

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
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 of :  
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 PHILIP COSTA, :  
 OFFICER OF CORNWALL OIL CO., INC. :  
 :  
 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, 1976 :  
 through February 28, 1982. :

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DECISION

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In the Matter of the Petition :  
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 of :  
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 GEORGE F. KENT, JR., :  
 OFFICER OF CORNWALL OIL CO., INC. :  
 :  
 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, 1976 :  
 through February 28, 1982. :

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Petitioners, Philip Costa, 47 South Corners Road, New Paltz, New York 12561, and George F. Kent, Jr., 11 Weather Oak Hill, Newburgh, New York 12550, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1976 through February 28, 1982 (File Nos. 39662 and 39663).

A consolidated hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Office Campus, Albany, New York, on March 18, 1985 at 1:15 P.M., with all briefs to be submitted by June 19, 1985. Petitioner Philip Costa appeared by James H. Tully, Jr., Esq. Petitioner George F. Kent, Jr. appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUE

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 July 20, 1982, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner Philip Costa, officer of Cornwall Oil Co., Inc., in the amount of \$51,802.87, plus penalty of \$13,678.97 and interest of \$26,976.26, for a total due of \$92,458.10 for the period March 1, 1976 through February 28, 1982. On the same date, the Audit Division issued an identical notice of determination against petitioner George F. Kent, Jr., officer of Cornwall Oil Co., Inc. Prior to the hearing, a Tax Compliance Bureau agent performed an analysis of payments received from Cornwall Oil Co., Inc. and recomputed the balance due from petitioners to be \$50,924.15, including penalty and interest as of February 11, 1985.

2. Petitioner George F. Kent, Jr. purchased the stock of Cornwall Oil Co., Inc. ("Cornwall") and became its president in 1969. At some unspecified later date, Kenneth R. Schliphack became a 50 percent owner of Cornwall and, together with Mr. Kent, bought the stock of B & C Fuel Oil Company, Inc. ("B & C") and Bueteefish Oil Company, Inc. ("Bueteefish"). In December, 1978, Mr. Kent and Mr. Schliphack entered into an agreement whereby Mr. Schliphack agreed to endorse and deliver all of his stock in Cornwall and Bueteefish to Mr. Kent and to resign as an officer and director of Cornwall and Bueteefish. Mr. Kent agreed to endorse and deliver all of his stock in B & C to Mr. Schliphack and to resign as an officer and director of B & C. As part of the same agreement, petitioner Philip Costa agreed to guarantee several notes and other obligations

of Cornwall and Buetefish. Mr. Costa was not identified as an officer or employee of either Cornwall or Buetefish in the agreement.

3. By resolution of the Board of Directors of Cornwall, dated January 3, 1979, Mr. Costa, along with Mr. Kent, was authorized to sign all corporate checks of Cornwall. Only one signature was required on such checks. The resolution identified Mr. Kent as President and Treasurer and Mr. Costa as Vice-President and Secretary of Cornwall. Both petitioners signed the resolution as the officers so designated.

4. Mr. Kent and Mr. Costa had been friends prior to Mr. Costa's involvement with Cornwall and Buetefish. Mr. Costa was aware that Cornwall was experiencing financial difficulties but he thought that he and Mr. Kent could get the business back into reasonable financial condition. At the time he became active in the business, Mr. Costa was not specifically aware that Cornwall was having problems paying its taxes; he was only aware that numerous creditors were seeking payment. Mr. Costa paid approximately \$20,000.00 to \$25,000.00 of his personal funds into the corporation to keep the creditors temporarily satisfied. Upon joining Cornwall, Mr. Costa hired an accountant to prepare tax returns and start paying creditors. In March, 1979, Mr. Costa sent a check in the amount of \$2,526.25 to the Audit Division in payment of Cornwall's October, 1978 sales tax. Cornwall, however, continued to file its sales tax returns late or without full payment until February, 1982.

5. Cornwall was never able to recover from its financial problems and, in February, 1982, Heritage Oil Company ("Heritage") foreclosed on a mortgage it held on all of Cornwall's property and other assets. The Audit Division agreed to remove a sales tax lien it held on Cornwall upon payment of \$10,000.00 by

Heritage, which payment was made by check dated February 5, 1982. Both petitioners have since filed petitions in bankruptcy.

6. Petitioner Philip Costa maintains that he did not become completely involved in Cornwall until March, 1979 and that he did not receive possession of the corporation's checkbook until that time, although his testimony indicated that he was working full time for Cornwall from January, 1979 and thereafter. Petitioners also argue that penalties and interest above the statutory minimum should be waived.

#### CONCLUSIONS OF LAW

A. That section 1133(a) of the Tax Law provides, in part, that every person required to collect the taxes imposed under the Sales 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 "persons 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 the Sales Tax Law.

B. 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).

C. That, with respect to petitioner George F. Kent, Jr., it was undisputed that, as president of Cornwall, he was a person required to collect sales tax for the entire period in issue. Petitioner Philip Costa, although agreeing to act as guarantor of certain corporate obligations in December, 1978, did not actually become active in the business until January 3, 1979 and thereafter. At that time, he became employed full time as vice president and secretary, he hired an accountant to assist with payment of creditors, became a signatory on corporate checks and became actively involved in the financial affairs of the corporation. He was, therefore, a person required to collect sales tax within the meaning and intent of sections 1131(1) and 1133(a) of the Tax Law. Mr. Costa was, however, responsible only for the period beginning January 3, 1979 and ending February 28, 1982.

D. That, inasmuch as petitioners failed to show that any reasonable cause existed for the failure to file returns or pay over taxes owed by Cornwall, penalties and interest will be sustained.

E. That the petition of Philip Costa is granted to the extent indicated in Finding of Fact "1" and Conclusion of Law "C"; that the Audit Division is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued July 20, 1982 accordingly; and that, except as so granted, the petition is in all other respects denied.

F. That the petition of George F. Kent, Jr. is granted to the extent indicated in Finding of Fact "1"; that the Audit Division is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due

issued July 20, 1982 accordingly; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

AUG 21 1985

STATE TAX COMMISSION

R. duichaw Allen  
PRESIDENT

Francis Q. Kolmg  
COMMISSIONER

[Signature]  
COMMISSIONER