

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
MICHAEL CURRIER : DECISION
d/b/a MIKE'S SUNOCO 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 November 30, 1980 :
through February 28, 1981. :

Petitioner, Michael Currier d/b/a Mike's Sunoco Service, 5495 Irish Road, North Tonawanda, New York 14120 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 November 30, 1980 through February 28, 1981 (File No. 50475).

A hearing was held before James J. Morris, Jr., Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on January 13, 1986 at 2:45 P.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUE

Whether petitioner was a vendor of gasoline required to collect sales tax, file sales tax returns and pay over sales tax on taxable sales of gasoline.

FINDINGS OF FACT

1. On December 20, 1983, as the result of a field audit, the Audit Division issued against petitioner, Michael Currier d/b/a Mike's Sunoco Service, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due in the amount of \$10,899.93 plus penalty of \$2,724.98 plus interest of \$4,126.89 for a total due of \$17,751.80 for the period September 1, 1980 through November 30, 1982.

2. From September 1, 1980 through March 1981, Michael Currier rented the bay area of a gasoline service station from Harold Geiger for the sum of \$500.00 per month. As a condition of the rental, Mr. Currier was required to pump gasoline for Mr. Geiger; in return, Mr. Currier received a commission of four cents for each gallon of gasoline pumped. Each day Mr. Currier completed a daily report sheet showing the number of gallons pumped, total gas sales and total credit card sales. On a daily basis, he deposited cash receipts as shown on the report sheets directly into Mr. Geiger's account at Manufacturers and Traders Trust Company. He subtracted his own commission from receipts on the last day of each week. Credit card sales were made through Sunoco credit cards using Geiger's account. Once a week a Geiger employee came by and collected the credit slips from Mr. Currier. Mr. Geiger collected on all credit sales directly from Sunoco. This arrangement ended in March 1981 when Geiger Enterprises, Inc., filed for bankruptcy. Mr. Currier then began paying rent directly to the owners of the gasoline service station. The record does not reveal whether or not Mr. Currier began to sell gasoline on his own.

3. Mr. Currier operated an automobile repair business on the premises rented from Mr. Geiger. He sold tires, batteries and accessories, performed New York State inspections and repaired vehicles. The repair work and accessory sales were completely unrelated to the Geiger gasoline sales. Mr. Currier applied for and received his own sales tax Certificate of Authority so that he could collect tax and file returns on his non-gasoline sales. The sales tax assessments under consideration are only for those quarters ended November 30, 1980 and February 28, 1981, during which Mr. Currier was engaged in pumping gasoline for Mr. Geiger. For all other quarters in the audit period and for all non-gasoline sales, it was determined that Mr. Currier had timely filed and

correctly reported sales tax due. It was Mr. Currier's understanding that Mr. Geiger was reporting and paying over the sales tax due on all gasoline sales.

4. The auditor determined, as stated in his report, "the vendor [Mr. Currier] never purchased gasoline during the audit period, however, the vendor did enter into an oral agreement with Geiger Enterprises, Inc. ("Geiger") to sell Geiger gasoline." An audit of Geiger disclosed that 124,782 gallons of gasoline were delivered to Mike's Sunoco Service during the audit period, and sales of this gasoline were never reported either by Geiger or Mr. Currier. The tax due on these sales was assessed against Mr. Currier, "since no written contract could be produced by the vendor to substantiate Geiger Enterprises, Inc. oral agreement to pay all sales taxes."

CONCLUSIONS OF LAW

A. That section 1133(a) of the Tax Law provides, in part, that "every person required to collect any tax imposed by [Article 28] shall be personally liable for the tax imposed, collected or required to be collected under this article". Section 1131(1) of the Tax Law includes within the term "person required to collect tax", "every vendor of tangible personal property or services...". Section 1101(b)(8)(i) defines the term vendor, in part, as "a person making sales of tangible personal property or services, the receipts from which are taxed by this article...".

B. That section 1101(b)(8)(ii) provides that:

"When in the opinion of the tax commission it is necessary for the efficient administration of this article to treat any salesman, representative, peddler or canvasser as the agent of the vendor, distributor, supervisor or employer under whom he operates or from whom he obtains tangible personal property sold by him or for whom he solicits business, the tax commission may, in its discretion, treat such agent as the vendor jointly responsible with his principal distributor, supervisor or employer for the collection and payment over of the tax."

C. That, in a similar case, the State Tax Commission determined that the individual pumping gasoline for Geiger was himself a vendor within the meaning and intent of section 1101(subd. [b][8]) of the Tax Law and thus personally liable for tax due on gasoline sales (Donald Mammosar d/b/a Don's Auto, State Tax Comm., August 6, 1985). However, in his relationship with Geiger, Mr. Currier was situated quite differently from the petitioner in Mammosar. Like Mr. Currier, Mammosar pumped gasoline for Geiger in return for a commission on the number of gallons pumped, but unlike Mr. Currier, Mammosar was actually involved in gasoline purchases and in recordkeeping for sales tax purposes. When gasoline was delivered to Mammosar's station, he paid the driver from gasoline receipts, subtracting his own commission and adjusting for credit card sales. For sales tax accounting purposes, Mammosar kept records and reported sales to an accountant selected by Geiger. Mammosar paid a fee to the accountant for his services. In contrast, Mr. Currier was not directly involved in gasoline purchases (Finding of Fact "4") and had no involvement whatsoever in Geiger's accounting or recordkeeping procedures. He merely collected the pump price on gasoline sold and deposited the sales receipts directly into Geiger's account. A Geiger employee came by weekly to collect credit card slips. Mr. Currier did not employ or work with a Geiger accountant for sales tax purposes.

D. That Mr. Currier was not a vendor of gasoline. At hearing, Mr. Currier produced credible evidence of an oral agreement whereby he was to act for Geiger by pumping Geiger gasoline and turning over all receipts, minus a commission, to Geiger. In light of the nature of the contractual relationship between Geiger and himself, Mr. Currier reasonably believed that he had no duty to keep records, file returns or pay over a tax when due. Furthermore, Mr. Currier

was diligent in carrying out what he perceived to be his own responsibilities to New York State. Under the circumstances, it would be unfair to treat Mr. Currier as a vendor of gasoline jointly responsible with Geiger for collection and payment over of tax.


E. That the petition of Michael Currier d/b/a Mike's Sunoco Service is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on December 20, 1983 is cancelled.


DATED: Albany, New York

STATE TAX COMMISSION

SEP 15 1986


PRESIDENT


COMMISSIONER


COMMISSIONER