

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
JACQUES AND JOAN BURGER, :
AS OFFICERS OF COUNTRY-WIDE LEASING CORPORATION :
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 March 1, 1978 :
through May 31, 1980. :

DECISION

Petitioners, Jacques and Joan Burger, as officers of Country-Wide Leasing Corporation, 5 Adams Place, Massapequa, New York 11758, 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 March 1, 1978 through May 31, 1980 (File Nos. 47462 and 47463).

On April 22, 1986, petitioners, by their representative, Martin M. Lehman, C.P.A., filed a waiver of hearing and requested that this matter be decided by the State Tax Commission on the basis of the existing record, with all briefs to be submitted by May 16, 1986. After due consideration, the Tax Commission renders the following decision.

ISSUES

I. Whether the Audit Division properly determined the additional tax liability of the petitioners for the period March 1, 1978 through May 31, 1980.

II. Whether section 1132(f) of the Tax Law relieves petitioners from the liability to collect sales tax under sections 1131(1) and 1133(a) of the Tax Law.

FINDINGS OF FACT

1. Petitioners, Jacques and Joan Burger, were officers of Country-Wide Leasing Corporation ("Country-Wide"), a motor vehicle sales and leasing corporation. Country-Wide was a registered sales tax vendor and filed quarterly New York State and local sales and use tax returns for the period March 1, 1978 through May 31, 1979.

2. On August 4, 1981, as a result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner Jacques Burger, as president of Country-Wide, in the amount of \$72,205.21, plus penalty of \$16,570.05 and interest of \$15,821.78, for a total due of \$104,597.04 for the period March 1, 1978 through May 31, 1980. On the same date, an identical notice was issued against petitioner Joan Burger, as secretary of Country-Wide. The assessment of \$72,205.21 was estimated because of the failure of petitioners to make adequate records available to the auditor.

3. Petitioners subsequently made their records available and the tax due was recomputed. Since there were no sales invoices indicating the selling price of automobiles sold, automobile selling prices were determined by referring to the used car selling price guide, known as the "Red Book", using the average selling price (wholesale selling price plus retail selling price divided by 2) as the basis for computing taxable auto sales. Additional taxable sales resulting from the sale of automobiles totalled \$367,686.00 for the period March 1, 1978 through May 31, 1980, resulting in a tax deficiency of \$25,738.02.

4. Tax due on leased automobiles for periods in which no returns were filed totalled \$12,432.14 for the aforesaid period, resulting in a total tax due of

\$38,170.16. Payments of \$17,752.48 were made against this amount, leaving a balance due on the assessment of \$20,417.68 plus statutory interest.¹

5. Petitioners have at no time protested their personal liability as officers of Country-Wide for the sales taxes due from the corporation.

6. Petitioners maintained that, pursuant to section 1132(f) of the Tax Law, a motor vehicle cannot be registered with the New York State Department of Motor Vehicles until it is first proven that the applicable tax has been paid, and that, therefore, the collection from petitioners of sales or use tax would result in a double payment of tax. Petitioners also disputed the amount of additional tax due assessed by the Audit Division.

7. Petitioners have produced no additional evidence to warrant a further reduction in the assessed amount of tax due or substantiate any claim that the amount, as finally assessed is in error.

CONCLUSIONS OF LAW

A. That every person required to collect sales tax shall collect the tax from the customer when collecting the price to which it applies (Tax Law § 1132[a]). It shall be presumed that all receipts for tangible personal property are subject to tax until the contrary is established, and the burden of proving that any receipt is not taxable shall be upon the person required to collect tax, unless the vendor shall have taken from the purchaser a certificate to the effect that the property was for resale or for some reason exempt from tax (Tax Law § 1132[c]). Furthermore, the receipts from the sale of a motor vehicle shall not be subject

¹ Due to the fact that Country-Wide filed for bankruptcy on November 27, 1984, no penalty charges were assessed.

to the retail sales tax, despite the taking of physical possession by the purchaser within the State, provided that the purchaser, prior to taking delivery, furnishes to the vendor an affidavit that he is a nonresident, has no permanent place of abode in the State, and is not engaged in carrying on in the State any employment, trade, business or profession in which the motor vehicle will be used (Tax Law §§ 1117[a] and 1214[a]).

B. That since Country-Wide Leasing Corporation was a person required to collect sales tax and did not receive from the purchasers resale certificates or nonresident affidavits, it was under a duty to collect New York State sales tax on its sales and leases of its vehicles. The fact that section 1132(f) of the Tax Law provides that a purchaser may not register a vehicle in New York until it is proven that the sales tax was paid, does not relieve Country-Wide of its duty and responsibility to collect the tax from said purchaser (Matter of Mendon Leasing Corporation, State Tax Commission, June 24, 1985).

C. That petitioners, Jacques and Joan Burger, as officers of Country-Wide Leasing Corporation, are personally liable for the sales tax due from the corporation (Tax Law § 1133[a]); and petitioners have failed to meet their burden of proving that the audit was otherwise erroneous.

D. That the petition of Jacques and Joan Burger is granted to the extent indicated in Findings of Fact "3" and "4"; that the Audit Division is directed to modify the notices of determination and demands for payment of sales and use taxes

due issued August 4, 1981 accordingly; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

STATE TAX COMMISSION

OCT 07 1986

Rodrich W. Clem
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark J. Smith
COMMISSIONER