

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ROBERT HESS	:	DECISION
OFFICER OF BILL & WALT'S SERVICE CENTER, 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 June 1, 1979	:	
through May 31, 1982.	:	

Petitioner, Robert Hess, officer of Bill & Walt's Service Center, Inc., 28 Wagon Lane, Levittown, New York 11756, 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 May 31, 1982 (File No. 41653).

A hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 25, 1985 at 1:15 P.M. Petitioner appeared by John C. Groarke, Esq. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

#### ISSUES

I. Whether petitioner is personally liable for sales taxes due from Bill & Walt's Service Center, Inc.

II. Whether the Audit Division had a reasonable basis for issuing an assessment to petitioner, individually, as an officer of Bill & Walt's Service Center, Inc.

#### FINDINGS OF FACT

1. On December 20, 1982, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Robert Hess, as officer of Bill & Walt's Service Center, Inc. ("B & W"), covering the

period June 1, 1979 through May 31, 1982 for taxes due of \$108,661.19, plus fraud penalty of \$54,330.60 and interest of \$24,758.10, for a total of \$187,749.89.

2. The Audit Division had conducted a field audit of B & W's books and records for the period June 1, 1979 through May 31, 1982. The audit disclosed additional taxes due of \$108,661.19. As a result of the audit, the Audit Division issued the above notice as well as notices in the same amount to B & W and William Lichtenberger, as officer of B & W.

3. Following a Tax Appeals Bureau pre-hearing conference with B & W and William Lichtenberger, individually, the Audit Division agreed to reduce the tax due to \$65,602.20. Based on the reduction against B & W, counsel for the Audit Division conceded that the notice against petitioner should be revised accordingly.

4. In 1974, petitioner invested \$5,000.00 in cash and contributed tools and equipment worth approximately \$5,000.00 in exchange for fifty percent ownership of B & W. The other fifty percent was owned by Mr. Lichtenberger. Petitioner's duties involved the repair of automobiles. He was not involved with maintaining the books and records, preparing or filing tax returns and had no authority to determine which bills should be paid. Petitioner was an authorized signatory on the business bank account; however, he only signed checks when Mr. Lichtenberger was absent. Petitioner and Mr. Lichtenberger received comparable wages from the business. Petitioner worked full time at the station and had no other source of income. He had the authority to hire and fire employees.

5. In May, 1982, petitioner and Mr. Lichtenberger had a falling out which resulted in the preparation of an agreement between the two which provided that Mr. Lichtenberger would purchase petitioner's interest in the corporation for

\$20,000.00. Petitioner signed the agreement; however, Mr. Lichtenberger refused to sign the agreement when he learned that stock certificates were never issued to petitioner. Petitioner was never officially a stockholder or an officer of the corporation and, on that basis, Mr. Lichtenberger would not pay petitioner for his financial interest in the corporation.

6. During the period at issue, petitioner considered himself a stockholder and officer of B & W.

7. When the Audit Division was conducting the audit of B & W, the accountant representing B & W, William Ferrier, advised the auditor that the corporation officers were William Lichtenberger and Robert Hess, and each owned fifty percent of the stock. Mr. Ferrier produced unsigned copies of federal corporation tax returns for the years 1979, 1980, 1981 and 1982 which, except for 1982, listed the aforementioned persons as the officers. Based on this information, the Audit Division issued the notices referred to in Findings of Fact "1" and "2" to the respective officers.

8. Petitioner took the position that since he was never an officer or stockholder of B & W, he cannot be held personally liable for unpaid sales taxes.

#### CONCLUSIONS OF LAW

A. That section 1133(a) of the Tax Law places personal liability for the taxes imposed, collected or required to be collected under Article 28 upon "every person required to collect any tax" imposed by said article. Section 1131, subdivision (1) furnishes the following definition for the term "persons required to collect tax":

"'Persons required to collect tax' or 'person required to collect any tax imposed by this article' shall include: every vendor of tangible personal property or services; every recipient of amusement charges; and every operator of a hotel. Said terms shall also include any

officer or employee of a corporation or of a dissolved corporation who as such officer or employee is under a duty to act for such corporation in complying with any requirement of this article and any member of partnership." (Emphasis supplied).

B. That resolution of the issue of personal liability for sales tax due turns upon a factual determination in each case (Vogel v. Dep't. of Taxation and Finance, 98 Misc.2d 222; Chevlowe v. Koerner, 95 Misc.2d 388). Relevant factors in making such determination include, inter alia, day-to-day responsibilities in the corporation, involvement in and knowledge of the corporation's financial affairs and its management, the identity of who prepared and signed tax returns and the authority to sign checks [Vogel, supra; see also 20 NYCRR 526.11(b)]. It is noted, in contrast to petitioner's assertion, that the fact that one is not an officer of a corporation does not absolutely absolve that individual of responsibility.

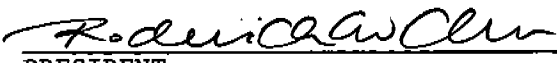
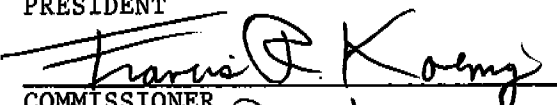
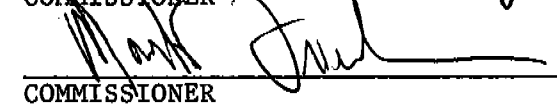
C. That petitioner had limited involvement with and knowledge of the financial affairs and management of B & W. Accordingly, he was not a person under a duty to collect, truthfully account for and pay over sales and use taxes within the meaning and intent of sections 1131(1) and 1133(a) of the Tax Law and thus bears no personal liability for the taxes due from B & W.

D. That in view of Conclusion of Law "C" Issue II is moot.

E. That the petition of Robert Hess, officer of Bill & Walt's Service Center, Inc. is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued December 20, 1982 is cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

  
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PRESIDENT  
  
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COMMISSIONER  
  
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COMMISSIONER