

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions :

of :

CHARLES MOTHON AND JOHN LANG :
AS OFFICERS OF MRR ENTERPRISES, INC. :
D/B/A PETTIT MACHINERY :

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 Periods Ended :
February 29, 1980, May 31, 1980, May 31, 1981, :
August 31, 1981, November 30, 1981 and :
February 28, 1982. :

Petitioners, Charles Mothon and John Lang, as officers of MRR Enterprises, Inc. d/b/a Pettit Machinery, RD #2, Ballston Spa, New York 12020, 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 periods ended February 29, 1980, May 31, 1980, May 31, 1981, August 31, 1981, November 30, 1981 and February 28, 1982 (File Nos. 39951 and 41727).

A combined small claims hearing was held before Richard L. Wickham, Hearing Officer, at the offices of the State Tax Commission, State Campus, Building 9, Albany, New York, on June 29, 1984 at 11:00 A.M., with all briefs to be submitted by October 8, 1984. Petitioners appeared by Morris D. Strauss, Esq. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether petitioners, Charles Mothon and John Lang, were responsible officers of MRR Enterprises, Inc. liable for the payment of sales taxes due from said corporation.

II. Whether petitioners are liable for the penalty and interest assessed against MRR Enterprises, Inc. due to late filing and/or late payment of tax as shown due on various New York State and local sales and use tax returns.

III. Whether the penalty assessed against petitioners should be waived and the interest reduced to minimum interest.

FINDINGS OF FACT

1. On October 1, 1982, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Charles Mothon in the amount of \$7,994.32. A notice in the same amount was also issued against John Lange (sic). Each notice was prepared on the basis that Mr. Mothon and Mr. Lang were officers of MRR Enterprises, Inc. and as such were personally liable for the taxes, penalty and interest due from said corporation. Said tax, penalty and interest were shown on the notice sent each petitioner as follows:

<u>PERIOD ENDING</u>	<u>TAX DUE</u>	<u>PENALTY DUE</u>	<u>INTEREST DUE</u>
2/29/80	\$ -0-	\$1,419.18	\$634.01
5/31/80	-0-	848.36	907.37
5/31/81	-0-	706.85	553.14
8/31/81	-0-	242.52	180.91
11/30/81	-0-	327.99	219.96
2/28/82	1,676.00	167.60	110.43

2. MRR Enterprises, Inc. operated an agricultural and light equipment dealership under the name Pettit Machinery until early 1982. Said business was conducted in accordance with franchise agreements executed by MRR Enterprises, Inc. with the White Motor Company, Massey Ferguson and Sperry New Holland. The White Motor Company filed a bankruptcy petition in September, 1980, which action caused MRR Enterprises, Inc. to experience difficulty in selling the White tractors in inventory and ultimately a reduction in corporate sales.

3. MRR Enterprises, Inc. d/b/a Pettit Machinery filed its New York State and Local Sales and Use Tax Return for the quarterly period ended February 29,

1980 late on June 6, 1980. The return for the period ended May 31, 1980 was late filed on August 14, 1980 without a remittance. The sales and use taxes due with said return were remitted on July 22, 1982.

4. The sales and use tax return of MRR Enterprises, Inc. for the quarterly period ended May 31, 1981 was late filed on August 17, 1981 with a partial remittance. The balance of the sales and use taxes due was remitted on July 22, 1982. The return for the period ended August 31, 1981 was timely filed with a partial remittance. The balance of tax due was remitted in installments on April 10, 1982, June 29, 1982 and July 22, 1982. The return for the period ended November 30, 1981 was late filed on April 19, 1982 without a remittance. The sales and use taxes due were remitted on July 22, 1982. The return for the period ended February 28, 1982 was timely filed without a remittance and the sales and use taxes due are still outstanding.

5. Petitioner John Lang was the principal stockholder in MRR Enterprises, Inc. owning 51 percent of the outstanding stock. He also held the office of vice-president and was the general manager of the business. Mr. Lang hired an office manager to oversee the financial end of the business. Although Mr. Lang devoted the major portion of his time to sales and service, he was apprised on a monthly basis as to the financial status of the firm. The office manager allegedly failed, however, to divulge the difficulties the firm was having in meeting its sales and use tax obligations and this did not become known to Mr. Lang until early 1982 when the office manager left the employ of MRR Enterprises, Inc.

6. The office manager prepared and signed the corporate sales and use tax returns for the two quarterly periods ended February 29, 1980 and May 31, 1980. He also directed the preparation of the returns for the periods ended May 31,

1981, August 31, 1981, November 30, 1981 and February 28, 1982 which Mr. Lang signed. Mr. Lang signed the returns fully aware that all but the return for the period ended February 28, 1982, were being late filed.

7. Mr. Lang had the authority to sign checks on behalf of MRR Enterprises, Inc. and on occasion did write checks to creditors.

8. In April, 1982 when Mr. Lang discovered that the office manager had entered into an agreement with the Tax Department to pay over to the state the outstanding sales and use taxes, penalty and interest, he drafted a letter requesting that the file of MRR Enterprises, Inc. be reopened and reviewed. Mr. Lang based his request on the grounds that the office manager entered into the agreement without the prior authorization of the corporate officers and that the office manager had no authority to make any agreement on behalf of MRR Enterprises, Inc.

9. Petitioner Charles Mothon was president of MRR Enterprises, Inc. and owned 49 percent of the outstanding stock of the corporation. Mr. Mothon became involved in MRR Enterprises, Inc. because the major manufacturers represented by MRR Enterprises, Inc. required someone with some financial substance to be involved in the business. Mr. Mothon occupied the office of president of MRR Enterprises, Inc. due to the demands of the White Company, Massey Ferguson and Sperry New Holland. For the time period under review, Mr. Mothon was gainfully employed in another occupation and left the operation of MRR Enterprises, Inc. to Mr. Lang.

CONCLUSIONS OF LAW

A. That under section 1133(a) of the Tax Law, every person required to collect any tax imposed by Article 28 shall be personally liable for the tax imposed, collected or required to be collected. Under section 1131(1) "(p)ersons

required to collect tax" are defined to include any officer of a corporation who as such officer is under a duty to act for such corporation in complying with any requirement of said article.

B. That the resolution of whether an officer is a person required to collect tax turns upon a factual determination. Factors which directly relate to such a determination include the officer's day to day responsibilities and involvement with the financial affairs and management of the corporation, the officer's knowledge of such matters, the officer's involvement in the preparation and filing of tax returns, and the officer's authority to sign checks. (Vogel v. Dep't. of Taxation and Finance, 413 NYS2d 862; Chevlowe v. Koerner, 407 NYS2d 427.)

C. That petitioner John Lang was a person required to collect tax within the meaning and intent of section 1131(1) of the Tax Law. Petitioner Charles Mothon was but a passive investor in MRR Enterprises, Inc. and cannot be considered a responsible officer personally liable for the tax, penalty and interest of MRR Enterprises, Inc.

D. That the Tax Law does not excuse an officer of a corporation who is under a duty to act from penalty and interest which is due New York State. (Matter of Harold Cohen, State Tax Commission, December 14, 1982.)

E. That section 1145(a)(1) of the Tax Law provides that if the Tax Commission determines that a delay in filing a tax return was due to reasonable cause and not due to willful neglect, then it shall remit the full penalty and interest above the minimum. Under regulation section 536.1(b), reasonable cause for failure to file a return on time must be affirmatively shown by the taxpayer.

F. That petitioner John Lang has failed to establish that the delay in filing returns and paying over the tax was due to reasonable cause.

G. That the petition of Charles Mothon is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued October 1, 1982 is cancelled.

The petition of John Lang is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued October 1, 1982 is sustained.

DATED: Albany, New York

FEB 15 1985

STATE TAX COMMISSION

Rodrick A. Chu
PRESIDENT

Francis R. Kong
COMMISSIONER

Mark Smith
COMMISSIONER