

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

B. GERTZ, INC.

(ALLIED STORES OF NEW YORK, INC.)

DETERMINATION

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 June 1, 1968 through :
May 31, 1971.

Petitioner, B. Gertz, Inc. (Allied Stores of New York, Inc.),
162-10 Jamaica Avenue, Jamaica, New York, 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 June 1,
1968 through May 31, 1971. (File No. 00287).

A formal hearing was held before Edward L. Johnson, Hearing
Officer, at the offices of the State Tax Commission, Two World
Trade Center, New York, New York on November 17, 1976 at 1:40 P.M.,
and continued on May 19, 1977 at 1:15 P.M. Petitioner appeared
by Michael Cook, Esq. The Sales Tax Bureau appeared by Peter
Crotty, Esq. (Abraham Schwartz, Esq., of counsel).

ISSUES

I. Whether when customers on "open account" made payments undifferentiated with respect to particular sales or the sales tax payable thereon, the earliest payment received by the petitioner, B. Gertz, Inc. (Allied Stores, Inc.) was to be considered first as payment of the entire sales tax due on all sales to that account.

II. Whether the Sales Tax Bureau properly determined whether construction work done for petitioner constituted a capital improvement to real property.

FINDINGS OF FACT

1. As the result of an audit, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated February 8, 1974 (Notice Number 90,751,823) was issued by the Sales Tax Bureau against the petitioner, B. Gertz, Inc. (Allied Stores of New York, Inc.), imposing additional tax due of \$86,724.29, including interest and penalty, for the period June 1, 1968 through May 31, 1971.

2. The petitioner, B. Gertz, Inc. (Allied Stores of New York, Inc.), operates a chain of high-class specialty department stores. The officers of the company are as follows: Thomas M. Macioce (president), Gilbert Belair (vice-president), Paul L. Dowd (vice-president), J. P. Fitzgibbons (secretary and treasurer), Herbert Wittken (vice-president).

3. Bad debts arise when any or all of the amount due for goods that were purchased on credit become uncollectible.

4. Petitioner computed its bad debt losses as follows. Every month the credit manager or his assistant would make a determination as to which of petitioner's approximately 200,000 accounts were uncollectible. The aggregate of these accounts would be entered into petitioner's account #9120. From this aggregate would be subtracted any collection or recovery attributable to accounts previously written off as a bad debt. The net amount would be petitioner's bad debt write-off for that month.

5. The net of the monthly bad debt write-offs for the quarter would be the deduction which petitioner took in arriving at the total taxable sales reported on its quarterly sales tax returns. The petitioner asserted that where the full sales tax was collected and paid on a credit sale, but part of the sale price remained uncollected, the seller should receive a refund or credit of tax proportionate to the ratio which the uncollected account bears to the total selling price. In other words, if the purchase price of an item subject to a 5% tax was \$100.00, but the store collected \$20.00 on the sale, it would pay \$1.00 in tax rather than the \$5.00 that it would have paid had the full purchase price been collected.

6. The auditors who audited petitioner's sales tax returns for the period June 1, 1968 through May 31, 1971 did not calculate the sales tax due on bad debts on a pro-rata basis. Instead, they calculated the sales tax on the full purchase price of an item. They treated any payments that petitioner received as applicable first to the entire amount of the sales tax on the total sales price and then as payment for the item. When the amount of money received equaled or exceeded the sales tax due, no credit was allowed against any remaining uncollectible portion of the account for sales tax purposes. In other words, using the example set forth in paragraph 5 above, of the \$20.00 paid on the \$100.00 item, the auditors would apply the first \$5.00 to the sales tax and the remaining \$15.00 to payment of the item.

7. The auditors allowed a full bad-debt deduction only in those instances in their sample when no payment had been collected by petitioner.

8. The petitioner, B. Gertz, Inc. (Allied Stores, Inc.) had partition walls constructed in its stores. These partition walls were constructed out of two-by-four, sheet rock, etc., and their construction resulted in some work also being done to the interior, peripheral walls of the stores.

9. The petitioner, B. Gertz, Inc. (Allied Stores, Inc.) acted in good faith and in reliance upon the advice of its accountant.

CONCLUSIONS OF LAW

A. That section 1132(e) of the Tax Law provides:

"The Tax Commission may provide, by regulation, for the exclusion from taxable receipts. . .of amounts representing sales where the contract of sale has been cancelled. . .or. . .has been ascertained to be uncollectible. . ."

B. That section 1132(d) of the Tax Law further provides:

"The Tax Commission may provide by regulation that the tax upon receipts from sales on the installment plan may be paid on the amount of each installment and upon the date when such installment is due."

C. That the applicable State regulation in effect during the audit period stated:

"Where a contract of sale has been cancelled. . .or the receipt. . .has been ascertained to be uncollectible, a vendor of tangible personal property. . .may exclude such receipts. . .from his return."

(New York State Compilation of Codes, Rules and Regulations, Section 525.5(a)(1967), subsequently amended.)

D. That where customers on open accounts made payments which were undifferentiated with respect to particular sales, or the sales tax applicable thereon, the Sales Tax Bureau correctly determined that the earliest payment received by the petitioner, B. Gertz, Inc. (Allied Stores, Inc.) was to be considered first as payment of the entire sales tax due on all sales to that account and that the sales tax due was not to be pro-rated. Prior to December 1, 1974, this was the consistent policy of the State Tax Commission and the interpretation placed by it upon Regulation section 525.5(a).

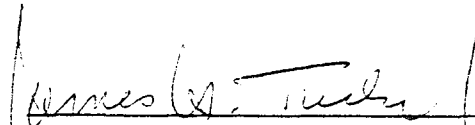
E. That the construction of partition walls in petitioner's premises, and the work done to the interior of the peripheral walls thereof, constituted a capital improvement in accordance with the meaning and intent of section 1105(c)(3) of the Tax Law. The tax due on the materials used in this construction having already been paid, the Sales Tax Bureau was in error in assessing additional tax in relation to this work.

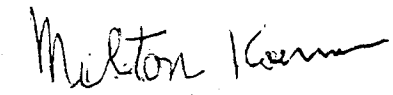
F. That the petition of B. Gertz, Inc. (Allied Stores, Inc.) and Thomas M. Macioce, Gilbert Belair, Paul L. Dowd, J. P. Fitzgibbons and Herbert Wittken is granted to the extent that the interest, in excess of the minimum interest, and the penalty imposed pursuant to section 1145(a) of the Tax Law be waived, and to the extent that the additional tax assessed upon the construction of partitions

in petitioner's premises is cancelled; that the Sales Tax Bureau is hereby directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued February 8, 1974; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York
December 7, 1977

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER