

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
	:	
of	:	
	:	
MARTIN LASCHEVER		DECISION
OFFICER OF WINSTON COACH CORPORATION	:	DTA NO. 802935
for Revision of a Determination or for Refund of Sales	:	
and Use Tax under Articles 28 and 29 of the Tax Law		
for the period December 1, 1977 through August 31, 1984.	:	

Petitioner, Martin Laschever, Officer of Winston Coach Corporation, 21 Manor Road, Medford, New York 11763, filed an exception to the determination of the Administrative Law Judge issued on May 26, 1988 with respect to his 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 December 1, 1977 through August 31, 1984 (File No. 802935). Petitioner appeared by Sidney J. Leshin, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Michael J. Glannon, Esq. of counsel).

Both parties filed briefs on exception. Oral argument, at the request of the petitioner, was held on October 11, 1988.

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

ISSUE

Whether petitioner as sole officer and shareholder of Winston Coach Corporation is liable for the corporation's failure to pay sales taxes on its purchases.

FINDINGS OF FACT

In the proceeding before the Administrative Law Judge the parties agreed to waive a hearing and to submit the case for determination based upon documentation and briefs to be submitted to the Administrative Law Judge.

We find the facts as stated in the determination of the Administrative Law Judge and such facts are incorporated herein by this reference except that we modify findings of fact "1" and "2" as indicated below. These facts are as follows.

Finding of fact "1" is modified as follows:

The Division commenced a field audit of Winston Coach Corporation ("WCC") on January 1984. Petitioner was requested to provide all books and records including purchase invoices for all fixed assets purchased and for the operating expenses of the corporation. Some invoices were provided; however, no invoices for any automotive vehicle purchases were made available to the Division. The Division of Taxation, on December 19, 1984, issued to Martin Laschever (hereinafter "petitioner") three notices of determination and demands for payment of sales and use taxes due as follows:

<u>Notice No.</u>	<u>Period</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
S84121901O	12/1/77-11/30/78	\$ 16,382.24	\$4,095.56	\$14,931.13	\$35,408.93
S841219011F	12/1/78-11/30/81	133,544.92	33,386.23	76,410.83	243,341.98
S841219012F	12/1/81-8/31/84	168,357.92	33,088.57	33,599.71	235,046.20

Identical amounts were assessed against WCC. On May 7, 1984, petitioner, as president of WCC, executed a consent extending the period of limitation for assessment of sales and use taxes whereby he agreed that such taxes for the period March 1, 1981 through May 31, 1984 could be assessed at any time on or before December 20, 1984.

Finding of fact "2" is modified as follows:

WCC was incorporated in 1978 and immediately began doing business in New York. It never filed sales tax returns until April 22, 1983 when it filed delinquent returns for the periods ending November 30, 1982 and February 28, 1983. On said returns, WCC stated that no tax was due and owing. For subsequent sales tax quarters through the period ending May 31, 1984, delinquent returns were also filed and all figures thereon were also zeros. As of the date of the completion of the audit, WCC paid no sales or use taxes. WCC owns and operates vans and buses, operating said vehicles between Suffolk County and New York City. It was determined, based upon an examination of available records (accountant's workpapers reflecting bank deposits and disbursements; Federal income tax returns with related schedules for calendar years 1981, 1982 and 1983; and a computer-generated general ledger, balance sheet and profit and loss statement), that tax had not been paid on fixed asset acquisitions and operating expense purchases. Petitioner's accountant verbally stated that sales tax had not been paid on vehicle acquisitions. The entire amount at issue herein was assessed as The result of WCC's failure to pay sales tax on said fixed asset acquisitions and operating expense purchases and was assessed against petitioner on the basis of the Division's determination that petitioner was a person required to collect and/or pay over sales and use taxes on behalf of WCC.

For the period at issue, petitioner was the sole officer and shareholder of WCC. Petitioner does not contest the amounts of the assessments herein.

OPINION

The Administrative Law Judge determined that petitioner was a responsible officer of WCC and as such was personally liable for the sales tax imposed by the Division.

On exception, petitioner concedes that if the assessments were based upon WCC's failure to collect tax on taxable sales of tangible personal property or services, he would, under these circumstances, be personally liable for such tax as an officer within the meaning and intent of Tax Law sections 1131(l) and 1133(a). It is petitioner's position, however, that WCC was a customer, i.e., purchaser of tangible personal property and that, while Tax Law section 1133(b) imposes liability upon a customer who has failed to pay tax to the person required to collect

such tax, the Tax Law does not impose a tax liability upon the corporate officers of such customer or purchaser. Petitioner contends that Tax Law section 1131(l) was intended to place tax liability on officers or employees of corporations which breached their fiduciary duty to collect and hold taxes for the benefit of the State. Since no fiduciary relationship was breached herein, petitioner argues he should not hold liable for the corporation's failure to pay sales taxes on its purchases.

The Division, relying principally on the definition of "person required collect tax" and "person required to collect any tax imposed by this Particle" in section 1133(l) which includes any officer of a corporation under a duty to act for the corporation in compliance with any requirement of Article 28 of the Tax Law concerning sales and use tax and the liability imposed on such person by section 1133(a)(b), asserts that petitioner is personally liable.

We sustain the determination of the Administrative Law Judge.

We deal first with the statutory framework concerning liability for sales tax. It is straight forward and clearly imposes personal liability for sales tax on responsible officers of corporations (see, Blodnick v. State Tax Commn., 124 AD2d 437; Cohen v. State Tax Commn., 128 AD2d 1022; Chavlowe v. Koerner, 95 Misc 2d 388).

More particularly, Tax Law section 1133(a) provides in relevant part:

“ . . . every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article.”

Tax Law section 1131(l) as relevant provides:

“Persons required to collect tax' or 'person required to collect any tax imposed by this article' shall include: every vendor of tangible personal property or services . . .”

This section provides further that:

“Said terms shall also include any officer. . . of a corporation . . . who as such officer . . . is under a duty to act for such corporation. . . in complying with any requirement of this article. . .”

In this case this would include petitioner who concedes he is sole shareholder and officer of WCC.

Tax Law section 1131(3) provides:

“Tax' shall include any tax imposed by sections eleven hundred five [sales tax], or eleven hundred ten [use tax], and any amount payable to the tax commission by a person required to file a return, as provided in section eleven hundred thirty-seven.”

This includes the sales tax deficiency asserted by the Division.

Tax Law section 1131(2) as relevant provides:

“Customer' . . . shall include: every purchaser of tangible personal property or services;. . .”

Here it is uncontroverted that WCC was a "customer" and that petitioner was a responsible officer of WCC.

Tax Law section 1133(b) provides:

“Where any customer has failed to pay a tax imposed by this article to the person required to collect the same, then in addition to all other rights, obligations and remedies provided, such tax shall be payable by the customer directly to the tax commission and it shall be the duty of the customer to file a return with the tax commission and to pay the tax to it within twenty days of the date the tax was required to be paid.” (Emphasis added.)

WCC failed to file returns from the time of its incorporation in 1978 until April, 1983 when it filed several delinquent returns indicating no tax due. Similar action was taken by WCC for the period ending May 31, 1984.

Applying the above sections to the facts in this case, we conclude petitioner, as a responsible officer of WCC, is clearly liable for the sales tax deficiency asserted against WCC by the Division since he was under a duty to act for the corporation with respect to compliance with any provision of Article 28 of the Tax Law.

We deal next with petitioner's principal assertion against his personal liability, namely that the definition of "person required to collect tax" in section 1131(l) applies only to officers of corporations which are "vendors" and that such liability is based on the fiduciary responsibility of the vendor to collect and hold taxes for the benefit of the State. Petitioner's argument rests on his interpretation of the words "[s]aid terms" in the second sentence of the definition which petitioner asserts refers to the phrase "vendor of tangible personal property."

We disagree. The reference is to the terms defined, i.e., "person required to collect tax" and "person required to collect tax imposed by this Article" and not to the phrase "vendor of tangible personal property". Petitioner concedes he is a responsible office of WCC. Thus, he is under a duty to act for WCC with respect to compliance of any requirement of Article 28, including WCC's responsibility as a customer to pay tax pursuant to section 1133(b) and is a person required to collect tax as that term is used in section 1133(a) of the Tax Law.

Accordingly, he is liable for the sales tax sought to be imposed by the Division (see, Blodnick v. State Tax Commn., supra; Cohen v. State Tax Commn., supra; and Chevlowe v. Koerner, supra).

We deal finally with petitioner's assertion that the officer's liability for sales tax results only because of the fiduciary responsibility of the officer to collect and hold taxes for the benefit of the State.

We are not persuaded by petitioner's argument. We find no basis in either the clear language of sections 1131(1)(3) and 1133(a), in the legislative history of these sections or in case law to substantiate petitioner's assertion. Nor, has petitioner presented anything other than his own interpretation of the relevant language in support of his assertion. To the contrary, the clear wording of the statute, "under a duty to act for such corporation . . . in complying with any requirement of this article reflects no such limitation.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the petitioner, Martin Laschever as Officer of Winston Coach Corporation, is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Martin Laschever as Officer of Winston Coach Corporation is denied and the notices of determination issued on December 19, 1984 are sustained in full.

Dated: Albany, New York
March 23, 1989

/s/ John P. Dugan
President

/s/ Francis R. Koenig
Commissioner