

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

M. R. WEIR ENTERPRISES, INC.

DECISION

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 February 27, 1981.

Petitioner, M. R. Weir Enterprises, Inc., 980 Washington Street, Peekskill, New York 10566, 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 February 27, 1981 (File No. 58451).

A hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on April 29, 1987 at 10:45 A.M. Petitioner appeared by David C. Dempsey, Esq. The Audit Division appeared by John P. Dugan, Esq. (Gary Palmer, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined sales and use taxes due from R. W. Miller Enterprises, Inc., the seller of assets purchased by petitioner in a bulk sale transaction.

11. If so, whether the assessment against petitioner was satisfied to any extent by the seizure of \$20,000.00 in escrow funds held by the escrow agent in said **bulk** sale transaction.

FINDINGS OF FACT

1. On February 27, 1981, petitioner, M. R. Weir Enterprises, Inc., purchased certain assets of R. W. Miller Enterprises, Inc. ("Miller"). The purchase of assets, in effect, constituted the purchase of a Shell gasoline station in Peekskill, New York. The purchase price was \$45,000.00, plus inventory (\$9,646.50 in inventory was paid to Shell Oil Company; \$316.41 in inventory was paid to Miller). The \$45,000.00 was allocated as follows:

Goodwill	\$15,000.00
Furniture, equipment & fixtures	22,500.00
Seller's restrictive covenant	<u>7,500.00</u>
Total	\$45,000.00

The sum of \$20,000.00 was held in escrow "for tax assessment" by David C. Dempsey, Esq., who was at that time Miller's attorney.

2. **Also** on February 27, 1981, petitioner's then attorney forwarded a Notification of Sale, Transfer or Assignment in Bulk to the Department of Taxation and Finance. The notice stated that the terms and conditions of the sale were as follows:

"Seller is selling to Purchaser pursuant to approval of Shell Oil Company service station business including the good will, customer records, furniture, equipment, trade fixtures, free and clear of all liens and encumbrances. The Seller warranted and represented that it has good and marketable title to all assets and that it has paid all taxes to include state sales tax, except those pertaining to state sales tax assessment S790314720C and Seller is in the process of negotiating settlement."

The notice was assigned the bulk sale number BSQ129653 by the Department of Taxation and Finance.

3. (a) On March 23, 1981, a Notice to Escrow Agent was issued to David C. Dempsey, Esq., placing him on notice of a possible claim for taxes due with respect to the aforementioned transaction.

(b) On the same date, a Notice of Claim to Purchaser was issued to petitioner. The notice given was similar to that given to the escrow agent.

(c) On April 8, 1981, a Notice to Seller was issued to Miller, alerting said seller to the potential claim.

4. A sales tax field audit of Miller's business was conducted between April and August of 1981. The audit covered the period March 1, 1978 through February 27, 1981. The essential audit findings were as follows:

(a) Miller operated two Shell gasoline stations during the period at issue. The station in Peekskill, New York was operated by Miller during the entire period, while the other in Montrose, New York had been sold to petitioner in November 1978.

(b) Miller sold gasoline, oil, parts, accessories, tires, batteries and antifreeze. Miller also had receipts from car rentals, used car sales and soda sales.

(c) Miller's records were deemed to be inadequate, since no cash register tapes were provided and also since it could not be determined if all repair invoices were available, as the invoices were not numbered. Moreover, there were no fixed asset purchase invoices.

(d) Miller's gasoline sales as per books were accepted, as the markup shown was 20.74 percent. After deducting discounts, sales tax and excise tax, taxable gross sales of gasoline were found to be \$1,686,461.80.

(e) Miller's parts, accessories, labor and lubrication sales per books of \$169,602.52 were accepted, as the markup was 190 percent.

(f) Oil sales per books were rejected, as the markup was only 3.6 percent. The auditor applied an estimated markup of 85 percent to net oil purchases of \$19,062.19 to arrive at taxable oil sales of \$36,745.05.

(g) Tires, batteries and accessories as per books showed a zero markup; thus, the auditor applied a 50 percent markup to net purchases of \$57,234.29 to arrive at taxable tires, batteries and accessories sales of \$85,851.44.

(h) Auto rental and miscellaneous sales totalled \$43,786.32 per books.

(i) Total taxable sales were \$2,022,447.13, which figure was reduced by nontaxable Post Office sales (\$809.58) and inspections (\$3,432.00) resulting in \$2,018,205.55 in audited taxable sales. As taxable sales reported were \$1,837,730.00, additional taxable sales were \$180,476.00 and sales tax due was \$9,023.80. No tax had been paid on the bulk sale to petitioner, thus tax of \$1,125.00 was computed on the \$22,500.00 paid for the tangible personal property transferred. As there were no bills for fixed assets purchased during the audit period, use tax of \$1,375.29 was imposed on \$27,505.89 in equipment purchases as per books. Accordingly, total tax due was calculated at \$11,524.09.

5. (a) On May 20, 1981, the Audit Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for \$13,473.27 in tax, \$78.75 in penalty and \$1,768.42 in interest for the period March 1, 1978 through February 27, 1981. The notice stated that the taxes were "determined to be due from R. W. Miller Enterprises, Inc. and represents your liability as purchaser, in accordance with Section 1141(c) of the Sales Tax Law." A footnote stated that "[t]his amount is in addition to any other open assessments". The document also referred to the bulk sale number BSQ129653.

(b) On October 28, 1981, the Audit Division issued a Notice of Assessment Review to petitioner reducing the tax on the above assessment to \$11,524.09, plus penalty and interest. The explanation was as follows:

"Recent adjustment of R. W. Miller Enterprises, Inc. sales tax liability has resulted in the above reduction in your liability, as purchaser, in accordance with Section 1141(c) of the Tax Law."

The notice also referred to bulk sale number BSQ129653.

6. On March 13, 1981, David C. Dempsey, Esq., as escrow agent, was served with a tax collector's levy for \$28,134.11 and two warrants, one for \$1,451.61 and the other for \$41,501.42. Consequently, Mr. Dempsey on the same date paid to the tax compliance agents the \$20,000.00 held in escrow from the February 27, 1981 transaction. Mr. Dempsey then called the White Plains office and was advised by a tax compliance agent that Miller's assets were being released.

7. The \$20,000.00 was credited in the following manner:

<u>Date</u>	<u>Amount</u>	<u>Notice Number</u>
3/13/81	\$16,080.17	D7809026006
3/13/81	1,424.60	S7812266940
4/27/81	2,495.23	S8010172932
Total	\$20,000.00	

8. On October 21, 1981, the Audit Division issued a Purchaser's And/Or Escrow Agent's Release -- Bulk Sale pertaining to bulk sale number BSQ111875.

The amounts of the assessments satisfied were as follows:

<u>Notice Number</u>	<u>Amount</u>
S790314719C	\$ 6,689.58
S790314720C	61,255.45

9. According to Department of Taxation and Finance records:

(a) Three assessments had been issued to Miller in connection with the 1978 sale of the Montrose station by Miller to petitioner, i.e., D7809026006, S7812266940, and S790314718C.

(b) Two assessments had been issued to petitioner, i.e., S790314719C and S790314720C.

(c) Assessments S790314718C and S790314719C had been cancelled on October 9, 1980 and were not affected by the March 13, 1981 levy.

(d) The payment of assessments S7812266940 and D7809026006 (Finding of Fact "7") resulted in the cancellation of S790314720C issued to petitioner.

(e) The Audit Division concedes that petitioner should be given credit for the \$2,495.23 which was credited against assessment S8010172932 (Finding of Fact "7").

10. At the hearing, petitioner's representative claimed that his client had no knowledge of earlier assessments issued against it. Said representative also asked that the State Tax Commission take judicial notice of Department of Taxation and Finance records relating to the seized assets.

11. Review of correspondence in the file reveals that petitioner's former attorney was aware of a claim made against petitioner arising out of the 1978 acquisition of the Montrose station. On October 16, 1980, petitioner's then attorney, Richard J. Duffy, wrote to the Audit Division enclosing a copy of a Notice of Assessment Review issued to petitioner on October 2, 1980, which reduced an assessment of \$61,255.45 to \$14,874.07 in tax, plus \$11,172.40 in penalty and interest. The letter requested that no action be taken against petitioner until Miller had an opportunity to resolve the matter.

CONCLUSIONS OF LAW

A. That Tax Law § 1138(a)(1) provides, in pertinent part, as follows:

"If a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors."

B. That where a taxpayer's records are incomplete or insufficient, the Audit Division may select a method reasonably calculated to reflect the sales and use taxes due and the burden then rests upon the taxpayer to demonstrate by clear and convincing evidence that the method of audit or amount of tax assessed was erroneous (Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858).

C. That in this case, the seller's records were incomplete and insufficient, since no cash register tapes were available and repair invoices were not numbered. Accordingly, it was proper for the Audit Division to perform a markup audit.

D. That under Tax Law § 1141(c), whenever a person required to collect tax makes a bulk sale of his business assets not in the ordinary course of business, the purchaser must notify the State Tax Commission of the impending sale ten days before taking possession of or paying for such assets. If the purchaser fails to give such notice, he will be personally liable for the amount of sales and use taxes owed by the seller. His liability is limited, however, to the purchase price or market value of the assets, whichever is higher.

E. That R. W. Miller Enterprises, Inc. was a person required to collect tax and petitioner failed to give timely notice of the bulk sale of February 27, 1981. Accordingly, petitioner is liable for said seller's unpaid sales and use taxes as specified in the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on May 20, 1981, as reduced by the Notice of Assessment Review issued on October 28, 1981.

F. That while ordinarily an escrow deposit in a bulk sale transaction must be applied under Tax Law § 1141(c) first to unpaid taxes relating to said

transaction, in this case, the \$20,000.00 escrow deposit was earmarked to secure a different assessment, i.e., assessment number S790314720C which was issued against petitioner as the purchaser in the 1978 bulk sale of the Montrose station. Said funds were, for the most part, used for that purpose, with a portion, \$2,495.23, being used to satisfy another of Miller's obligations, notice of which had not been given to petitioner.

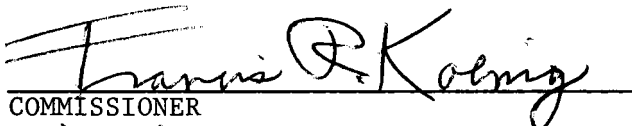
G. That the petition of M. R. Weir Enterprises, Inc. **is** denied and the Notice **of** Determination and Demand for Payment of Sales and Use Taxes Due issued on May 20, 1981, as reduced by the Notice of Assessment Review dated October 28, 1981, is sustained. Petitioner, however, is to be given credit for \$2,495.23 of the seized escrow funds which amount was applied by the Tax Compliance Bureau to an unrelated assessment.

DATED: Albany, New York

STATE TAX COMMISSION

AUG 3 1 1987


PRESIDENT


COMMISSIONER


COMMISSIONER