

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MITCHELL NICHTBERGER, OFFICER OF MARKE PAINTING CO., INC.	:	DETERMINATION DTA NO. 808139
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 September 1, 1985 through November 30, 1986.	:	

Petitioner, Mitchell Nichtberger, officer of Marke Painting Co., Inc., 25 Fessler Drive, New Hempstead, New York 10977, 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 September 1, 1985 through November 30, 1986.

A hearing was held before Robert F. Mulligan, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on March 12, 1991 at 1:15 P.M., with all briefs to be submitted by July 1, 1991. Petitioner submitted a letter brief on June 20, 1991 and the Division of Taxation submitted a letter brief on July 1, 1991. Petitioner appeared by Joseph N. Salianni, enrolled agent. The Division of Taxation appeared by William F. Collins, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect tax on behalf of Marke Painting Co., Inc., and is personally liable for unpaid sales and use taxes owed by said corporation.

FINDINGS OF FACT

On January 10, 1989, the Division of Taxation issued the following notices of determination and demands for payment of sales and use taxes due to petitioner,

Mitchell Nichtberger,¹ as officer of Marke Painting Co., Inc. ("the corporation"):

<u>Quarter Ending</u>	<u>Tax Due</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>	
11/30/85	\$14,278.70		\$4,360.59	\$5,882.58	\$24,521.87
2/28/86	13,027.82		4,064.53	5,278.62	22,370.97
5/31/86	7,252.06		2,282.14	2,442.30	11,976.55
8/31/86	9,079.21		2,723.72	2,847.89	14,650.82
11/30/86	1,000.00		120.00	21.69	1,141.69

It appears that the assessments for the first four quarters were based on actual returns filed by the corporation, without remittance. The corporation did not file a return for the quarter ending November 30, 1986, and the assessment for said quarter was estimated by the Division of Taxation. The actual sales tax returns were not offered in evidence.

The corporation, which was organized in Delaware, operated a commercial painting and decorating business based in New York City starting in or about September 1985. Petitioner, Jay Nichtberger (who is petitioner's father) and Marshall Koplitz, each owned approximately one- third of the issued and outstanding stock. Jay Nichtberger was president of the corporation and petitioner and Marshall Koplitz were vice presidents.²

The corporation was a successor to another firm, Marke Painting & Decorating, Company., Inc., which had been owned by Jay Nichtberger and one Frank Arnold.

Petitioner worked as a salesmen and estimator for the corporation, spending most of his time out of the office. He came into the office about three times per week. Jay Nichtberger, as president of the corporation, was involved in the day-to-day management of the business and was also involved in sales. Marshall Koplitz was the financial officer of the corporation.

Petitioner, Jay Nichtberger and Marshall Koplitz were all listed as officers of the corporation in the vendor's registration information on the sales tax registration certificate filed by the corporation.

¹The notices issued for all quarters except the quarter ending February 28, 1986, misspelled petitioner's surname as "Nightberder".

²Exhibit F.

It is unclear who the directors of the corporation were. From the context of the testimony, it appears that the three officers were the directors, but that there were no formal meetings of the board.

Petitioner, Jay Nichtberger and Marshall Koplitz were signatories on the corporation's checking account. Two signatures were required to negotiate checks.

Petitioner received a salary. He did not receive commissions, bonuses, dividends or profits from the corporation.

The credible testimony of the former manager of the corporation's accounting department established that proper sales tax returns were prepared (except for the last period at issue) and checks for the amounts due were attached to the returns. The checks usually bore one signature at that point, either that of petitioner or his father, Jay Nichtberger. The sales tax returns and checks were then given to Mr. Koplitz who reviewed the returns and usually was to supply the second signature required on the checks. At one point during the period in issue, the accounting manager noticed that cancelled checks for sales tax were not being returned with the bank statements and asked Mr. Koplitz about it. Mr. Koplitz stated he was "handling it".

The corporation was apparently unable to meet its obligations to a creditor, Central National Bank. Under arrangements which are not entirely clear, the corporation ceased business activity in or about August 1986, and its business was transferred to another corporation, All-Marke Painting, Inc. (All-Marke). Neither petitioner nor Jay Nichtberger nor Mr. Koplitz owned shares in All-Marke.

CONCLUSIONS OF LAW

A. Tax Law § 1133(a) provides, in pertinent part, as follows:

"Except as otherwise provided in section eleven hundred thirty-seven, 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."

B. During the period in issue, Tax Law § 1131(former [1]) provided as follows:

"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; every recipient of amusement charges; and every operator of a hotel. Said terms shall also include any officer, director or employee of a corporation or of a

dissolved corporation, any employee of a partnership or any employee of an individual proprietorship who as such officer, director or employee is under a duty to act for such corporation, partnership or individual proprietorship in complying with any requirement of this article; and any member of a partnership."

C. Petitioner, Mitchell Nichtberger, although a one-third shareholder and officer of Marke Painting Co., Inc., was not a person required to collect tax on behalf of said corporation within the meaning of Tax Law § 1133(a). That a person was an officer and shareholder of a corporation is insufficient to require a finding of liability for unpaid sales and use taxes where he did not play an active role in the management of the corporation. (Vogel v. New York State Department of Taxation and Finance, 98 Misc 2d 222, 413 NYS 2d 862.) Petitioner was primarily a salesman and an estimator. The business was managed by petitioner's father, Jay Nichtberger, who was president of the corporation and its financial affairs were handled by Marshall Koplitz. Jay Nichtberger and Marshall Koplitz were the persons required to collect tax on behalf of the corporation.

Petitioner has sustained his burden of proof based primarily on his own credible testimony and on the credible testimony of an impartial witness, the corporation's former accounting manager. Copies of affidavits of Mr. Koplitz and others which were attached to Mr. Koplitz's Request for Conciliation Conference in a related withholding tax liability case and which were submitted herein by the Division of Taxation, have been accorded little weight.³ Also, copies of certain documents offered by petitioner which reflect unfavorably on Mr. Koplitz's business practices have been found to be unnecessary for purposes of this determination and have not been treated in these Findings of Fact.

³It is noted that the Division of Taxation could have subpoenaed the affiants as witnesses but did not do so. It is also noted that the affidavits, which would tend to exculpate Mr. Koplitz, do not show that petitioner was a person required to collect tax, but place the blame on petitioner's father, Jay Nichtberger.

D. The petition of Mitchell Nichtberger is granted, and the notices of determination and demands for payment of sales and use taxes due issued January 10, 1989, are cancelled.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE