

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

C MARCHR 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 December 1, 1980 :
through November 30, 1983.

DECISION

In the Matter of the Petition

of

:

GEORGE PLEVETES

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, 1980 :
through November 30, 1983.

Petitioner, C Marchr Corporation, 265 Pine Hollow Road, Oyster Bay, New York 11771, 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, 1980 through November 30, 1983 (File No. 54716).

Petitioner, George Plevetes, 265 Pine Hollow Road, Oyster Bay, New York 11771, 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, 1980 through November 30, 1983 (File No. 54717).

A consolidated hearing was held before Allen Caplowaith, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 7, 1987 at 1:15 P.M., with all briefs to be submitted by June 25, 1987. Petitioners appeared by John Thomas Roesch, Esq. The Audit

Division appeared by John P. Dugan, Esq. (Michael B. Infantino, Esq., of counsel).

ISSUE

Whether the audit method and the adjustments resulting therefrom were proper.

FINDINGS OF FACT

1. On November 23, 1983, the Audit Division's Central Office Audit Bureau received notification of the bulk sale of the furniture, fixtures, equipment and supplies of C Marchr Corporation ("the seller") to George Plevetes ("the purchaser"). Such notification reported the type of business as a stationery store and the scheduled date of sale as November 10, 1983. The selling price of the assets sold was reported thereon as follows:

Furniture, fixtures, equipment and supplies	\$ 2,500.00
Merchandise inventory for sale	15,000.00
Goodwill and other assets, if any	<u>45,000.00</u>
Total Selling Price	\$62,500.00

The information reported on the aforesaid notification was provided by one Ralph Marchionna, the owner of C Marchr Corporation prior to the bulk sale at issue herein. Sales tax of \$206.25 on the bulk sale of C Marchr Corporation was paid at the time said notification was submitted.

2. On December 2, 1983, the Audit Division issued a Notice of Claim to Purchaser to **Mr.** Plevetes (the purchaser) at his home address, indicating his possible liability for unpaid sales tax, as a "bulk sale" purchaser. On the same date, a similar notice of claim was also served on the escrow agent in the transaction, one John Thomas Roesch, Esq.

3. On December 19, 1983, a Bulk Sale Questionnaire was sent to the seller. Said questionnaire was neither answered nor returned to the Audit Division.

4. On April 6, 1984, (subsequent to the issuance of the assessments noted in Finding of Fact "6", infra) a Bulk Sale Questionnaire was sent to John Thomas Roesch, Esq. on behalf of the seller and purchaser. This questionnaire was neither answered nor returned to the Audit Division.

5. In light of the seller's failure to complete and return the Bulk Sale Questionnaire, the Audit Division reviewed the seller's sales tax returns as filed, which returns indicated seller reported between 33.6 percent and 39 percent of its gross sales as taxable sales. By contrast, Audit Division experience indicated 68 percent as the mean taxable ratio (taxable sales to gross sales) for stationery stores in New York. More specifically, the aforesaid mean taxable ratio was based on the results of 37 separate field audits of stationery stores.

6. On February 21, 1984, the Audit Division issued a separate Notice of Determination and Demand for Payment of Sales and Use Taxes Due to the seller and the purchaser (petitioners herein). Each notice assessed additional sales tax of \$3,239.70, plus penalty and interest of \$1,274.29, for a total due of \$4,513.99, for the period December 1, 1981 through November 30, 1983.

7. The tax assessed on the notices of determination was determined by multiplying the seller's reported gross sales by 58 percent, computing tax due on such amount and, thereafter, allowing credit for tax previously paid or assessed.

8. The perfected petitions of the purchaser and seller each allege only that the Department of Taxation and Finance made the following error: "Arbitrarily assessed Sales and Use Taxes when there were none due."

9. Mr. Marchionna (seller's owner) testified that the seller was not a stationery store. He asserted that seller operated basically a newsstand and

tobacco shop, which additionally sold greeting cards and boxed candy. To support such assertions, the seller submitted cash disbursements computer printouts for the periods January 1, 1981 through June 30, 1981 and January 1, 1983 through June 30, 1983. Review of the printouts appears to show that the sellers merchandise purchases were mainly of newspapers, tobacco products, candy and greeting cards. However, no supporting source documents, such as invoices or cancelled checks were submitted at the hearing.

10. A comparison of the seller's gross sales, per the Audit Division's Sales Tax Master File Transcript, to the purchases, per the seller's cash disbursements computer printout submitted, reveals that the seller's reported purchases were nearly as large in dollar amount as its reported sales.

11. Subsequent to the bulk sale, an audit of the purchaser was conducted for the period September 1, 1983 through February 28, 1987. Such audit, which was based on a three month test for September, October and November 1986, resulted in acceptance of purchaser's sales tax returns as filed. The type of business operated by purchaser was reported as "stationery" and the principal product, as reported on the Sales Tax Audit Report Information Sheet, was cigarettes, magazines and newspapers. The audit indicated that 70.94 percent of the purchases during the audit period were of items not subject to tax when sold.

CONCLUSIONS OF LAW

A. That Tax Law § 1141(c) provides, in part, that a bulk sale purchaser must notify the Tax Commission of such bulk sale at least ten days prior to taking possession or paying therefor. If the purchaser fails to so notify the Tax Commission, he will be personally liable for any sales taxes determined to be due from the seller to the extent of the amount of the purchase price or

fair market value of the assets purchased, whichever is higher. Section 1141(c) provides that within 90 days of receipt of notice from the purchaser, the Tax Commission shall notify the purchaser, transferee or assignee of the total amount of tax claimed to be due from the seller, transferor or assignor. It is, in sum, the purchaser's duty to see that the purchase funds are held in escrow until either the Tax Commission releases the purchaser of liability for taxes due or until the noted 90 day period passes without presentation of a claim for taxes due and owing by the seller. Until such time as either of these events occurs, the purchaser, transferee or assignee remains personally liable as noted (Tax Law § 1141[c]).

B. That inasmuch as notification of the subject bulk sale was not made within the time frame set forth in section 1141(c), the Audit Division was entitled to assess the petitioner purchaser as personally responsible for any taxes assessed against the seller. The assessment against the purchaser herein was issued within the requisite 90 day period after notice of the bulk sale was received (~~see~~ Findings of Fact "1" and "6"), and hence remains valid unless petitioners prove error in either the choice of method used in arriving at the assessments or in the calculations made thereunder.

C. That Tax Law § 1138(a) provides, in part, that if a return required to be filed is incorrect or insufficient, the Tax Commission shall determine the amount of tax due on the basis of such information as may be available. This section further provides that if necessary the tax may be estimated on the basis of external indices.

D. That it ~~is~~ well settled that where a taxpayer does not maintain and/or make available such information and records, including source documents, as will allow the establishment of an audit trail and enable verification of the

accuracy of returns filed, the Audit Division may resort to indirect audit methodologies in carrying out its audit function. In determining the amount of a sales tax assessment, it is the duty of the Audit Division to select a method "reasonably calculated to reflect the taxes due" (Matter of Grant Co. v. Joseph, NY2d 196, 206; Matter of Meyer v. State Comm., 61 AD2d 223, 227, lv. denied 44 NY2d 645). In turn, when the Audit Division employs such a method, it becomes incumbent upon the petitioner to establish error (Matter of Meyer v. State Tax Commn., supra).

E. That receipts from all sales of tangible personal property are presumed to be subject to tax until the contrary is established, and the burden of proving that any receipts are not subject to tax rests with the person required to collect tax or the customer (Tax Law § 1132[c]). Furthermore, every person required to collect tax is under a duty to keep adequate records pertaining thereto and to make such records available for examination by the Audit Division (Tax Law § 1135).

F. That in view of petitioner seller's failure to supply information as requested by the Audit Division on the Bulk Sale Questionnaire, the Audit Division was entitled to resort to available information, including external indices, in determining the correctness of the returns filed.

G. That given the information available, the Audit Division's calculation and issuance of the assessments at issue, based on disallowance of a percentage of claimed nontaxable sales thus serving to increase taxable sales, (but not serving to increase petitioner's reported total sales) was reasonable. In turn, petitioners have not adduced such evidence as would warrant reduction or abatement thereof. It is noted that the subsequent audit of the purchaser does not establish that the merchandise sold by the purchaser was of the same kind,

and in the same taxable versus nontaxable proportions, as that sold by the seller.

H. That the petitions of C Marchr Corporation and George Plevetes are hereby denied and the notices of determination and demands for payment of sales and use taxes due, issued to each petitioners on February 21, 1984, are sustained.

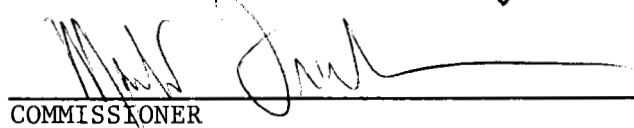
DATED: Albany, New York

STATE TAX COMMISSION

AUG 31 1987


PRESIDENT


COMMISSIONER


COMMISSIONER