

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

RALPH SERPICO, OFFICER OF
INDUSTRIAL SCRAP PROCESSING CORP.

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 March 1, 1977
through February 28, 1981.

Petitioner, Ralph Serpico, Officer of Industrial Scrap Processing Corp.,
c/o 105 Court Street, Room 500, Brooklyn, New York 11201, 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 March 1, 1977 through
February 28, 1981 (File No. 43712).

A hearing was held before Frank A. Landers, Hearing Officer, at the
offices of the State Tax Commission, Two World Trade Center, New York, New
York, on October 23, 1986 at 10:45 A.M., with all briefs to be filed by
January 23, 1987. Petitioner appeared by John R. Serpico, Esq. The Audit
Division appeared by John P. Dugan, Esq. (Angelo A. Scopellito, Esq., of
counsel).

ISSUES

I. Whether petitioner, Ralph Serpico, was a person required to collect
tax within the meaning of section 1131(1) of the Tax Law and, therefore, could
be held personally liable for any taxes due from Industrial Scrap Processing
Corp. pursuant to section 1133(a) of the Tax Law.

11. If so, whether the Audit Division properly assessed use taxes against
the petitioner.

FINDINGS OF FACT

1. On December 21, 1981, the Audit Division issued to petitioner, Ralph Serpico, officer of Industrial Scrap Processing Corp. ("Industrial"), a Notice of Determination and Demand for Payment of Sales and Use Taxes Due assessing sales and use taxes of \$129,764.00, plus penalty of \$31,972.17 and interest of \$46,511.08, for a total amount due of \$208,247.25 for the period March 1, 1977 through August 31, 1980. On the same date, the Audit Division issued a second Notice of Determination to petitioner assessing sales and use taxes of \$6,739.16, plus penalty of \$1,045.90 and interest of \$744.45, for a total amount due of \$8,529.51 for the period September 1, 1980 through February 28, 1981.

2. In the later part of 1979, Samuel Neblett, an auditor for the Audit Division initiated an examination of the books and records of Industrial. Mr. Neblett determined additional sales and use taxes were due from Industrial which may be summarized as follows:

Additional taxable sales	\$ 205,200	
Taxable sales reported	<u>410,397</u>	
Adjusted taxable sales	\$ 615,597	
Statutory rate	<u>8%</u>	
Tax due on taxable sales		\$ 49,247.76
 Disallowed nontaxable sales	 \$ 417,018	
Statutory rate	<u>8%</u>	
Tax due on disallowed nontaxable sales		33,361.44
 Machinery and equipment	 \$1,700,000	
Statutory rate	<u>4%</u>	
Tax due on machinery and equipment		68,000.00
 Repairs and maintenance expense	 \$ 377,866	
Statutory rate	<u>4%</u>	
Tax due on repair and maintenance expense		<u>15,114.64</u>
 Total sales and use tax due		\$165,723.84
Less: tax paid or assessed		<u>29,220.68</u>
Additional sales and use taxes due		\$136,503.16

On November 10, 1981, Industrial, by signature of its representative, executed a Consent to Fixing of Tax Not Previously Determined and Assessed whereby it agreed to the above sales and use tax liability.

3. On December 21, 1981, the Audit Division issued to Industrial two notices and demands for payment of sales and use taxes due which were identical to the notices of determination issued to petitioner. Industrial, by signature of its vice-president, Joseph Serpico, had previously executed consents extending the statute of limitations for assessing sales and use taxes due for the period March 1, 1977 through February 29, 1980 to March 30, 1982.

4. Petitioner contests neither the audit methodology nor the additional taxes found due, but rather claims that he was not a responsible officer of Industrial during the audit period. Petitioner argued alternatively that, if he is found to be a responsible officer, he cannot be held liable for use taxes.

5. Industrial, a New York corporation, operated as a scrap metal processor and auto parts retailer from its property located at 681 East 56th Street in Brooklyn, New York. At all times the property was owned by petitioner's father. In 1973, subsequent to their father's retirement, Ralph Serpico became the president of Industrial and ran the scrap processing operations, and his brother, Joseph Serpico, became vice-president and secretary and ran the auto parts operations. In or about 1975, the brothers realized that Industrial was not big enough and decided to expand their operations. Accordingly, on January 7, 1975, Industrial purchased property located at 475 Exterior Street in the Bronx, New York from Gerosa-Paladino Corporation for \$554,000.00. For the next three and one-half years petitioner spent the majority of his time and a substantial portion of the assets of Industrial

developing a scrap metal processing business at this location. The new corporation began operations on October 1, 1979 and was known as Bronx Industrial Scrap Processing Corp. Due to financial difficulties, in or about August 1982 both corporations completely ceased operations at the direction of petitioner and the business assets were presumably sold for one-tenth of cost.

6. During the period at issue, petitioner, as authorized, signed corporate checks on behalf of Industrial. Petitioner at his own direction utilized the employees, equipment and cash of Industrial developing the Bronx facility. Petitioner signed seven New York State and local sales and use tax returns filed by Industrial during the audit period. For the years 1976, 1977 and 1978 petitioner was paid salaries, as president, by Industrial of \$80,900, \$44,993 and \$40,746, respectively, whereas his brother was paid, as vice-president, \$69,900, \$39,600 and \$20,000, respectively.

7. On June 16, 1978, Industrial purchased an automobile shredder from The Pettibone Companies of Cedar Rapids, Iowa for \$1,700,000. It is conceded by petitioner that no taxes were paid on said purchase and that, accordingly, use taxes are due to New York State.

8. Petitioner maintains that between 1975 and 1982 he spent his time developing and running Bronx Industrial Scrap Processing Corp. Petitioner claims that he had nothing to do with Industrial during this period, and that Industrial was controlled by Joseph Serpico and Alan Jacobs, Industrial's accountant.

9. Included in petitioner's brief were proposed findings of fact, as to which this commission makes the following rulings:

- a. Proposed findings 1, 2, 4, 5, 7, 8, 9, 11, 12, 16, 18 & 19 are adopted and have been incorporated into this decision.

- b. Proposed findings 3, 10, 13, 14, 15 & 20 are rejected as not established by the evidence. Proposed findings 6 & 17 are rejected as irrelevant.

CONCLUSIONS OF LAW

A. That section 1131(1) of the Tax Law, in effect during the period in issue, provides:

"'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.... 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 a partnership."

B. That section 1131(3) of the Tax Law provides:

"'Tax' shall include any tax imposed by sections eleven hundred five, or eleven hundred ten, and any amounts payable to the tax commission by a person required to file a return, as provided in section eleven hundred thirty-seven."

C. That section 1133 of the Tax Law provides:

"(a) Except as otherwise provided in section eleven hundred thirty-seven, every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article."

D. That the resolution of whether petitioner, Ralph Serpico, **is** a person required to collect tax turns upon a factual determination in each case.

(Vogel v. New York State Department of Taxation and Finance, 98 Misc 2d 222

Chevlowe v. Koerner, 95 Misc 2d 388.) Relevant factors in such a determination include, but are not limited to, the following: the day-to-day responsibilities in the corporation, involvement in and knowledge of the financial affairs of the corporation; the identity of who prepared and signed tax returns; authority to sign checks.

E. That petitioner signed checks and sales tax returns as president of Industrial Scrap Processing Corp. Petitioner, at his own discretion, freely

utilized the assets of said corporation and personally terminated its operation in 1982. Petitioner also received a substantial salary from Industrial Scrap Processing Corp.

F. That petitioner has failed to establish that he was not an officer or employee under a duty to act for Industrial Scrap Processing Corp. Accordingly, petitioner was a person required to collect tax within the meaning and intent of section 1131(1) of the Tax Law and, therefore, is personally liable for the tax due from said corporation pursuant to section 1133(a) of the Tax Law.

G. That section 1110 of the Tax Law provides:

"Except to the extent that property or services have already been or will be subject to the sales tax under [Article 28], there is hereby imposed on every person a use tax for the use within this state... (A) of any tangible personal property purchased at retail... ."


H. That, pursuant to the meaning and intent of sections 1131, 1133 and 1110 of the Tax Law, the Audit Division properly assessed petitioner, Ralph Serpico for the use tax liability of Industrial Scrap Processing Corp.

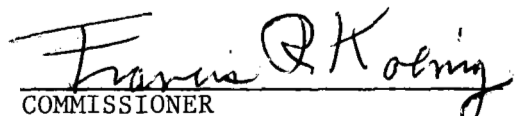
I. That the petition of Ralph Serpico, officer of Industrial Scrap Processing Corp., is denied and the notices of determination and demands for payment of sales and use taxes due issued December 21, 1981 are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

APR 17 1987


PRESIDENT


COMMISSIONER


COMMISSIONER