

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
SAMUEL TOMASHOVER, :  
OFFICER OF ROUTE 59 GAS, 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 February 13, 1981 :  
through June 11, 1981. :

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DECISION

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In the Matter of the Petition :  
of :  
CHAIM BRATT, :  
OFFICER OF ROUTE 59 GAS, 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 February 13, 1981 :  
through June 11, 1981. :

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Petitioner Samuel Tomashover, Officer of Route 59 Gas, Inc., 1428 North Broad Street, Hillside, New Jersey 07205, 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 February 13, 1981 through June 11, 1981 (File No. 44136).

Petitioner Chaim Bratt, Officer of Route 59 Gas, Inc., 201 East 87th Street, New York, New York 10028, 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 February 13, 1981 through June 11, 1981 (File No. 44137).

A hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on

March 11, 1985 at 1:15 P.M. Petitioners appeared by Alan M. Stark, Esq. The Audit Division appeared by John P. Dugan, Esq. (Irwin Levy, Esq., of counsel).

#### ISSUES

I. Whether petitioners were persons required to collect and pay over sales tax on behalf of Route 59 Gas, Inc. within the meaning and intent of sections 1131(1) and 1133(a) of the Tax Law during the periods at issue herein.

II. If so, whether the Audit Division properly determined the sales taxes due from Route 59 Gas, Inc.

III. Whether the penalties and interest in excess of the minimum statutory rate should be waived.

#### FINDINGS OF FACT

1. On February 10, 1983, the Audit Division, as the result of a field audit, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner Chaim Bratt, officer of Route 59 Gas, Inc., for taxes due of \$31,577.72, plus penalty of \$7,801.98 and interest of \$8,188.69, for a total amount due of \$47,568.39 for the period August 22, 1980 through June 11, 1981.

2. Also on February 10, 1983, the Audit Division, as a result of the same field audit, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner Samuel Tomashover under the name, Sami Tomashovetz, officer of Route 59 Gas, Inc., for taxes due of \$31,577.72, plus penalty of \$7,801.98 and interest of \$8,188.69, for a total amount due of \$47,568.39 for the period August 22, 1980 through June 11, 1981.

3. At the hearing held herein, the Audit Division stipulated that the tax due on the notices issued against the petitioners should be reduced to \$7,705.32.

The period at issue was also found to be February 18, 1981 through June 11, 1981.

4. On May 10, 1983, each of the petitioners timely filed a petition for a hearing to review the notices of determination. The petitioners claim that they were only salaried employees of Route 59 Gas, Inc. ("the corporation") and had no control over its operations; that, alternatively, the corporation does not owe the taxes asserted; that, during the period at issue, the corporation performed no repair services; that the corporation was not able to pay the sales taxes because of the small profit margin coerced upon it by Power Test Petroleum Distributors, Inc. ("Power Test"); and that the penalties should be waived.

It is the position of the Audit Division that petitioner Chaim Bratt and petitioner Samuel Tomashover were president and vice-president, respectively, of the corporation during the period at issue and were responsible for managing the day-to-day finances of the corporation. The Audit Division further claims that the audit which it performed was proper and the sales taxes determined due as a result thereof were correct.

5. In or about January, 1982, the Audit Division performed an audit of the gas station located at 165 Route 59, Monsey, New York. The station then operating at that location had one gas island with six pumps and two service bays for maintaining and servicing automobiles. The auditor was unable to ascertain the previous operators and consequently contacted Power Test for this information. Power Test advised the auditor, inter alia, that for the period August 22, 1980 through June 11, 1981, petitioner Chaim Bratt and Hilel Lewkowicz operated the station as C & H Power Test. Power Test also advised the auditor

that, during this period of time, the operators purchased 563,520 gallons of gasoline.

Since only one sales tax return was filed during this period, the auditor next determined the sales tax liability. The auditor multiplied the number of gallons purchased times an average retail selling price reflecting the various grades of gasoline sold of \$1.25 to compute taxable gasoline sales of \$704,400.00. The auditor then, based on prior auditing experience, estimated repair sales of \$200.00 per day, times 2 bays, times 25 work days per month, which resulted in taxable repair sales of \$103,333.00. Total taxable sales of \$807,733.00 times the 4 percent tax rate equalled a tax due of \$32,309.32, less tax paid of \$731.60, resulted in additional tax due of \$31,577.72.

6. According to a Certificate of Registration filed on February 18, 1981 with the Audit Division by the corporation, petitioner Chaim Bratt and petitioner Samuel Tomashover were the president and vice-president, respectively, of the corporation. The auditor therefore issued notices of determination against the petitioners for the additional taxes found due on audit.

At a pre-hearing conference, the petitioners presented evidence that the corporation was incorporated on February 18, 1981, which resulted in an adjustment to the notices (see Finding of Fact "3").

7. Prior to the period at issue, petitioner Chaim Bratt worked as a salesman in an electronics store. He had no prior experience in operating a gas station. On August 22, 1980, petitioner Bratt and Aviv Fogel executed a lease agreement for the gas station premises at 165 Route 59, Monsey, New York with Power Test. From that time on and throughout the period at issue, petitioner Bratt worked as an attendant at the station and received a weekly salary of \$180.00. Petitioner Bratt was advised by Mr. Fogel that, as a condition of his

employment, he was required to sign the Certificate of Registration and the lease agreement with Power Test.

Petitioner Bratt's duties included the pumping of gas, taking the daily gas readings and handing over the receipts to Mr. Fogel on a daily basis. Petitioner Bratt was authorized to sign checks on the corporation's checking account, but only did so at the direction of Mr. Fogel who maintained the checkbook. Petitioner Bratt was also on the board of directors of the corporation, but this also was for the convenience of Mr. Fogel. He had no investment in the corporation.

8. Prior to the period at issue, petitioner Samuel Tomashover was unemployed. He also had no prior experience in operating a gas station. Petitioner Tomashover was hired by Mr. Fogel as an attendant for the gas station at 165 Route 59, Monsey, New York and paid a weekly salary of \$190.00. Petitioner Tomashover's duties were essentially the same as petitioner Bratt's, i.e. pumping gas, taking the daily gas readings and handing over the receipts to Mr. Fogel. Petitioner Tomashover signed the Certificate of Registration as a condition of his employment. He also had no investment in the corporation.

9. Aviv Fogel was responsible for the financial affairs of the corporation. Mr. Fogel decided when and how much gas to order and which bills were to be paid. Mr. Fogel also determined the price of gasoline and was responsible for the corporation's tax returns. Both petitioners quit their positions in or about June, 1981 when, according to petitioner Tomashover, they were not getting paid.

10. The petitioners testified that they serviced between 25 and 35 cars per day mainly because they did not sell super unleaded gasoline. Petitioners alleged that they sold approximately 8,000 gallons of gas every two weeks. Petitioners offered no substantial evidence to support their allegations.

11. During the period at issue, the service bays were boarded up by Power Test and, therefore, the corporation had no repair sales.

12. Petitioners offered no evidence that the failure to pay the tax in a timely manner was due to reasonable cause and not willful neglect.

#### CONCLUSIONS OF LAW

A. That section 1133(a) of the Tax Law provides, in part, that "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." Section 1131(1) defines "persons required to collect tax" as including any officer or employee who is under a duty to act for a corporation in complying with the Sales and Use Tax Law.

B. That 20 NYCRR 526.11(a)(2) provides:

"(2) Whether an officer or employee of a corporation is a person required to collect, truthfully account for, or pay over the sales or use tax is to be determined in every case on the particular facts involved. Generally, a person who is authorized to sign a corporation's tax returns or who is responsible for maintaining the corporate books, or who is responsible for the corporation's management, is under a duty to act.

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Example 2: M is an employee of S Corporation. His sole function with the corporation is to sign checks. M owns no stock, has no authority to determine which bills should be paid, has no authority to pay corporate bills with cash, does not file returns and keeps no books or financial records of any kind. M is not a 'person required to collect tax' under section 1131(1) of the Tax Law as he acts only in a ministerial capacity."

C. That, within the meaning and intent of sections 1133(a) and 1131(1) of the Tax Law and regulation section 20 NYCRR 526.11(a)(2), neither petitioner Chaim Bratt nor petitioner Samuel Tomashover was a person required to collect tax on behalf of Route 59 Gas, Inc. The actions taken by petitioners were

either as a condition of employment or for the convenience of Aviv Fogel, who was responsible for the financial affairs of the corporation.

D. That in view of Conclusion of Law "C", Issues II and III are hereby rendered moot.

E. That the petitions of Samuel Tomashover and Chaim Bratt are granted and the notices of determination and demand for payment of sales and use taxes due issued February 10, 1983 are cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

JUL 16 1985

*Rodrick A. Allen*  
PRESIDENT

*Francis R. Koenig*  
COMMISSIONER

*Mark J. Jankel*  
COMMISSIONER