

STATE OF NEW YORK
 DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MARTIN LASCHEVER OFFICER OF WINSTON COACH CORPORATION	:	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 December 1, 1977 through August 31, 1984.	:	

Petitioner, Martin Laschever, officer of Winston Coach Corporation, 21 Manor Road, Medford, New York 11763, 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 December 1, 1977 through August 31, 1984 (File No. 802935).

On September 16, 1987, the parties, by their representatives, agreed to waive their right to a hearing and to submit the case for determination based upon documentation submitted and briefs to be submitted by December 15, 1987. After due consideration of the record, Brian L. Friedman, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner was a person required to collect and/or pay over sales and use taxes on behalf of Winston Coach Corporation within the meaning and intent of Tax Law §§ 1131(1) and 1133(a) for the period at issue.

FINDINGS OF FACT

1. Pursuant to a field audit of Winston Coach Corporation ("WCC") which commenced in January 1984, the Audit Division, 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>	
S841219010F	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.

2. 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. 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 Audit Division's determination that petitioner was a person required to collect and/or pay over sales and use taxes on behalf of WCC.

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

SUMMARY OF PETITIONER'S POSITION

4. 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 §§ 1131(1) and 1133(a). It is petitioner's position, however, that WCC was a customer or purchaser of tangible personal property and that, while Tax Law § 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 § 1131(1) 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 should not be held liable for the corporation's failure to pay sales and use taxes on its purchases.

CONCLUSIONS OF LAW

A. That Tax Law § 1133(a) provides, in part, that every person required to collect the taxes imposed under Article 28 of the Tax Law is also personally liable for the tax imposed, collected, or required to be collected under such law. Tax Law § 1131(1) defines "(p)ersons required to collect tax", as used in Tax Law § 1133(a), to include any officer or employee of a corporation, or a dissolved corporation who, as such officer or employee, is under a duty to act for the corporation in complying with any requirement of Article 28 of the Tax Law.

B. 20 NYCRR 526.11(b)(1) provides as follows:

"Every officer or employee of a corporation, or of a dissolved corporation who is under a duty to act for such corporation in complying with any requirement of the sales tax law is a person required to collect tax."

C. Tax Law § 1133(b) provides as follows:

"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."

D. Since WCC failed to pay sales tax on its fixed asset acquisitions and its operating expense purchases to the vendors who were required to collect such tax, it was required, pursuant to Tax Law § 1133(b), to file a return and pay over the tax directly to the Tax Commission (now, the Commissioner of Taxation and Finance). Petitioner, admittedly the responsible officer of WCC, was, therefore, under a duty to act for the corporation in complying with this requirement. Pursuant to Tax Law § 1133(a), he is personally liable for the sales tax imposed on WCC on its fixed asset acquisitions and operating expense purchases.

E. The petition of Martin Laschever, officer of Winston Coach Corporation, is denied and the notices of determination and demands for payment of sales and use taxes due issued December 19, 1984 are hereby sustained in full.

DATED: Albany, New York
May 26, 1988

_____/s/_____
ADMINISTRATIVE LAW JUDGE