

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
 :
 of :
 :
 HAROLD FELDER, SECRETARY OF :
 WE DO IT ALL 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 September 1, :
 1979 through August 31, 1980. :

In the Matter of the Petition :
 :
 of :
 :
 FRANK MIR, PRESIDENT OF :
 WE DO IT ALL 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 September 1, :
 1979 through August 31, 1980. :

DECISION

In the Matter of the Petition :
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 of :
 :
 FRANK NATALE, TREASURER OF :
 WE DO IT ALL 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 September 1, :
 1979 through August 31, 1980. :

Petitioners, Harold Felder, 1744 Bard Lane, East Meadow, New York 11554,
Frank Mir, 78 Lyon Lane, Westbury, New York 11590 and Frank Natale, 7 Regina
Avenue, Bellmore, New York 11710, each 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 September 1, 1979 through August 31, 1980 (File Nos. 42972, 42973 and 42974).

A consolidated hearing was held before Brian L. Friedman, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 5, 1986 at 1:15 P.M., with additional evidence to be submitted by May 7, 1986. Petitioners appeared by David M. Millman, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Kevin A. Cahill, Esq., of counsel).

ISSUES

I. Whether petitioners were persons required to collect and pay over sales tax on behalf of We Do It All Service Center, Inc. within the meaning and intent of sections 1131(1) and 1133(a) of the Tax Law for the period at issue herein.

II. If so, whether the Audit Division properly determined the sales taxes due from We Do It All Service Center, Inc. for the period at issue.

FINDINGS OF FACT

1. On September 20, 1982, subsequent to a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Harold Felder as Secretary of We Do It All Service Center, Inc. (hereinafter "the corporation"), for the period September 1, 1979 through August 31, 1980, asserting total tax due of \$11,680.77 plus interest of \$2,661.86, for a total amount due of \$14,342.63. On the same date identical notices were issued to Frank Mir as President of the corporation and to Frank Natale as treasurer of the corporation.

2. The corporation operated a Vantage service station at 944 Jerusalem Avenue, Uniondale, New York, from September 1, 1979 until November 30, 1980. Form ST-105, Certificate of Registration, filed with the Department of Taxation and Finance by the corporation, listed as its principal officers:

Frank Mir	- President
Willie Kelty	- Vice President
Frank Natale	- Treasurer
Harold Felder	- Secretary

Each of the officers invested \$5,000.00 in the corporation and in return therefor, each held corporate offices.

3. Petitioner Harold Felder was the secretary of the corporation from the time it began doing business on September 1, 1979. He had control of the corporate books and was responsible for the filing of the corporation's tax returns and for the payment of its taxes. The corporation's New York State and Local Sales and Use Tax Return for the period September 1, 1979 through November 30, 1979 was signed by Harold Felder as secretary on December 20, 1979. Mr. Felder had a dispute with Willie Kelty and resigned from the corporation at the end of January, 1980, although said resignation was not submitted in writing. At that time, he turned over the corporate books to Willie Kelty, and discontinued working at the service station. On March 1, 1980, the corporation executed a written corporate resolution designating the National Bank of North America as a depository of the corporation. The corporate resolution was signed by Willie Kelty as president and by Frank Natale as vice president and secretary.

4. Petitioner Frank Mir was the president of the corporation from the time it commenced business on September 1, 1979. He opened the service

station each morning at 7:00 A.M. and worked until 5:00 P.M. His primary function was to perform body work at the service station for B & W Used Cars, a company owned by Harold Felder and Willie Kelty. Petitioner Frank Mir was an authorized signatory for corporate checks and had the authority to sign corporate tax returns, but does not recall ever having signed corporate returns. He left the corporation at the end of November 1979 and took a job with Flower Hill Auto Body in Roslyn, New York where he worked daily from 8:00 A.M. until 5:30 P.M. When he left the corporation in November 1979, Mr. Mir turned in his keys to the service station, but never executed a written letter of resignation.

5. Petitioner Frank Natale was the treasurer of the corporation from the time it commenced business on September 1, 1979. Mr. Natale did not perform any work at the service station due to physical incapacity, but he spent a considerable amount of time at the station. He had authority to sign corporate checks and tax returns and often did so. Mr. Natale desired to resign from the corporation in March 1980. He contacted Robert S. Witt, C.P.A., the corporation's accountant, who drew up an agreement whereby Mr. Natale was to receive \$2,000.00 from his original investment. However, Mr. Natale received only \$1,000.00 from the corporation upon his resignation in March 1980. On the corporate resolution of March 1, 1980, which designated the National Bank of North America as a depository of the corporation, Frank Natale is listed as the vice president and secretary of the corporation. A subsequent signature card and corporate resolution were filed with the National Bank of North America (now known as National Westminster Bank USA) on

March 28, 1980 which deleted Mr. Natale as an officer and signatory of the corporation.

6. At the time of the commencement of the audit in November 1981, the service station at 944 Jerusalem Avenue, Uniondale, New York, was no longer in business. The Audit Division obtained the names of the corporate officers from the Certificate of Registration filed with the Department. No books and records were provided to the auditor by any of the officers nor by the accountants to whom the auditor was referred by the said officers.

7. Because the service station was no longer in operation at the time of the audit and books and records were not provided, the Audit Division contacted the corporation's supplier of gasoline, Vantage Petroleum Co., and obtained therefrom the total purchases by the corporation. Vantage Petroleum Corp. reported that, for the period at issue, the corporation had purchased \$131,697.00 worth of gasoline. Based upon the auditor's experience in audits of service stations in that particular area, a 10 percent mark-up was applied (excluding the State gasoline tax) which resulted in taxable gasoline sales of \$144,866.70.

8. Although the service station was no longer doing business at the time of the audit, the auditor visited the premises on two occasions and ascertained that the service station contained one repair bay. Based upon his observation and his experience in audits of service stations in the same area as the corporation's service station, the auditor estimated parts and repair sales of \$12,000.00 per sales tax quarter, or \$60,000.00 for the five sales

tax quarters at issue.

9. Taxable gasoline sales of \$144,866.70 were added to parts and repair sales of \$60,000.00 resulting in audited taxable sales of \$204,866.70. The corporation had reported taxable sales of \$37,998.00 for this period. Additional taxable sales were, therefore, determined to be \$166,868.70 which represented an underreporting factor of 439.15 percent. The applicable sales tax rate of 7 percent was applied, resulting in additional sales tax due in the amount of \$11,680.77.

10. Each of the petitioners argued that the gasoline purchases supplied by Vantage Petroleum Corp. were erroneous and that the estimated parts and repair sales were excessive. Petitioners further argued that most of the repair work performed at the service station was body work performed for B & W Used Cars and, therefore, that the corporation was not required to collect sales tax on said body work. No resale certificates or other exemption certificates were presented by petitioners relative to the work alleged to have been performed for B & W Used Cars. Furthermore, no credible evidence was adduced by petitioners to support their argument that gasoline purchases supplied by Vantage Petroleum Corp. were erroneous or that estimated parts and repair sales were excessive.

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 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.

B. That the determination of whether an individual is a person or officer under a duty to act for the corporation is based upon the facts presented (Vogel v. New York State Department of Taxation and Finance, 98 Misc.2d 222). The relevant factors include, but are not limited to: the individual's daily involvement in the corporation; the individual's participation and involvement in the financial affairs of the corporation; the individual who prepared and signed the sales and use tax returns; the individual's authority to draft checks on the firm's bank account; and, in the case of a closely-held corporation, the individual's knowledge of the affairs of the firm and benefits from the firm's profits (Matter of Robert Gattie, State Tax Commission, September 5, 1980).

C. That petitioner Harold Felder was a person under a duty to collect sales and use taxes for We Do It All Service Center, Inc. for the period September 1, 1979 through January 31, 1980. This determination is based upon the fact that he remained an officer of the corporation, that he had control of corporate books and records and was responsible for the filing of corporate tax returns and payment of corporate taxes for this period.

D. That petitioner Harold Felder was not a person under a duty to collect sales and use taxes for We Do It All Service Center, Inc. for the period February 1, 1980 through August 31, 1980. During this period, Mr. Felder had resigned from his office of secretary of the corporation, had no

authority or control over corporate books and records, was no longer a signatory for corporate bank accounts and took no part in the day-to-day business of operating the corporation's service station.

E. That petitioner Frank Mir was a person under a duty to collect sales and use taxes for We Do It All Service Center, Inc. for the period September 1, 1979 through November 30, 1979. This determination is based upon the fact that, for said period, he was an officer of the corporation, was an authorized signatory for corporate checks, had authority to sign corporate tax returns and was employed, on a full-time basis, at the corporation's service station.

F. That petitioner Frank Mir was not a person under a duty to collect sales and use taxes for We Do It All Service Center, Inc. for the period December 1, 1979 through August 31, 1980. As of December 1, 1979, Mr. Mir had severed all ties with the corporation. He no longer acted as president of the corporation, was not an authorized signatory for the corporate bank accounts and no longer worked at the corporation's service station. As of December 1, 1979, Mr. Mir worked, on a full-time basis, at another service station located in Roslyn, New York.

G. That petitioner Frank Natale was a person under a duty to collect sales and use taxes for We Do It All Service Center, Inc. for the period September 1, 1979 through March 27, 1980. This determination is based upon the fact that, for said period, he was an officer of the corporation, had the authority to and did, in fact, sign corporate checks and tax returns and spent a considerable amount of his time at the corporation's service station.

H. That petitioner Frank Natale was not a person under a duty to collect sales and use taxes for We Do It All Service Center, Inc. for the period March 28, 1980 through August 31, 1980. Mr. Natale resigned from his duties as an officer of the corporation and, as of March 28, 1980, was no longer authorized to act as a signatory for corporate bank accounts.

I. That no books and records were provided to the Audit Division by the corporation for purposes of substantiating taxable sales. Accordingly, the Audit Division's use of third party verification of purchases and of an estimated markup audit as a basis for determining the sales tax liability of We Do It All Service Center, Inc. was proper pursuant to section 1138(a) of the Tax Law.

J. That the estimate procedures adopted by the Audit Division were reasonable under the circumstances and petitioners failed to sustain their burden of showing that the method of audit or the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. State Tax Commission, 85 A.D.2d 858).

K. That the petition of Harold Felder, secretary of We Do It All Service Center, Inc., is granted to the extent indicated in Conclusion of Law "D"; the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, issued to said petitioner on September 20, 1982; and that, except as so granted, the petition is in all other respects denied.

L. That the petition of Frank Mir, president of We Do It All Service Center, Inc., is granted to the extent indicated in Conclusion of Law "F"; the Audit Division is hereby directed to modify the Notice of Determination and

Demand for Payment of Sales and Use Taxes Due, issued to said petitioner on September 20, 1982; and that, except as so granted, the petition is in all other respects denied.

M. That the petition of Frank Natale, treasurer of We Do It All Service Center, Inc., is granted to the extent indicated in Conclusion of Law "H"; the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued to said petitioner on September 20, 1982; and that, except as so granted, the petition is in all other respects denied.

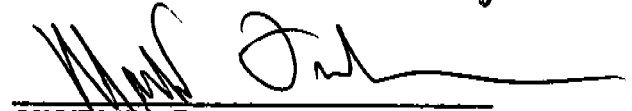
DATED: Albany, New York

STATE TAX COMMISSION

SEP 26 1986


PRESIDENT


COMMISSIONER


COMMISSIONER