

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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| In the Matter of the Petition                   | : |               |
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| of  | : |               |
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| <b>AUTEX CORPORATION</b>                        | : |               |
|   | : |               |
| 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, 1980     | : |               |
| through November 30, 1982.                      | : |               |
| <hr/>   | : | DECISION      |
|   | : | D T A N O S . |
|   | : | 801016/801017 |
| In the Matter of the Petition                   | : |               |
|   | : |               |
| of  | : |               |
|   | : |               |
| <b>CHRISTOPHER T. GILLIGAN</b>                  | : |               |
| <b>OFFICER OF AUTEX CORPORATION</b>             | : |               |
|   | : |               |
| 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, 1980     | : |               |
| through November 30, 1982.                      | : |               |
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Petitioners, Autex Corporation and Christopher T. Gilligan, as officer, P.O. Box 235, Quogue, New York 11959, filed an exception to the determination of the Administrative Law Judge issued on January 28, 1988 with respect to their 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, 1980 through November 30, 1982 (File Nos. 801016 and 801017). Petitioners appeared by James G. Fouassier, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Irwin A. Levy, Esq., of counsel).

Neither of the parties filed a brief on exception. Oral argument was heard on June 7, 1988 at the request of the petitioner.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

### ***ISSUES***

I. Whether the Division of Taxation properly determined additional sales tax due from Autex Corporation for the period at issue.

II. Whether Christopher T. Gilligan was a person required to collect and pay over sales tax on behalf of Autex Corporation within the meaning and intent of Tax Law sections 1131(1) and 1133(a) for the period at issue.

III. Whether the Division of Taxation was under a duty to disclose information with respect to proceedings against another officer of petitioner, Autex Corporation.

### ***FINDINGS OF FACT***

We find the facts as stated by the Administrative Law Judge.

On December 20, 1983, pursuant to a field audit of Autex Corporation, the Division of Taxation issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to the said corporation and to Chris Gilligan, officer of Autex Corporation, in the amount of \$14,982.53, plus penalty and interest, for a total amount due of \$19,988.60 for the period March 1, 1980 through November 30, 1982.<sup>1</sup>

Upon commencement of the audit, a request was made that corporate books and records such as purchase and sales journals, invoices, register tapes, bank records and sales tax returns be provided to the auditors. The only records made available were repair invoices for the month of January 1982. Gasoline purchases for the period March 1, 1980 through August 31, 1982 only were obtained from Mobil Oil Corporation ("Mobil"), the corporation's supplier, since, as of September 1, 1982, the law was changed to require that sales tax be paid directly to the gasoline distributor. For said period, gasoline purchases were determined to be \$963,646.36 (excluding the 8¢ per gallon State excise tax). These purchases were marked up by 10 percent to arrive at taxable gasoline sales for the period of \$1,060,011.00.

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<sup>1</sup>It should be noted that although the full name of the petitioner/officer of Autex Corporation is Christopher T. Gilligan, the Notice of Determination and Demand was issued by the Division of Taxation to Chris Gilligan.

As of September 23, 1982, the business ceased operations and the station became vacant. For the period March 1, 1980 through September 23, 1982, the auditors obtained from Mobil the corporation's purchases of oil and other fluids which amounted to \$8,242.00. These purchases were marked up by 80 percent to arrive at taxable oil and fluid sales of \$14,835.60.

The repair sales invoices for January 1982 which were provided by the corporation to the auditors indicated that such sales were in the amount of \$10,094.52. Mr. Gilligan stated to the auditors that during the months of June, July and August, repair sales were approximately twice that of winter months. The total months for the audit period (31) were, therefore, increased by 9 to account for this increase during the summers within the period. By multiplying the January 1982 repair sales of \$10,094.52 by 40 (31 + 9), taxable repair sales for the audit period were determined to be \$403,780.80. Audited taxable sales for the audit period were, therefore, determined to be \$1,478,627.40 (\$1,060,011.00 gasoline + \$14,835.60 oil and fluids + \$403,780.80 repairs). Reported taxable sales for the period were \$1,270,332.00. For the last two sales tax quarters of the audit period, i.e., the quarters ended August 31, 1982 and November 30, 1982, sales tax returns were not filed and payments of tax were not made. Additional sales tax due for the audit period was \$14,982.53 (\$10,915.38 of which was due for the sales tax quarters in which no returns were filed).

Autex Corporation was formed by Christopher T. Gilligan in 1979. At the time of incorporation, he was the sole officer and shareholder. In February 1980, Autex Corporation purchased a gasoline station and repair shop known as Hampton Imports from Hampton Imports, Inc. After the purchase of Hampton Imports by Autex Corporation, Bruce Sheehy and Robert Woods, who were employees prior to said purchase, continued to work at the station.

In May 1981, Mr. Gilligan and Mr. Sheehy entered into an agreement whereby Mr. Sheehy was to purchase 50 percent of the stock of Autex Corporation for \$25,000.00. The shares were subsequently issued to Mr. Sheehy, although he never paid the sum agreed upon. Mr. Sheehy became the vice-president of Autex Corporation and, along with Mr. Gilligan, became a signatory of the corporate checking account. In the early part of 1982, Mr. Gilligan and Mr. Sheehy began to have serious disagreements concerning the operation of the business. In March 1982, Robert Woods

took over as manager of Hampton Imports pursuant to the direction of Mr. Sheehy although Mr. Gilligan continued to work at the station. In June 1982, Mr. Gilligan stopped going to work at Hampton Imports. At approximately the same time, Bruce Sheehy commenced an action in the Supreme Court of Suffolk County to dissolve the corporation. Mr. Gilligan moved to dismiss the proceeding on the basis that Mr. Sheehy was not a 50 percent shareholder. A hearing was held wherein it was determined that Mr. Gilligan did not establish that Bruce Sheehy was not a 50 percent shareholder. The court, on June 28, 1982, ordered that Autex Corporation could no longer expend corporate funds and that it must cease doing business.

On July 15, 1982, after Autex Corporation was ordered to cease doing business and expending funds, the corporation, by Christopher T. Gilligan, president, entered into an agreement with Ralph Licursi whereby it was agreed that Mr. Licursi would operate the gasoline filling portion of the business as a subcontractor.

For the period at issue, all sales tax returns filed by Autex Corporation were signed by Christopher T. Gilligan with the exception of the returns for the quarters ending November 30, 1980 and February 28, 1982 which were signed by Tamara Bobb, secretary. All filed returns were timely and sales taxes due thereon were paid.

After entry of the court order which prohibited Autex Corporation from doing business and expending corporate funds, Ralph Licursi, pursuant to the agreement entered into on July 15, 1982, operated the gasoline filling portion of the business and Bruce Sheehy operated the automobile repair business using his own personal funds. After June 1982, Christopher T. Gilligan no longer went to work at the station, stopped receiving a salary or other income from the business and remained unemployed for the duration of the audit period. Autex Corporation was never formally dissolved.

For the quarter June 1, 1982 through August 31, 1982, the Division, through the use of its third party verification from Mobil, determined that Autex Corporation had taxable gasoline sales of \$77,011.31 and oil and other fluid sales of \$2,163.01. Using the formula as set forth in finding of fact "5" of the Administrative Law Judge's determination, repair sales for the quarter were \$60,567.12.

Total taxable sales for this quarter were, therefore, determined to be \$139,741.44. Total additional tax was found to be due in the amount of \$10,131.25.

In addition to the facts found by the Administrative Law Judge, we find that during the course of the hearing the hearing officer reminded petitioners' representative of their right to subpoena an individual and the individual's books and records to appear at the hearing. Petitioners' representative did not exercise this right.

### ***OPINION***

The Administrative Law Judge determined that the Division of Taxation properly determined sales tax and penalty due from petitioner, Autex Corporation, for the period March 1, 1980 through November 30, 1982. The Administrative Law Judge also concluded that petitioner, Christopher T. Gilligan, was a person under a duty to collect sales and use tax for Autex Corporation for the period March 1, 1980 through June 30, 1982 and that Christopher T. Gilligan was personally liable for such tax and penalty through June 30, 1982.

On exception, petitioners argue that Christopher T. Gilligan was not a responsible person, the audit determined an unreasonably high markup and volume of gasoline sales and that the Division had information from the books and records of the corporation from Mr. Sheehy which it failed to disclose.

We affirm the determination of the Administrative Law Judge.

The Tax Law imposes personal liability for taxes required to be collected under Tax Law Article 28 upon a person required to collect such tax (Tax Law { 1133[a]). "Persons required to collect tax" and a "person required to collect any tax imposed by this article (Article 28)" include any officer or employee of a corporation who, as such officer or employee, is "under a duty to act for such corporation in complying with any requirement of [Article 28]" (Tax Law { 1131[1]) (hereinafter "responsible officer").

The determination that an individual is a responsible officer depends upon the particular facts of each case (Stacy v State, 82 Misc 2d 181, 183). Factors stated by the Division's regulations are whether the person was authorized to sign the corporate tax return, was responsible for managing or

maintaining the corporate books or was permitted to generally manage the corporation (20 NYCRR 526.11[B][2]).

Other indicia developed by the case law are: the authorization to hire or fire employees, the derivation of substantial income from the corporation or stock ownership (Blodnick v. State Tax Commn., 124 AD2d 437); the individual's possible shared status as an officer, director or stockholder (Cohen v. State Tax Commn., 128 AD2d 1022, 1023); the individual's day-to-day responsibilities, involvement with, knowledge of and control over the financial affairs and management of the corporation, the duties and functions as outlined in the certificate of incorporation and the bylaws, the preparation and filing of sales tax forms and returns (Vogel v. NY Tax & Finance, 98 Misc 2d 222, 225-226); and the payment, including the authorization to write checks on behalf of the corporation, of other creditors other than the State of New York and the United States (Chevlowe v. Koerner, 95 Misc 2d 388, 391). Within closely held corporations, "an officer's knowledge of the corporate affairs and his benefits received from corporate profits (are) extremely important considerations" (Vogel v. NY Tax & Finance, *supra*, at 226).

Applying these criteria to petitioner Christopher T. Gilligan's circumstances, we find that he was a responsible officer because he was an officer and shareholder of Autex Corporation, signed sales tax returns for the corporation, had check signing authority, earned income from the corporation and, until June 30, 1982, was involved in the day-to-day operations of the corporation.

With respect to the audit methodology and amount of the assessment, it is undisputed that the records provided by Autex Corporation were inadequate. When records are incomplete and insufficient, it is the Division's duty to select a method reasonably calculated to reflect the taxes due (Matter of Grant Co. v. Joseph, 2 NY2d 196, 206). The burden then rests upon the taxpayer to demonstrate by clear and convincing evidence that the audit method or the amount of the assessment is erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858, 859). Since petitioners have introduced no evidence indicating that either the audit methodology or the amount of assessment are incorrect, they are sustained.

Throughout the hearing and on exception petitioners have argued that they could not produce the records of Autex Corporation because such records were under the control of Bruce Sheehy. We note that petitioners' inability to produce records, even though unintentional, does not relieve them of their burden of proof (see, Malinowski v. Commissioner of Internal Revenue, 71 TC 1120, 1125).

Petitioners have also alleged that the Division of Taxation had access to the information in Mr. Sheehy's hands and failed to disclose it to petitioners. There is no evidence in the record before us that the Division did in fact obtain information from Mr. Sheehy. In any event, the petitioners may not shift the burden of proof from themselves by alleging that the Division should have verified their audit results elsewhere (see, Sloan's Supermarkets, Inc. v. Chu, 140 AD2d 794). It is important to note that petitioners choose not to exercise their right to subpoena Mr. Sheehy and his books and records even after the hearing officer reminded them of such right.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exceptions of Autex Corporation and Christopher T. Gilligan are denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Autex Corporation is denied and the Notice of Determination issued on December 20, 1983 is sustained; and
4. The petition of Christopher T. Gilligan is granted to the extent indicated in conclusions of law "D", "E", "F" and "G" of the Administrative Law Judge's determination and the Notice of Determination issued to said petitioner on December 20, 1983 is modified accordingly, but except as so granted the petition is in all other respects denied.

Dated: Albany, New York  
November 23, 1988

/s/John P. Dugan

John P. Dugan  
President

/s/Francis R. Koenig

Francis R. Koenig  
Commissioner

