

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

ANDREW R. MAFFEI :

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, 1975 :
through August 31, 1978. :

DECISION

In the Matter of the Petition :

of :

JOHN A. MICHELSEN :

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, 1975 :
through August 31, 1978. :

Petitioners, Andrew R. Maffei, 20 South Broadway, Yonkers, New York 10701,
and John A. Michelsen, 1050 Nepperhan Avenue, Yonkers, New York, filed petitions
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, 1975 through
August 31, 1978 (File Nos. 35834 and 45790).

On May 3, 1985, petitioners by their representative, Lawrence L. Maffei,
Esq., filed a waiver of hearing and requested that this matter be decided by
the State Tax Commission on the basis of the existing record, with all briefs
to be submitted by December 13, 1985. After due consideration, the Tax Commission
renders the following decision.

ISSUES

I. Whether the State Tax Commission has jurisdiction to determine the sales tax liability of petitioners for the period September 1, 1975 through August 31, 1977.

II. Whether petitioners were persons 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. On April 20, 1980, the Audit Division issued a Notice and Demand for Payment of Sales and Use Taxes Due against petitioner Andrew R. Maffei as president of the City Club of Yonkers, Inc. ("the Club") in the amount of \$11,053.42, plus penalty of \$2,800.79 and interest of \$4,827.64, for a total due of \$18,681.85 for the period September 1, 1975 through August 31, 1977. On the same date, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Mr. Maffei in the amount of \$13,378.64, plus penalty of \$3,286.49 and interest of \$3,222.51, for a total due of \$19,887.64 for the period September 1, 1977 through August 31, 1978. The notice and demand was issued in response to sales and use tax returns filed by the Club reflecting taxes due but with no remittance enclosed. The notice of determination was based on estimated taxes for periods for which no returns were filed. On the same date, identical notices were issued against petitioner John A. Michelsen as an officer of the Club.

2. On March 16, 1983, the Audit Division issued notices of assessment review to both petitioners which reduced the tax due for the period September 1, 1977 through August 31, 1978 to \$7,561.84 plus penalty and interest. The assessment for the earlier period was not adjusted. Following a pre-hearing conference, the tax due for the period September 1, 1977 through August 31,

1978 was further reduced to \$2,186.37 plus penalty and interest. The assessment for the earlier period remained the same.

3. The Club was founded in the City of Yonkers on October 10, 1885 as a male social club. The membership of the Club included many social, political and civic leaders of New York State. In 1974, the Club began to undergo financial problems. The old building which housed the Club was slowly crumbling and a number of health code violations were found. The Club was closed for a two month period in 1975 due to these violations. As a result, membership began to dwindle and the funds necessary to sustain the Club were reduced accordingly. A few members, including Mr. Maffei, the president, and Mr. Michelsen, the treasurer, attempted to keep the Club open and operating.

4. During the period September 1, 1977 through September 30, 1978, the Club was open intermittently as a result of the continuing deterioration of the building due to lack of funds for repairs. Various judgments were taken against the Club for non-payment of bills. Part of the payroll was paid out of petitioners' own funds and was never reimbursed. Finally, on February 6, 1979, the mortgagees of the property owned by the Club instituted a foreclosure action against the Club for default on payment. The actual foreclosure sale took place on July 30, 1979.

5. Petitioners do not deny that they were persons responsible for collecting sales tax. They maintain, however, that they were merely attempting to keep the Club operating with their own money and on their own time, and that at no time did either petitioner profit or attempt to profit from their actions. Petitioners purposefully filed sales tax returns without remittance because they decided to pay the Club's employees first with the limited funds available.

Petitioners did not raise any arguments nor submit any evidence with respect to the accuracy of the two assessments as finally revised.

6. At the time this matter was submitted to the Tax Commission, neither petitioner nor the Audit Division brought to the Commission's attention the fact that part of the liability in issue was based on assessments against officers for tax due as a result of returns filed without remittance. Additionally, neither party raised the issue of whether the State Tax Commission has jurisdiction or authority to conduct an administrative proceeding to determine petitioners' personal liability for such unpaid sales taxes. Since this presents a question of subject matter jurisdiction, the Commission raises the issue sua sponte. See Robinson v. Oceanic Steam Navigation Co., 112 N.Y. 315, 324.

CONCLUSIONS OF LAW

A. That where timely and correct sales tax returns are submitted, lacking only the remittance of tax shown as due thereon, this Commission is not empowered to administratively determine the liability of persons required to collect tax. 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, 108 A.D.2d 488. Notwithstanding petitioners' request for a hearing and redetermination of the issue of their liability without objection to the forum, jurisdiction may not be conferred when none exists.

B. That with respect to the period September 1, 1975 through August 31, 1977, where returns were filed lacking the remittance of tax shown as due, this Commission does not have the authority to administratively determine petitioners'

liability. With respect to the period September 1, 1977 through August 31, 1978, however, no returns were 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 clearly, petitioners, as president and treasurer of the Club, were persons required to collect tax. They admitted that they were forced to make choices when making payments and that they paid the employees prior to paying sales taxes. They are, therefore, personally liable for the sales taxes due from the Club. Moreover, petitioners failed to show that the taxes determined on audit, as finally revised, were erroneous.

E. That, with respect to the period September 1, 1975 through August 31, 1977, there being no authority to determine petitioners' liability at an administrative hearing, the petitions of Andrew R. Maffei and John A. Michelsen are dismissed.

F. That, with respect to the period September 1, 1977 through August 31, 1978, the petitions of Andrew R. Maffei and John A. Michelsen are granted to the extent indicated in Finding of Fact "2"; that the Audit Division is directed to modify the notices of determination and demands for payment of sales and use


taxes due issued April 20, 1980 accordingly; and that, except as so granted, the petitions are in all other respects denied.

DATED: Albany, New York

FEB 18 1986

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER

 
COMMISSIONER