

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
SANFORD BERKMAN	:	DECISION
	:	
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, 1979	:	
through August 31, 1980.	:	

Petitioner, Sanford Berkman, 184 Winthrop Avenue, Albany, New York 12206 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 March 1, 1979 through August 31, 1980 (File No. 33442).

A formal hearing was commenced before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Office Campus, Albany, New York, on September 9, 1981 at 9:30 A.M., and continued to conclusion before Daniel J. Ranalli, Hearing Officer, at the same location on November 29, 1984 at 1:15 P.M., with all briefs to be submitted by March 4, 1985. Petitioner appeared by Daniel Centi, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Patricia Brumbaugh, Esq., of counsel) on September 9, 1981 and by John P. Dugan, Esq. (Patricia Brumbaugh, Esq. of counsel) on November 29, 1984.

ISSUES

I. Whether the State Tax Commission has jurisdiction to determine the sales tax liability of petitioner for the period March 1, 1979 through August 31, 1980.

II. Whether petitioner was a person required to collect sales tax within the meaning and intent of sections 1131(1) and 1133(a) of the Tax Law.

FINDINGS OF FACT

1. During the period in issue, Kulik Restaurant, Inc. ("the corporation") filed five New York State and local sales and use tax returns reflecting taxes due but enclosed no remittance therewith. The returns showed taxes due in the following amounts:

<u>Period Ended</u>	<u>Date Filed</u>	<u>Tax</u>
5/31/79	10/18/79	\$13,885.32
8/31/79	10/18/79	14,561.94
11/30/79	1/11/80	14,482.05
2/29/80	7/18/80	13,754.34
5/31/80	7/18/80	14,968.07

For the period ended August 31, 1980, the corporation did not file a sales tax return.

2. On February 21, 1981, the Audit Division issued a Notice and Demand for Payment of Sales and Use Taxes Due against petitioner, Sanford Berkman, as an officer of the corporation for the period March 1, 1979 through August 31, 1980, asserting taxes, penalty and interest due in the amount of \$106,048.84, scheduled as follows:

<u>Period Ended</u>	<u>Tax Due</u>	<u>Penalty Due</u>	<u>Interest Due</u>
05/31/79	\$ 5,385.32	\$ 2,730.64	\$ 2,099.45
08/31/79	14,561.94	3,058.01	2,475.53
11/30/79	14,482.05	2,606.77	2,027.49
02/29/80	13,754.34	2,063.15	1,512.98
05/31/80	14,968.07	1,796.17	1,197.44
08/31/80	18,710.08	1,683.91	935.50
	<u>\$81,861.80</u>	<u>\$13,938.65</u>	<u>\$10,248.39</u>

The notice contained the following statement:

"You are personally liable as officer of Kulik Restaurant Inc. under Sections 1131(1) and 1133 of the Tax Law for the following taxes determined to be due in accordance with Section 1138(a) of the Tax Law.

THE TAX ASSESSED HEREIN HAS BEEN ESTIMATED AND/OR DETERMINED TO BE DUE IN ACCORDANCE WITH THE PROVISIONS OF SECTION 1138 OF THE TAX LAW AND MAY BE CHALLENGED THROUGH THE HEARING PROCESS BY THE FILING OF A PETITION WITHIN 90 DAYS."¹

3. Petitioner began working for the corporation on January 1, 1979. He was hired by Joseph Kulik, president of the corporation with the oral understanding that at some future date petitioner would purchase stock of the corporation and be elected an officer of the corporation. This understanding was not reduced to writing and petitioner never purchased any of the stock of the corporation.

4. The corporation operated a commercial restaurant and catering operation. Petitioner's official title was manager and his duties involved supervising the day-to-day operations of the restaurant which had twenty employees. Petitioner ordered food, set up catering jobs and occasionally took customer orders in the restaurant. Under authority granted by Mr. Kulik, petitioner was responsible for hiring and firing employees. When a new accounting system was placed in operation, petitioner fired the two bookkeepers and engaged the services of an accountant. Petitioner signed the letter of agreement to engage the services of the accountant and, on the accountant's recommendation, interviewed and hired a new bookkeeper.

5. Petitioner, Mr. Kulik, the accountant and the bookkeeper were authorized signatories on corporate checks. Petitioner was also authorized to sign Mr. Kulik's name on checks and the bookkeeper was authorized to sign petitioner's

1 The notice with respect to the period ended August 31, 1980, when no return was filed, should, properly, have been issued by a Notice of Determination and Demand rather than a Notice and Demand; however, the statement on the notice meets all the notice requirements of section 1138(a) of the Tax Law.

name. Petitioner signed sales tax returns and corporate franchise tax returns on behalf of the corporation. He signed these returns listing his title as "Vice President". On the corporate franchise tax report for 1979, petitioner was listed with the official title of "Vice President" at an annual salary of \$15,300.00.

6. The corporation began falling behind on its sales tax payments during 1979. The accountant prepared the sales tax returns and gave them to petitioner for his signature and for payment. Petitioner felt, however, that, if there was not enough money to pay both suppliers and taxes, he should pay the suppliers first in order to keep the business operating. Petitioner put the sales tax returns in a desk drawer and waited a month or more until sufficient cash came into the business and then he paid the tax. Petitioner did not notify Mr. Kulik each time he deferred payment in this manner, but Mr. Kulik was aware of the financial situation and condoned petitioner's actions. Petitioner and Mr. Kulik would meet regularly and decide which bills to pay and in what order.

7. In late 1980, representatives of the Department of Taxation and Finance contacted petitioner to discuss the corporation's delinquent sales tax payment situation. Petitioner referred the representatives to the accountant. Eventually a meeting was held between petitioner and the Department where a payment plan was arranged whereby the corporation would pay the Department \$500.00 a week to pay off the taxes due and owing. Petitioner signed the payment agreement and he was listed on the agreement as the vice president and treasurer. The corporation began making the weekly payments but again fell behind and in January 1981, the Department seized the business. In June, 1981 the restaurant reopened under the ownership of a new corporation owned by Mr. Kulik. Petitioner was rehired by a new accountant but was fired shortly

thereafter by the accountant acting on Mr. Kulik's orders. Petitioner had no contact with the business or Mr. Kulik after the firing and some \$17,000.00 he loaned to the corporation has never been paid back. Mr. Kulik died on July 29, 1982.

8. Petitioner maintains that he was never an elected officer of the corporation, that Mr. Kulik told him to sign the corporate documents using the title of Vice President and that Mr. Kulik was ultimately responsible for setting corporate policy and deciding which creditor was to be paid. Petitioner also moved for a cancellation of the assessment based on laches because this matter was first commenced in September, 1981 and during the interim Mr. Kulik died and the absence of his testimony prejudiced petitioner's case.

9. Petitioner also argues that the State Tax Commission lacks jurisdiction or authority to conduct an administrative proceeding to determine petitioner's personal liability for unpaid sales taxes.

CONCLUSIONS OF LAW

A. That where timely and correct returns are submitted, lacking only the remittance of tax shown as due thereon, the issuance of a Notice and Demand is not statutorily authorized and this Commission is thus not empowered to administratively determine petitioner's liability for the unpaid taxes at issue.

Parsons v. State Tax Commission, 34 N.Y.2d 190. Notwithstanding the enactment of Tax Law section 171, paragraph twenty-first (L. 1979, Ch. 714, eff. January 1, 1980), the Tax Law does not confer administrative jurisdiction on the Tax Commission to recover unpaid taxes where correct returns have been filed.

Hall v. New York State Tax Commission, App. Div., Third Dept., June 6, 1985, Main, J. Finally, it is noted that section 1138(a) of the Tax Law has been amended, effective April 17, 1985 (L. 1985, Ch. 65), such that under the facts

presented herein the issuance of a Notice of Determination and Demand would be authorized and the State Tax Commission would have jurisdiction to determine petitioner's liability.

B. That with respect to the periods ended May 31, 1979 through May 31, 1980, where returns were filed lacking the remittance of tax shown as due, this Commission does not have the authority to administratively determine petitioner's liability and the Notice and Demand is to be modified by removing the tax due for said periods from such notice. With respect to the period ended August 31, 1980, however, no return was filed and the Tax Commission is authorized under section 1138(a) of the Tax Law to administratively determine the tax liability under such circumstances.

C. That section 1133(a) of the Tax Law 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. Section 1131(1) of the Tax Law defines "(p)ersons required to collect tax" as used in section 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.

D. That 20 NYCRR 526.11(b)(2) describes an officer or employee under a duty to act as a person who is authorized to sign a corporation's tax returns or who is responsible for maintaining the corporate books, or who is responsible for the corporation's management. Other "[i]ndicia of this duty...include factors...such as the officer's day-to-day responsibilities and involvement with the financial affairs and management of the corporation" and "the officer's

duties and functions..." (Vogel v. New York State Department of Taxation and Finance, 98 Misc.2d 222, 225).

E. That petitioner was the manager of the business with authority to hire and fire employees, sign corporate checks and tax returns and decide which creditors were to be paid. He was intimately involved with the day-to-day operations of both the restaurant and the catering service and had full knowledge of the corporation's financial situation including the delinquent sales tax payments. Petitioner, in fact, contributed to the delinquency by deferring payments on the tax when there was not enough cash to pay all the creditors. Although petitioner was not a formally elected officer of the corporation, he and Mr. Kulik held petitioner out to the public as an officer on numerous occasions. In any case, the statute does not require a person under a duty to collect sales tax to be an officer; he may also be an employee having the same duties. It is also difficult to imagine that, in light of petitioner's extensive duties and responsibilities, he was a mere puppet following Mr. Kulik's orders. Petitioner was, therefore, a person required to collect tax within the meaning and intent of sections 1131(1) and 1133(a) of the Tax Law.

F. That the State may not be estopped "from collecting taxes lawfully imposed and remaining unpaid in the absence of statutory authority" (McMahon v. State Tax Commission, 45 A.D.2d 625, 627). Petitioner was aware of Mr. Kulik's age and physical condition and, if his testimony was crucial to petitioner's case, petitioner should have taken steps to obtain an expedited hearing. It should be noted that petitioner delayed the proceedings himself by making several motions to the Commission as well as the Supreme Court, Albany County prior to the hearing. Petitioner had the right to take these actions; however,

he cannot now claim that the Audit Division is guilty of laches and his motion is denied.

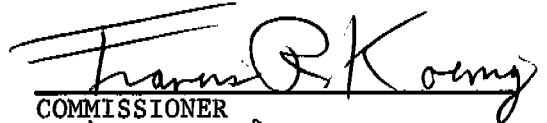
G. That the petition of Sanford Berkman is granted to the extent indicated in Conclusion of Law "B"; that the Audit Division is directed to modify the Notice and Demand for Payment of Sales and Use Taxes Due issued February 21, 1981 accordingly; and that, except as so granted, the petition is in all other respects denied.

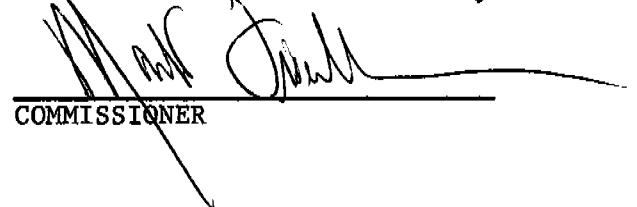
Dated: Albany, New York

OCT 31 1985

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER