

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

JOHN E. McINTOSH, JR. :

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 Period Ended November 30,
1978 and the Periods Ended November 30, 1979 :
through November 30, 1980. :

Petitioner, John E. McIntosh, Jr., 11 Euclid Avenue, Lockport, NY 14094, 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 November 30, 1978 and the periods ended November 30, 1979 through November 30, 1980 (File No. 43270).

A formal hearing was held before James J. Morris, Jr., Hearing Officer, at the offices of the State Tax Commission, State Office Building, 65 Court Street, Buffalo, New York, on April 3, 1985 at 9:15 A.M., with all briefs to be submitted by June 17, 1985. Petitioner appeared by Ralph J. Gregg, Esq. The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of Counsel).

ISSUE

Whether the State Tax Commission has jurisdiction to conduct an administrative hearing regarding petitioner, John E. McIntosh, Jr., with respect to his personal liability for penalty and interest on sales taxes due from 2075 Sheridan Drive, Inc., and, if so, whether petitioner was a person responsible for the payment of such taxes.

FINDINGS OF FACT

1. On June 7, 1982, the Audit Division issued to petitioner, John E. McIntosh, Jr., as officer of 2075 Sheridan Drive, Inc., a Notice and Demand for Payment of Sales and Use Taxes Due for the period ended November 30, 1978 and the periods ended November 30, 1979 through November 30, 1980, with respect to penalty in the amount of \$1,281.10 and interest in the amount of \$2,349.76 accrued to the date of issuance of the notice.

2. The notice of determination provided on its face the following explanation as the basis for issuance, together with a detailed breakdown of the amounts for each of the quarterly periods at issue:

"[y]ou are personally liable as a responsible officer of 2075 Sheridan Drive Inc. under Sections 1131(1) and 1133 of the Tax Law."

<u>PERIOD ENDING</u>	<u>TAX DUE</u>	<u>PENALTY DUE</u>	<u>INTEREST DUE</u>
11/30/78	-0-	\$1,056.16	\$1,302.80
11/30/79	-0-	23.44	459.16
2/29/80	-0-	-0-	159.67
5/31/80	-0-	-0-	62.26
8/31/80	-0-	201.50	337.43
11/30/80	-0-	-0-	28.44

3. The above Notice and Demand issued to petitioner stems from assessments issued against 2075 Sheridan Drive Inc., as a result of that entity's filing of sales and use tax returns for the periods at issue, which returns had either no remittance of the tax shown as due thereon or were filed and paid later than the due date therefor without payment of interest and penalty. All sales taxes as shown due on such returns were paid subsequent to the filing of said returns. The only outstanding liability at issue herein is interest and penalty.

4. Petitioner is listed as the president of 2075 Sheridan Drive, Inc. upon its "Certificate of Registration" as a sales and use tax vendor.

5. Petitioner offered no testimony or other evidence in support of the assertions raised in his petition, but rather rests his entire case upon the following arguments: (a) that under the particular factual circumstances, the State Tax Commission lacks jurisdiction to determine petitioner's liability for the taxes at issue via its administrative hearing procedure; and (b) that the Commission does not have the authority to hold petitioner personally liable for penalty and interest owing from the corporation due to the corporation's failure to timely file and pay sales taxes. A determination by this body that no administrative remedy lies in this situation would remove a potential obstacle to judicial action by petitioner.

6. Petitioner submitted proposed "findings of fact" with respect to this proceeding which have been substantially incorporated in Findings of Fact 1-3 herein.

CONCLUSIONS OF LAW

A. That where as here, correct returns were submitted by the corporate entity, this Commission is not empowered to determine a petitioner's liability as "a person required to collect tax" for the corporation's unpaid sales taxes in an administrative hearing. [Matter of Parsons v. State Tax Commission, 34 N.Y.2d 190 (1974); Matter of William R. Hall v. State Tax Commission, 108 A.D.2d 488 (Third Dept., 1985)].

B. That for the periods herein, section 1145(a)(3) of the Tax Law in pertinent part provided that:

"Unpaid penalties and interest may be determined, assessed, collected and enforced in the same manner as the tax imposed by this article."

Since penalties and interest are to be determined in the same manner as tax, and since this Commission lacks the authority to determine the petitioner's liability as a person required to collect tax for the sales taxes claimed due herein in an

administrative hearing, it follows that it likewise lacks the authority determine a petitioner's liability as a person required to collect tax for interest and penalties in respect of such taxes in its administrative hearings.

C. That since this Commission does not have the authority to determine petitioner's liability at an administrative hearing, his petition is dismissed.

DATED: Albany, NY

JAN 28 1986

STATE TAX COMMISSION

Rodnick Arch
PRESIDENT

Francis P. Koenig
COMMISSIONER

Mark Jink
COMMISSIONER