1978 through February 28, 1982 to June 20, 1983.

11. From Mobil, the auditor obtained third party verification of Sodarama's purchases for the calendar years 1980 and 1981. He applied a 12 percent markup to gasoline purchases, a 100 percent markup to oil purchases, a 400 percent markup to grease purchases and estimated repair sales of 25 percent of gasoline and related sales. Using this method, the auditor estimated total gross sales for the period January 1, 1980 through August 31, 1981 of \$1,690,241.00. For the period June 1, 1979 through August 31, 1981, Sodarama reported gross sales of \$2,126,455.00. It is noted that translating these totals into monthly sales figures would yield somewhat higher audited than reported gross sales. However, the auditor accepted gross sales figures as reported.

12. Since there was no evidence of exempt sales, the auditor deemed all sales to be taxable except that portion consisting of the State excise tax on gasoline. In the twenty month period for which purchase records were available,

the auditor calculated nontaxable sales of \$84,496.00 by applying the .08 excise tax to gallons of gasoline purchased. In the twenty-seven month audit period, Sodarama reported nontaxable sales of \$337,588.00. The auditor determined that audited nontaxable sales were equal to 25.03 percent of reported nontaxable sales by dividing \$337,588.00 into \$84,496.00. He then applied this percentage to reported nontaxable sales in each sales tax quarter under consideration to calculate audited nontaxable sales. This latter figure was subtracted from reported nontaxable sales, resulting in additional taxable sales of \$253,090.00. The auditor applied a tax rate of eight percent to this amount to determine additional tax due from Sodarama of \$20,247.30.

13. At hearing, the auditor's supervisor agreed that in calculating the percentage to be applied to reported nontaxable sales an erroneous comparison was made between periods of different lengths. Calculating the percentage using the same periods in both the numerator and denominator results in a percentage of 31.38.

14. During the audit period the sales tax rate in Nassau County was seven percent.

15. Sponski was assessed \$12,387.04, representing tax due from Sodarama for the last five quarters of the audit period. In addition, Sponski was assessed tax of \$1,812.50, representing tax allegedly due on the sale of fixed assets from Sodarama to Sponski. According to the auditor's supervisor, the \$25,000.00 value placed on the fixed assets appeared to be a "pure estimate". No tangible assets were identified as having been transferred in the alleged bulk sale transaction.

16. The field audit report contained transcriptions of Sodarama's

invoices from Sodarama's tobacco distributors. Sponski's representative used these documents to estimate purchases of 38,760 cartons of cigarettes during the period for which Sponski was assessed. By applying the state excise tax of \$1.50 per carton to the estimated number of cartons sold, the representative calculated additional nontaxable sales of \$58,140.00. Sponski argued that the auditor should have included this amount in nontaxable sales and that his failure to do so resulted in an overstatement of tax due.

17. Sodarama was a licensed inspection station. Through Spontak it performed 50 car inspections per month charging \$6.00 for each inspection. The charges for inspections were not subject to sales tax, and the charges for the period January 1, 1980 through August 31, 1981 amounted to \$6,000.

18. On September 15, 1983, a Notice of Claim to Purchaser was issued to Sponski by the Audit Division.

#### CONCLUSIONS OF LAW

A. That Tax Law § 1141(c) provides in pertinent part that:

"Whenever a person required to collect tax shall make a sale, transfer, or assignment in bulk of any part or the whole **of** his business assets, otherwise than in the ordinary course of business, the purchaser, transferee or assignee shall at least ten days before taking possession of the subject of said sale, transfer **or** assignment, or paying therefor, notify the tax commission by registered mail **of** the proposed sale....

\* \* \*

...For failure to comply with the provisions of this subdivision the purchaser, transferee or assignee shall be personally liable for the payment to the state of any such taxes... due to the state from the seller, transferrer or assignor....'

B. That the surrender of a lease in exchange for value constitutes a

"bulk sale" within the context of the statute (Matter of Acres Storage Company,

C. That Sponski questions whether it may be charged as a purchaser on the basis of a transaction involving Lapinsky and Spontak. The Notice of Determination and Demand for Payment of Sales and Use Taxes Due stated that the assessment issued to Sponski was premised upon taxes determined to be due from Sodarama. As a person required to collect tax in accordance with Tax Law § 1131(1), Lapinsky was personally responsible for sales tax due from Sodarama (Tax Law § 1133[a]). His sale to Spontak fell within **the** purview of **the** bulk sale statute and made Spontak responsible for "the payment of any such taxes... due to the state" from Lapinsky. To the extent that Lapinsky was liable for taxes due from Sodarama, Spontak became correspondingly liable. If Spontak assigned all rights with regard to the bulk sale transaction to Sponski, Sponski may be held to be responsible for taxes due from the Sodarama and Lapinsky (see Matter of Acres Storage Co., Inc. v. Chu, 501 NYS 2d 966, supra). Evidence that such an assignment occurred is found in Sponski's corporation franchise tax reports where it reported having begun doing business as the operator of the Uniondale station on October 1, 1981.

D. That Sponski could have protected its interest by notifying the Tax Commission "at least ten days before taking possession of the subject" of the bulk sale (see Tax Law § 1141[c]). Spontak's casual statement to an auditor, made more than two months after the sale occurred, did not satisfy the notice requirements of the statute. It did not cure the failure to notify the Tax Commission as required, and it did not place the Tax Commission under a duty to give notice of a possible claim within the statutory time limits.

E. **That** in the absence of adequate books and records, the auditor **properly** estimated the sales tax due from Sodarama (see Tax Law § 1138[a]).

The auditor was not required to look beyond the records of the taxpayer.

where it was determined that the records of such sales were inadequate to form the basis of an assessment. Contrary to Sponski's assertion, the decision not to estimate cigarette sales decreased its tax liability since such sales properly would have been added to audited gross and taxable sales. Inasmuch as cigarette sales were not included in estimated sales, an adjustment is not warranted for the cigarette excise tax allegedly collected in connection with those sales.

F. That Sponski has shown that several adjustments must be made in the auditor's calculations in order to correctly estimate its tax liability: Sodarama's audited nontaxable sales, for the period January 1, 1980 through August 31, 1981 are to be increased in the amount of \$6,000.00 to reflect nontaxable state inspection charges; the resulting figure is to be divided by reported nontaxable sales for the same period to calculate a percentage which is to be applied to reported nontaxable sales in those sales tax quarters for which Sponski was assessed; audited nontaxable sales so calculated are to be subtracted from reported nontaxable sales to calculate additional taxable sales; a tax rate of seven percent is to be applied to additional taxable sales.

G. That tangible personal property transferred in a bulk sale of a business asset constitutes a purchase at retail as defined in Tax Law § 1101(b) and is subject to the tax imposed under Tax Law § 1105(a). There is no evidence that a transfer of fixed assets or other tangible personal property occurred nor that Spontak paid Lapinsky for any asset other than the surrender of the lease. Therefore, tax assessed on the alleged sale of assets amounting to \$1,812.50 is cancelled.



H. That the petition of Sponski Co., Inc. is granted to the extent indicated in Conclusions of Law "F" and "G"; that the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on July 20, 1983 shall be modified accordingly; and that except as **so** granted, the petition **is** denied.

DATED: Albany, New York

STATE TAX COMMISSION

MAR 20 1987

Roderick W. Allen  
PRESIDENT

Francis R. Koenig  
COMMISSIONER

Mark J. [Signature]  
COMMISSIONER