

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter *of* the Petition

of

COUNTRY-WIDE AUTO SALES CORP.

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 August 31, 1981.

DECISION

In the Matter of the Petitions

of

JACQUES BURGER AND JOAN BURGER
AS OFFICERS OF COUNTRY-WIDE AUTO SALES CORP.

for Revision **of** Determinations or **for** Refunds :
of Sales and Use Taxes under Articles **28** and
29 of the Tax Law for the Period March **1**, 1978 :
through August **31**, 1981.

Petitioners, Country-Wide Auto Sales Corp., 5 Adam Place, Massapequa, New York 11758, and Jacques Burger and Joan Burger, as officers of Country-Wide Auto Sales Corp., 5 Adam Place, Massapequa, New York 11758, filed petitions for revision of determinations or for refunds *of* sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1978 through August 31, 1981 (File Nos. 57687, 57688 and 57689).

On January 15, 1987, petitioners waived their right to a formal hearing and requested that the State Tax Commission render a decision based on the record contained in their files, with all briefs to be submitted by March 27, 1987. After due consideration, the State Tax Commission hereby renders the following decision.

ISSUES

I. Whether the Audit Division properly determined the additional tax liability of petitioners for the period March 1, 1978 through August 31, 1981.

II. Whether section 1132(f) of the Tax Law relieves petitioners of the liability to collect and remit sales tax.

FINDINGS OF FACT

1. Petitioner Country-Wide Auto Sales Corp. (hereinafter "Country-Wide") was engaged in the business of buying and selling used automobiles. Country-Wide was a registered vendor for sales tax purposes; however, it did not file sales and use tax returns for the period at issue.

2. On August 20, 1984, the Audit Division, as the result of a field examination, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Country-Wide for the period March 1, 1978 through August 31, 1981. Said notice determined additional sales tax due of \$3,144.66, plus penalty of \$786.16 and interest of \$2,256.76, for a total amount due of \$6,187.58. On the same date, identical notices were issued to Jacques Burger as president of Country-Wide and to Joan Burger as secretary of Country-Wide. Petitioners Jacques Burger and Joan Burger do not protest their personal liability for any sales taxes which may be due from Country-Wide.

3. Country-Wide did not maintain adequate books and/or records during the period at issue. Moreover, no sales invoices were maintained indicating the selling price of automobiles sold by Country-Wide and, therefore, the Audit Division determined the selling price of said automobiles by referring to a used car selling guide known as the "Red Book". The Audit Division used average selling price (wholesale selling price plus retail selling price divided by 2) as a basis for computing taxable automobile sales of \$240,343.00. Application

of the 7 percent tax rate to audited taxable sales of \$240,343.00 produced a total tax of \$16,824.01. Country-Wide was allowed credit of \$1,464.00 for tax paid, thus resulting in additional tax due of \$15,360.01. Country-Wide, Jacques Burger and Joan Burger were each issued two notices of determination and demands for payment of sales and use taxes due. One of the notices assessed tax due of \$3,144.66 and is the subject of this proceeding. The other notice, dated August 4, 1981, assessed an estimated amount of \$30,000.00 which was subsequently reduced to \$12,215.35 (\$15,360.01 - 3,144.66). The notice dated August 4, 1981 is not at issue in this proceeding.

4. Petitioners maintain that, pursuant to section 1132(f) of the Tax Law, a motor vehicle cannot be registered with the New York State Department of Motor Vehicles until it is first proven that the applicable tax has been paid, and that, therefore, the collection from petitioners of sales or use tax would result in a double payment of tax. Petitioners also dispute the amount of additional tax due assessed by the Audit Division.

5. Petitioners have produced no evidence to warrant a reduction in the assessed amount of tax due or substantiate any claim that the amount as assessed is in error.

CONCLUSIONS OF LAW

A. That every person required to collect sales tax shall collect the tax from the customer when collecting the price to which it applies (Tax Law § 1132[a]). It shall be presumed that all receipts for tangible personal property are subject to tax until the contrary is established, and the burden of proving that any receipt is not taxable shall be upon the person required to collect tax, unless the vendor shall have taken from the purchaser a certificate to the effect that the property was for resale or for some reason exempt from tax (Tax

Law § 1132[c]). Furthermore, the receipts from the sale of a motor vehicle shall not be subject to the retail sales tax, despite the taking of physical possession by the purchaser within the State, provided that the purchaser, prior to taking delivery, furnishes to the vendor an affidavit that **he is a** nonresident, has no permanent place of abode in the State, and is not engaged in carrying on in the State any employment, trade, business or profession in which the motor vehicle will be used (Tax Law §§ 1117[a] and 1214[a]).

B. That Country-Wide was a person required to collect sales tax and since it did not receive from its customers resale certificates or nonresident affidavits, it was under a duty to collect New York State sales tax on its sales of automobiles. The fact that section 1132(f) of the Tax Law provides that a purchaser may not register a motor vehicle in New York until it is proven that the sales tax was paid, does not relieve Country-Wide of its duty and responsibility to collect the tax from said purchaser (Matter of Mendon Leasing Corporation, State Tax Commission, June 24, 1985).


C. That petitioners Jacques Burger and Joan Burger, as officers of Country-Wide, are personally liable for the sales tax due from the corporation (Tax Law § 1133[a]); and petitioners have failed to meet their burden of proving that the audit was otherwise erroneous.

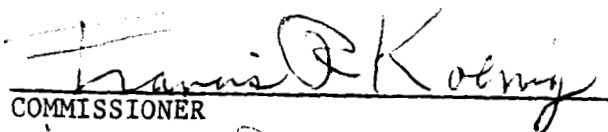
D. That the petitions of Country-Wide Auto Sales Corp., Jacques **Burger** and Joan Burger are **denied** in full and that the three notices of determination and demands **for** payment of sales and **use** taxes due dated August 20, 1984 are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

JUN 09 1987


PRESIDENT


COMMISSIONER


COMMISSIONER