

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
GITLITZ AUTO SERVICE
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 November 30, 1982.

DECISION

Petitioner, Gitlitz Auto Service, 382 Remsen Avenue, Brooklyn, New York 11212, 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 November 30, 1982 (File No. 49164).

A hearing was held before Robert F. Mulligan, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 16, 1986 at 1:15 P.M. Petitioner appeared by Isaac Sternheim, C.P.A. and Louis Chaiken, P.A. The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUES

I. Whether a consent fixing sales and use tax executed by petitioner was valid.

II. If not, whether the sales tax audit of petitioner's books and records was proper.

FINDINGS OF FACT

1. Petitioner, Gitlitz Auto Service, is a sole proprietorship operated by Sidney Gitlitz. The business is a Texaco automobile service station located at 382 Remsen Avenue, Brooklyn, New York.

2. A sales tax field audit conducted by the Department of Taxation and Finance found that petitioner's books and records were inadequate. This finding was based largely on the fact that petitioner's purchases of gasoline as per its records differed substantially from petitioner's purchases as reported by its suppliers.

3. Petitioner had two suppliers of gasoline during the period at issue, JAL Oil Co., Inc. ("JAL") and Pride Oil Corp. ("Pride"). Verification from the two suppliers showed 50,500 gallons of gasoline sold to petitioner for the quarter ending February 28, 1981. Petitioner did not retain any records with respect to gasoline received from Pride.

4. The auditor used the 50,500 gallons per quarter figure together with an average selling price of \$1.25 per gallon and estimated gasoline sales at \$63,125.00 per quarter.

5. The auditor estimated repair sales based on \$30.00 per hour for three mechanics, times eight hours per day and six days per week, for thirteen weeks per quarter, resulting in estimated repair sales per quarter of \$56,160.00.

6. A letter proposing an assessment of \$62,274.85 was issued to petitioner by the Audit Division on March 14, 1983.

7. Petitioner objected to the proposed assessment and, after a conference at the Brooklyn District Office on June 1, 1983, the following adjustments were made:

a) the gasoline sales price for the periods December 1, 1979 through May 31, 1981 was reduced to \$1.15 per gallon and estimated gasoline sales for this period were reduced to \$58,075.00 per quarter;

b) the labor rate was reduced from \$30.00 per hour to \$27.00 per hour;

c) the six day week was reduced to five and one-half days;

d) five days per year were allowed for vacation and ten days for holidays.

8. Based on the reductions made at the conference, total adjusted taxable gasoline and repair sales for the audit period amounted to \$1,190,899.00. Taxable sales reported for the same period were \$599,053.00, resulting in additional taxable sales of \$591,846.00. Accordingly, additional tax due was calculated at \$47,929.94.

9. At the conference held at the Brooklyn District Office, Sidney Gitlitz was told that if he did not consent to the revised assessment of \$47,929.94, criminal charges would be placed against him. Petitioner's lawyer and accountant both advised Mr. Gitlitz to sign the consent.

10. On June 8, 1983, petitioner executed a "Consent to Fixing of Tax Not Previously Determined and Assessed", agreeing to \$47,929.94 in additional tax. By the terms of the consent form, petitioner agreed to pay the amount due after issuance of a Notice and Demand, plus penalty and interest.

11. On October 20, 1983, the Audit Division issued a Notice and Demand for Payment of Sales and Use Taxes Due to petitioner in the amount of \$47,929.94 in tax, \$11,226.67 in penalty, plus interest.

12. Petitioner filed a petition dated December 14, 1983 which was received by the Tax Appeals Bureau on January 9, 1984, protesting the labor used in the calculation of the additional tax on the basis that the hours of labor on which the calculations were based did not allow for any nonbillable time and that the average labor rate should be reduced to \$20.00 per hour to allow for that fact.

13. Petitioner filed a Tax Amnesty Application under the Tax Amnesty Program established by the State of New York beginning on November 1, 1985 and

ending on January 31, 1986. During the course of the program, petitioner's representative met with an auditor at the Brooklyn District Office (not the auditor who conducted the audit) and a proposal to reduce the additional tax to \$26,604.96 was apparently agreed to by the second auditor. When this proposal was submitted to the auditor's supervisor, however, it was rejected on the basis that petitioner had already executed a consent fixing tax.

CONCLUSIONS OF LAW

A. That section 1138(c) of the Tax Law provides as follows:

"(c) A person liable for collection or payment of tax (whether or not a determination assessing a tax pursuant to subdivision (a) of this section has been issued) shall be entitled to have a tax due finally and irrevocably fixed prior to the ninety-day period referred to in subdivision (a) of this section, by filing with the tax commission a signed statement in writing, in such form as the tax commission shall prescribe, consenting thereto."


B. That petitioner did not sign the consent fixing tax under duress. Accordingly, the consent fixing tax is valid and it finally and irrevocably fixed petitioner's tax. The petitioner may, however, pay the tax and file for a refund under section 1139[c] of the Tax Law.

C. That the petition of Gitlitz Auto Service is denied.

DATED: Albany, New York

STATE TAX COMMISSION

NOV 20 1986


PRESIDENT


COMMISSIONER


COMMISSIONER