

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

CARL R. NELLIS AND ELEANOR NELLIS

for Redetermination of a Deficiency or for
Refund of Personal Income and Unincorporated :
Business Taxes under Articles 22 and 23 of the
Tax Law for the Years 1980 and 1981.

DECISION

In the Matter of the Petition

of

CARL R. NELLIS

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, 1978.

Petitioners, Carl R. Nellis and Eleanor Nellis, 6897 North Bergen Road, Byron, New York 14422, filed a petition for redetermination of a deficiency or for refund of personal income and unincorporated business taxes under Articles 22 and 23 of the Tax Law for the years 1980 and 1981 (File No. 57526).

Petitioner, Carl R. Nellis, 6897 North Bergen Road, Byron, New York 14422, 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, 1978 (File No. 57559).

A consolidated hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, 259 Monroe Avenue, Rochester, New York, on June 2, 1986 at 1:15 P.M., with additional evidence to be submitted by

July 2, 1986 Petitioner : :

Neild, of counsel). The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether the source and application of funds analysis used by the Audit Division **to** reconstruct petitioners' income properly determined that petitioners understated their income for the years 1980 and 1981.

II. Whether the Audit Division properly determined sales tax due upon the purchase of a motor vehicle in 1978.

FINDINGS OF FACT

1. Petitioners, Carl R. Nellis and Eleanor Nellis, timely filed New York State income tax resident returns for the years 1980 and 1981. In 1981, petitioners filed separately on one return. Mr. Nellis reported a taxable income from business of \$5,644.00, and Mrs. Nellis reported a taxable income from wages of \$10,684.00. In 1981, petitioners filed a joint return reporting taxable income from business and wages of \$10,579.00. Mr. Nellis, an independent trucking contractor, did not file an unincorporated business tax return in 1980.

2. On September 27, 1984, as the result **of** a field audit of petitioners' books and records, the Audit Division issued against petitioners two notices **of** deficiency. The first asserted a tax due of \$4,321.73, including unincorporated business tax of \$2,053.94, plus penalty and interest for the years 1980 and 1981. The second asserted a tax due **of** \$1,319.37, plus penalty and interest for the same years.

3. A Statement **of** Personal Income Tax Audit Changes issued on July 18, 1984 explained that the Audit Division used a source and application of funds method to reconstruct petitioners' income.

petitioners' income from all sources and subtracted from this amount total applications of income to arrive at understated income in the amounts of \$27,041.72 in 1980 and \$24,449.12 in 1981.

4. Carl Nellis worked, almost exclusively, hauling produce for Sodoma Farms ("Sodoma"). From an audit of Sodoma's disbursement journal, the auditor determined that Sodoma made loans to Mr. Nellis totalling \$3,210.00 in 1981. Petitioners made loan payments to Sodoma of \$11,283.00 in 1980 and \$9,674.18 in 1981.

5. Prior to hearing, petitioners submitted documents to the Audit Division showing that in 1981 Sodoma had advanced monies to Mr. Nellis to pay for fuel and later deducted the amounts owed by Mr. Nellis from payments it made to him for his services. Mr. Nellis's fuel expenditures had been included in the applications factor without the correct offsetting amounts being included in the sources factor. At hearing, the Audit Division conceded that the applications factor should be reduced by \$2,044.91 to reflect these transactions.

6. The Audit Division further conceded that two checks totalling \$521.59 had been included in both the loan payments and personal living expenses categories and that an adjustment in the application of funds factor should be made accordingly.

7. On their 1980 Federal tax return, petitioners claimed a depreciation allowance for capital improvements acquired in the same year, consisting of three trailers and a copier with a combined cost basis of \$23,200.00. In 1981, petitioners claimed a Federal investment tax credit on a 1965 Mack truck with an unadjusted basis of \$13,000.00. The auditor included these amounts in the applications factor for the applicable year.

8. Petitioners contended that the 1980 Federal tax return was erroneous in that the three trailers shown on it were actually acquired in 1978 and 1979 with loans from Sodoma. Therefore, they argued, the amounts for capital improvements should be eliminated from the applications factor **or**, alternatively, included in the sources factor.

9. Mr. Nellis identified the three trailers in question as an International trailer and a Utility purchased in 1978 and a Great Dane purchased in 1979. Sodoma's records show that Sodoma made a series of loans to petitioners totalling \$32,981.62. Included were loans in the amounts **of** \$12,950.00, \$3,250.00 and \$1,662.00 for a truck, a Great Dane and a trailer, respectively. The records do not reveal the date upon which any particular loan was made. Petitioner offered no other evidence to substantiate his claim that the three trailers were purchased prior to 1980.

10. **On** September 27, 1984, the Audit Division issued against petitioner, Carl R. Nellis, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period March 1, 1978 through ~~May~~ 31, 1978 in the amount of \$3,955.00 plus interest. The assessment was predicated upon Mr. Nellis's failure to pay sales tax upon his purchase **of** a truck, during the period under consideration.

11. **Mr.** Nellis conceded that he purchased and took possession of the truck in question in New York State. However, he argued that no sales tax was due because a form, purportedly furnished to him by the New York State Department of Motor Vehicles, indicated that no tax was due **if** the truck's first load for delivery originated out of state.

12. After purchasing the truck in New York, Mr. Nellis drove it to New Jersey where he loaded the truck for the first time and then returned with it to New York State.

CONCLUSIONS OF LAW

A. That where a deficiency *is* asserted under Articles 22 and 23 of the Tax Law, the burden *of* proof is placed upon the petitioner to show that he is not liable for the tax imposed, except in three specifically enumerated instances which do not apply here (Tax Law §689[e]; § 722). Petitioners have failed to show that capital improvements totalling \$23,200.00 were not acquired in 1980. While the record shows that petitioners did receive loans from Sodoma to purchase a truck and two trailers, it was not possible to determine when the loans were made or whether they were used to acquire the three trailers shown on the 1980 Federal tax return. In this regard, it is especially damaging that petitioners did not produce a bill of sale, invoice, title or any other document which would have supported Mr. Nellis's testimony that the trailers were acquired in years other than 1980.

B. That petitioners have shown that the applications factor was overstated in the amount of \$2,566.50 (see Findings of Fact "5" and "6"), The Audit Division is directed to recompute petitioners' liability accordingly.

C. That liability for the sales tax arises at the point of delivery or the point at which liability transfers from the vendor to the purchaser (20 NYCRR 525.2[a][2], [3]). Section 1117 of the Tax Law provides for exemption from sales tax, despite the taking *of* physical possession by the purchaser within this state, under certain specifically enumerated circumstances, none *of* which exist here. There is no provision in the Tax Law which provides an exemption such as that claimed by the petitioners.

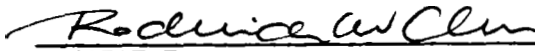
he was misled by or misunderstood instructions emanating from the Department of Motor Vehicles. However, in the absence of statutory authority, the State cannot be prevented from collecting taxes imposed and remaining unpaid (Matter of McMahon v. State Tax Commn., 45 AD2d 624, lv denied 36 NY2d 646).

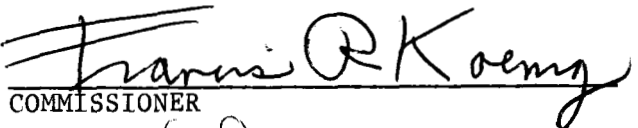
D. That the petitions of Carl R. Nellis and Eleanor Nellis are granted to the extent indicated in Conclusion of Law "B"; that the notices of deficiency issued on September 27, 1984 shall be modified accordingly; that the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on September 27, 1984 is sustained; and that, in all other respects, the petitions are denied.


DATED: Albany, New York

STATE TAX COMMISSION

NOV 20 1986


PRESIDENT


COMMISSIONER


COMMISSIONER