

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	DECISION
	:	
ROLAND G. GRAY	:	
	:	
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, 1981	:	
through May 31, 1982 and November 30, 1982.	:	

Petitioner, Roland G. Gray, Box 127, Liverpool, New York 13088, 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, 1981 through May 31, 1982 and November 30, 1982 (File No. 43335).

A hearing was held before Arthur Bray, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York on October 7, 1985 at 2:45 p.m. with all briefs to be submitted by November 27, 1985. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

#### ISSUES

I. Whether the Audit Division must attempt to collect sales taxes due from other parties before it attempts to collect the entire amount due from petitioner.

II. Whether petitioner was a person required to collect and pay over sales taxes on behalf of Graycor Construction Co., Inc. within the meaning and intent of sections 1131(1) and 1133(a) of the Tax Law during the periods at issue herein, and, if so, whether the Audit Division determined the correct amount of tax due.

FINDINGS OF FACT

1. On April 15, 1983 the Audit Division issued to petitioner, Roland G. Gray, a Notice and Demand for Payment of Sales and Use Taxes Due for the period ended November 30, 1979. The notice assessed tax due of \$358.44 plus penalty of \$189.60 and interest of \$271.84 for a total amount due of \$819.88. Thereafter, the Audit Division issued a Notice of Assessment Review cancelling the foregoing assessment.

2. On April 15, 1983 the Audit Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the periods ended November 30, 1981 through May 31, 1982 and November 30, 1982. The Notice assessed a tax due of \$8,061.38 plus penalty of \$564.28 and interest of \$225.07 for a total amount due of \$8,850.73. The Notice stated that as an officer of Graycor Construction Co., Inc. ("Graycor") petitioner was personally liable for the assessed tax. The amount of tax assessed was estimated on the basis of a multiple of the amount of taxable sales previously reported by Graycor.

3. After the Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued, the Audit Division reduced the amount of tax sought by \$1,386.38 based on proof submitted on behalf of Graycor which established that it was not in business during the quarter ended November 30, 1982.

4. Graycor was incorporated on or about May 13, 1977. Graycor's certificate of registration for sales tax listed Margaret Komel as president and petitioner as vice-president. Margaret Komel and petitioner were married to each other at the time Graycor began operating.

5. Graycor engaged in insurance estimating and general contracting.

6. Graycor's books and records were maintained by a secretary who also functioned as a bookkeeper. Graycor's tax returns were prepared by an accountant

based on information provided by the secretary. Thereafter, petitioner would sign the tax returns and indicate that his title was vice-president and general manager. Although petitioner acknowledged he was the office manager, he was never formally elected to an office of the corporation.

7. Petitioner had the authority to sign checks and, in conjunction with Margaret Komel, decided what bills would be paid. On occasion, petitioner would be involved with inquiries made by creditors of Graycor.

8. Petitioner had the authority to hire and fire employees.

9. Petitioner would examine the financial records of Graycor. However, he maintained that he did not have the training to understand them.

10. Petitioner resigned from Graycor effective June 23, 1982.

11. On or about July 20, 1982 petitioner and Margaret Komel were divorced. One provision of the divorce decree provided that Margaret Komel was to transfer all of her interest in Graycor to petitioner and that petitioner was to assume all of the responsibilities and obligations thereon. In spite of this, Margaret Komel has retained custody of all of the corporation's books and records.

12. Graycor was audited for compliance with sales and use tax reporting requirements for the period December, 1978 through August, 1981. Petitioner was the person who assisted the Audit Division in conducting the audit. In the course of the audit it was noted that Graycor was delinquent on its filing of sales and use tax returns for two quarters. However, these returns were filed before the audit was completed. Consequently, the Audit Division concluded that no additional tax was due.

13. During the one year period prior to petitioner's divorce, the amount of the corporation's business activity steadily subsided until, at the time of the divorce, the corporation ceased activity.

14. At the hearing, petitioner acknowledged that the corporation had sales and use tax liability, including penalties and interest, of approximately \$1,000.00 and maintained that this represented the total liability of the corporation. Petitioner also asserted that Graycor never did the level of business to warrant the amount of tax assessed. This testimony is found credible and supported by the sales and use tax returns in the record and the report of the prior field audit. In view of the of the foregoing, the amount of tax due is determined to be \$300.00 per quarter for the periods ended November 30, 1981 through May 31, 1982.

15. Petitioner also maintained at the hearing that the Audit Division should have first attempted to collect the amount of tax due from Graycor or from Margaret Komel.

#### CONCLUSION 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. Accordingly, petitioner, who served as office manager, is not relieved of liability by the fact that he may not have been formally elected an officer of Graycor.

B. That in Matter of Keith Pierpont, Officer of Treemania, Inc. (State Tax Commission, October 21, 1983) it was noted that "... a person required to collect tax who is equally liable with others for the payment of unpaid tax,

cannot avoid collection against himself on the ground that the State should first collect it from other parties (citations omitted)". Therefore, petitioner may not use as a defense the fact that Graycor or another individual may also be liable.

C. 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).

D. That in Matter of Robert Gattie (State Tax Commission, September 5, 1980) it was noted that the relevant factors to determine whether an individual is a person required to collect tax includes, but is not limited to the following:

"...the officer's day to day responsibilities in the corporation; the officer's involvement in and knowledge of the financial affairs of the corporation; the identity of the officers who prepared and signed Sales and Use Tax Returns; the officer's authority to sign checks on the corporation's bank accounts; and in the case of a closely held corporation, the officer's knowledge of corporate affairs and benefits he received from the corporate profits."

E. That in view of the facts, among others, that petitioner served as Graycor's office manager; was involved in Graycor's financial affairs; signed Graycor's sales and use tax returns and had the authority to sign checks, it is clear that petitioner was under a duty to act for the corporation in complying with any requirements of the Sales Tax Law.


F. That on the basis of Findings of Fact "13" and "14", the amount of tax due is reduced to \$300.00 per quarter for the periods ended November 30, 1981 through May 31, 1982.

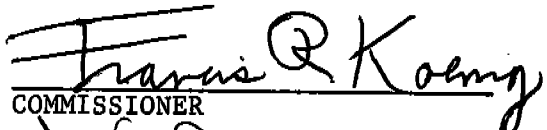
G. That the petition of Roland Gray is granted to the extent of the Conclusion of Law "F" and the Audit Division is directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due accordingly; the petition is, in all other respects denied and, as modified, the Notice is sustained.

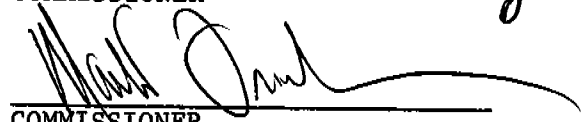
DATED: Albany, New York

STATE TAX COMMISSION

**JUN 19 1986**

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER