

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
ALICE ANN SATTORA :
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 June 1, 1979 :
through November 30, 1979. :

DECISION

In the Matter of the Petition :
of :
JAMES E. SATTORA :
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 Ended June 9, :
1982. :

Petitioner, Alice Ann Sattora, 1432 West Lake Road, Conesus, New York 14435, 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 June 1, 1979 through November 30, 1979 (File No. 40125).

Petitioner, James E. Sattora, 1929 Poleridge Road, Avon, New York 14414, 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 ended June 9, 1982 (File No. 40124).

A hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, 259 Monroe Avenue, Rochester, New York, on June 4, 1985 at 2:00 P.M., with all briefs to be submitted by July 24, 1985. Petitioners

appeared by Streb, Porter, Meyer & Wesley (Roger G. Streb, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

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

II. Whether the Audit Division properly determined petitioner James E. Sattora's sales tax liability as a purchaser with respect to a bulk sales transaction in accordance with section 1141(c) of the Tax Law.

FINDINGS OF FACT

1. On September 13, 1982, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner Alice Ann Sattora in the amount of \$11,153.67, plus fraud penalty of \$5,576.84 and interest of \$4,003.56, for a total due of \$20,734.07 for the period June 1, 1979 through November 30, 1979.

2. On August 23, 1982, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner James E. Sattora in the amount of \$20,576.26 representing his liability as bulk purchaser of Jock's AM/PM Minimart from his father, Harold G. Sattora, who is also the husband of petitioner Alice Sattora.

3. Harold G. Sattora owned Jock's AM/PM Minimart ("Jock's") in Caledonia, New York under a franchise from Arco Petroleum Products Company ("Arco"). Jock's was a gas station with an attached quick service grocery store. In spring, 1979, there was a gasoline shortage and Harold's local Arco representative approached him with a plan to start an Arco operation in Dansville, New York. The Dansville station had been closed and the representative wanted to keep it

open in order to continue the gasoline allocation for that station. The representative asked Harold if he would be interested in entering into a double lease on the station in Dansville along with Jock's in Caledonia. Harold did not want to enter into a double lease transaction, so the representative asked if Harold's wife, petitioner Alice Sattora, would put the Dansville lease under her name with the Arco representative actually operating the station. Because of his position with Arco, the representative could not put the lease under his name.

4. Alice entered into the lease in May, 1979. In return, the Arco representative promised Harold that Harold could have some of the gas allocated to Dansville if he would transport it to Caledonia. Harold had been using up his allocation of gas and needed the additional gas from Dansville. Because Alice's name was on the lease, all billing statements from Arco were in her name; however, the Arco representative paid for the gas. Harold and Alice Sattora went to the Dansville station shortly after signing the lease but before the station opened. This was the only time either of them ever visited the station. Alice did not make any rent or utility payments on the Dansville station and hired no employees for the station; the Arco representative paid for all expenses. She worked full time as a computer operator for a fuel distributor during this period.

5. Over the seven months during which Alice's name was on the lease, Harold received approximately 66,000 extra gallons of gas through the Dansville station. This gas was billed to Dansville but paid for by Harold. After seven months, Alice wanted to end the lease because Harold was not receiving as much extra gas as he had been promised and, on December 11, 1979, the lease was terminated by mutual consent.

6. On audit of Jock's, the Audit Division received a printout from Arco of gas purchases for the Dansville station which were billed to Alice Sattora. The auditor went to the Dansville station and found that it had been closed for some time. He checked with neighboring businesses and automobile parts suppliers, none of whom recalled the station ever being operated by Alice Sattora or anyone named Sattora. When the auditor asked Mrs. Sattora for the business records of the Dansville station, she informed him that she had no records because she had never operated the station. Mrs. Sattora was also not registered as a vendor for sales tax purposes. Based solely on the Arco billing records, the auditor determined that Mrs. Sattora was responsible for collecting sales tax at the Dansville station and calculated her tax liability by multiplying the gallons purchased from Arco by the average retail selling price in the Rochester area as reported in area newspapers during the audit period.

7. In 1982, the Department of Taxation and Finance began collection actions against Harold Sattora, including seizing the assets of Jock's. On May 17, 1982, an inventory was taken of the merchandise remaining at Jock's. It was determined that the merchandise inventory totalled \$14,700.00 excluding beer. The beer inventory totalled \$5,341.26. The furniture, fixtures and equipment had a value of \$500.00. On May 21, 1982, petitioner James E. Sattora notified the Audit Division that he was purchasing Jock's from his father, Harold Sattora, on June 9, 1982. The selling price was reported as \$15,200.00, comprised of \$500.00 for furniture, fixtures and equipment and \$14,700.00 for merchandise inventory. On the same date, James Sattora's attorney advised the Audit Division that he had received \$15,235.00 from James to be held in escrow pending closing of the sale and release of the New York State sales tax levy on Jock's assets. Sometime between May 27 and June 2, 1982, the Department released

the lien on the assets of Jock's which had been levied upon for failure to pay sales taxes.

8. At the time of its closing, Jock's had gasoline in its inventory. This gas had not been paid for and, rather than take the gas back, Arco gave Harold credit for the gas and issued a new bill to James which James paid. There was also beer in inventory from five different distributors. Harold had outstanding accounts with these distributors. As with the gas, rather than have the distributors take their beer back, James paid Harold's bills for the beer. However, the distributors did not issue new bills to James as Arco did; James merely paid off Harold's outstanding accounts.

9. On audit, the auditor determined that the money paid for the gasoline was not part of the consideration for the sale of the business because Harold's account had been credited by Arco and a new bill issued to James. With respect to the beer inventory, however, the auditor determined that since James merely paid off Harold's outstanding accounts, the amount paid, \$5,341.26, was part of the consideration for the sale of the business and, therefore, had to be added to the \$15,235.00 paid for the equipment and merchandise inventory. Thus, James Sattora's liability as purchaser was determined to be \$20,576.26. Petitioner James Sattora argues that he paid for the beer as a convenience so that he would not have to reorder beer after the distributors removed the unpaid for beer and that, moreover, the entire inventory determination comprising the values reported on the bulk sale notification was based on appraisals conducted under the Department's auspices. The inventory specialist hired by the Department excluded the beer from Harold's inventory because it had not yet been paid for. Petitioner agrees that the \$15,235.00 placed in escrow was properly assessed.

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 who is under a duty to act as a person who is authorized to sign a corporation's tax returns or is responsible for maintaining the corporate books, or 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 inasmuch as Alice Sattora had no connection to the Dansville Arco station other than lending her name for use on the lease, she was not a person required to collect sales tax within the meaning and intent of sections 1131(1) and 1133(a) of the Tax Law.

D. That section 1141(c) of the Tax Law provides, in part, as follows:

"Whenever a person required to collect tax shall make a sale, transfer or assignment in bulk of any part or the whole of his business assets, otherwise than in the ordinary course of business, the purchaser, transferee or assignee shall at least ten days before taking possession of the subject of said sale, transfer or assignment, or paying therefor, notify the tax commission by registered mail of the proposed sale and of the price, terms and conditions thereof... Whenever the purchaser, transferee or assignee shall fail to give

notice to the tax commission...or whenever the tax commission shall inform the purchaser, transferee or assignee that a possible claim for such tax or taxes exists, any sums of money, property or choses in action, or other consideration, which the purchaser, transferee or assignee is required to transfer over to the seller, transferrer or assignor shall be subject to a first priority right and lien for any such taxes theretofore or thereafter determined to be due from the seller, transferrer or assignor to the state, and the purchaser, transferee or assignee is forbidden to transfer to the seller, transferrer or assignor any such sums of money, property or choses in action to the extent of the amount of the state's claim."

E. That the title to the beer originally passed to Harold Sattora upon delivery with only the reservation of security interests by the five distributors. U.C.C. §2-401(1). When James Sattora paid Harold's outstanding accounts with the distributors, he was merely releasing the security interests enabling Harold to transfer the beer to James as part of the sale. Thus, the \$5,341.26 paid to the distributors was additional consideration for the sale. This differed from the situation with respect to the gasoline in that Arco closed out Harold's account and opened a new account for James, in effect repossessing the gasoline and transferring title to James. The beer distributors did not transfer title to James, they merely released their security interests thereby allowing Harold to transfer title to James. Therefore, the \$5,341.26, as part of the consideration, was subject to a first priority right and lien for taxes due from Harold.

F. That the petition of Alice Ann Sattora is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 13, 1982 is cancelled.

G. That the petition of James E. Sattora is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued August 23, 1982 is sustained.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 03 1986


PRESIDENT


COMMISSIONER


COMMISSIONER