

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
EDWARD KUBASAK, :
OFFICER OF BRIDGE SUNOCO SERVICE STATION, INC. :
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, 1978 :
through August 31, 1982. :

DECISION

Petitioner, Edward Kubasak, officer of Bridge Sunoco Service Station, Inc., 80 Kinghorn Street, Staten Island, New York 10312, 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, 1978 through August 31, 1982 (File Nos. 50892 and 53861).

A hearing was held before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 19, 1986 at 9:15 A.M., with all briefs to be filed by September 2, 1986. Petitioner appeared by William T. Barbera, Esq. The Audit Division appeared by John P. Dugan, Esq. (Mark F. Volk, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined the sales tax liability of Bridge Sunoco Service Station, Inc. for the period December 1, 1978 through August 31, 1982.

II. Whether petitioner Edward Kubasak was a person required to collect tax within the meaning of section 1131(1) of the Tax Law and, therefore, could be held personally liable for any taxes due from Bridge Sunoco Service Station, Inc. pursuant to section 1133(a) of the Tax Law.

FINDINGS OF FACT

1. During the period under consideration, Bridge Sunoco Service Station, Inc. ("Bridge") operated a gas station at 579 92nd Street, Brooklyn, New York. Following an audit conducted in 1982 and 1983, petitioner, Edward Kubasak, was informed by notices of determination and demands for payment of sales and use taxes due that he was liable as a responsible person under Tax Law §§1131(1) and 1133 for taxes owed by Bridge as determined under Tax Law §1138. The first notice, dated January 20, 1984, asserted a tax due of \$180,892.12, plus a 50 percent fraud penalty of \$90,446.07 and interest of \$92,233.28, for a total amount due of \$363,571.47 for the period December 1, 1978 through February 28, 1981. The second notice, dated June 4, 1984, asserted a tax due of \$35,582.83, plus a 50 percent fraud penalty of \$17,791.42 and interest of \$13,617.07, for a total amount due of \$66,991.28¹ for the period March 1, 1981 through November 30, 1981. The third and final notice, dated August 20, 1984, asserted a tax due of \$35,497.00, plus a 50 percent fraud penalty of \$17,748.50 and interest of \$10,813.31, for a total amount due of \$64,058.81 for the period December 1, 1981 through August 31, 1982.

2. On March 5, 1982 and February 22, 1983, the petitioner, on behalf of Bridge, executed consents extending the period of limitations for issuing an assessment for sales and use taxes. Petitioner indicated his title as president.

3. Throughout its audit of the books and records of Bridge, the Audit Division communicated with petitioner at the business premises and at his home concerning the affairs of Bridge. On June 8, 1982, petitioner advised the

¹ The total amount due as stated on the notice is correct, however, the interest, as the result of an apparent typographical error, was incorrectly stated. It should have been \$13,617.03.

auditor that his accountant had lost the books and records. Based on pump prices, the auditor first computed a markup on gasoline of 10.97 percent. The auditor next applied the markup to Bridge's gasoline purchases for the period September 1979 through July 1982 as supplied by the Sun Oil Co. ("Sun") to determine audited taxable gasoline sales of \$3,534,205.70. The auditor then computed oil sales of \$6,958.58 for this period by marking up oil purchases as supplied by Sun by 100 percent. (This markup was based on the Audit Division's experience.) The auditor computed total audited taxable sales for the period September 1979 through July 1982 of \$3,541,164.28 which, when compared to taxable sales reported of \$1,056,692.00, resulted in additional taxable sales of \$2,484,472.28, or a margin of error of 235.12 percent. The margin of error was applied to taxable sales reported for the entire audit period to compute audited taxable sales of \$4,463,533.60 and additional sales tax due of \$251,971.95.

4. The sales and use tax returns filed on behalf of Bridge for the periods ended May 31, 1979 through August 31, 1981 were signed by petitioner, whose title was indicated as president.

5. At the hearing, the Audit Division waived the fraud penalty and, in lieu thereof, imposed the penalty authorized by Tax Law §1145(a)(1)(i).

6. Petitioner's representative did not contest the computation of additional sales tax found due, but rather contended that the Audit Division has failed to prove that petitioner was a person responsible for the sales tax liability of Bridge.

CONCLUSIONS OF LAW

A. That section 1135(a) of the Tax Law provides that every person required to collect tax shall keep records of every sale and of all amounts paid,

charged or due thereon and of the tax payable thereon. Such records shall include a true copy of each sales slip, invoice, receipt or statement.

B. That section 1138(a)(1) of the Tax Law provides, in pertinent part, that the amount of tax due shall be determined from such information as may be available. If necessary, the tax may be estimated on the basis of external indices.

C. That the books and records of Bridge Sunoco Service Station, Inc. were inadequate and incomplete for purposes of determining taxable sales or sales tax due. Therefore, the use of external indices was permissible (Matter of Korba v. N.Y.S. Tax Commission, 84 AD2d 655). Accordingly, the Audit Division's determination of additional tax due was proper pursuant to section 1138(a)(1) of the Tax Law. Exactness is not required where it is the taxpayer's own failure to maintain proper records which prevents exactness in the determination of sales tax liability (Matter of Markowitz v. State Tax Commission, 54 AD2d 1023).

D. That section 1131(1) of the Tax Law provides:

"Persons required to collect tax' or 'persons required to collect any tax imposed by this article' shall include: every vendor of tangible personal property or services;... Said terms shall also include any officer, director or employee of a corporation or of a dissolved corporation...who as such officer, director or employee is under a duty to act for such corporation...in complying with any requirement of this article; and any member of a partnership."

E. That the resolution of whether a petitioner is a person required to collect tax turns upon a factual determination in each case (Vogel v. N.Y. State Dept. of Taxation and Finance, 98 Misc 2d 222; Chevlowe v. Koerner, 95 Misc 2d 388). Relevant factors in such a determination include, but are not limited to, the following: the day-to-day responsibilities of the officer; involvement

in and knowledge of the financial affairs of the corporation; the identity of who prepared and signed tax returns; authority to sign checks.

F. That petitioner signed the sales tax returns as president of Bridge Sunoco Service Station, Inc.; he communicated with the auditor concerning the affairs of the corporation; and he signed consents extending the statute of limitations on behalf of the corporation indicating his title as president. Petitioner has failed to establish by sufficient evidence that he was not an officer or employee under a duty to act for Bridge Sunoco Service Station, Inc. Accordingly, petitioner was a person required to collect tax within the meaning and intent of section 1131(1) of the Tax Law and therefore has personal liability for the sales tax due from Bridge Sunoco Service Station, Inc. pursuant to section 1133(a) of the Tax Law.


G. That the petition of Edward Kubasak is denied and the notices of determination and demands for payment of sales and use taxes due, as revised by the Audit Division (see Finding of Fact "5"), are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

DEC 05 1986


PRESIDENT


COMMISSIONER


COMMISSIONER