

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
FRANCIS J. MAGUIRE	:	DECISION
Officer of M & B BLOCK CO., 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 June 1, 1979	:	
through May 30, 1982.	:	

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Petitioner, Francis J. Maguire, Officer of M & B Block Co., Inc., Green Acres Road, Hudson, New York 12534, 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 June 1, 1979 through May 30, 1982 (File No. 45257).

A small claims hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Office Campus, Albany, New York on February 4, 1985 at 9:15 A.M., with all documents to be submitted by February 18, 1985. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect and pay over sales and use taxes on behalf of M & B Block Co., Inc. pursuant to the terms of sections 1131(1) and 1133(a) of the Tax Law.

FINDINGS OF FACT

1. On May 13, 1983, the Audit Division issued to petitioner, Francis J. Maguire, as an officer of M & B Block Co., Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period June 1, 1979 through May 31, 1982 in the amount of \$9,723.03 plus penalty and interest.

2. M & B Block Co., Inc. ("M & B"), was incorporated in New York State on April 1, 1977, and began doing business in New York State on April 11, 1977. M & B was, until its liquidation resulting from bankruptcy, engaged in the manufacture of concrete products including concrete blocks and mats. The one hundred issued and outstanding shares of M & B stock were held by its officers and directors as follows:

<u>Name</u>	<u>Office</u>	<u># of Shares Held</u>
Francis J. Maguire	President	1
William H. Brownell	Vice-President	1
Constance Ann Maguire	Secretary and Treasurer	98

Each of the above-named individuals was an authorized signatory on M & B's checking account.

3. On or about April 24, 1978, M & B was experiencing financial difficulties and one Robert C. Kellam became associated with M & B by his infusion of \$50,000.00 into the business. Mr. Kellum did not become an officer of M & B. However, he was made an authorized signatory on the checking account, and ownership of M & B's issued and outstanding stock was restructured as follows:

<u>Name of Shareholder</u>	<u># of Shares Held</u>
Francis J. Maguire	1
William H. Brownell	1
Constance Anne Maguire	47
Robert C. Kellam	51

4. On or about January 31, 1979, petitioner's employment with M & B was terminated by Mr. Kellam (M & B's controlling shareholder), and petitioner and Constance Anne Maguire were removed from all participation in the affairs of M & B. After his termination, petitioner never returned to M & B's premises. Petitioner never formally resigned from his corporate office nor did he surrender his one share of M & B stock.

5. M & B's Corporation Franchise Tax Reports (Forms CT-4) for the fiscal years ended March 31, 1980 and March 31, 1981, list petitioner on the Schedule of Officers and Stockholders (Schedule D) as president, but indicate his total compensation as "none", with Mr. Kellam and Mr. Brownell as the only officers or shareholders receiving any compensation.

6. Wage and Tax Statements (Forms W-2) issued to petitioner by M & B for the years 1978 and 1979 reflect his total compensation for 1978 as \$15,600.00 and for 1979 as \$1,500.00. Schedules K-1, also attached to the Franchise Tax Reports for the noted fiscal years, indicate petitioner's compensation as "none" and the percentage of time he devoted to the business as "none".

7. On April 6, 1982, M & B filed a petition to liquidate in the U.S. Bankruptcy Court for the Northern District of New York. Petitioner was not involved in the bankruptcy proceedings.

#### CONCLUSIONS OF LAW

A. That section 1133(a) of the Tax Law places personal liability for the taxes imposed, collected or required to be collected under Article 28 upon "every person required to collect any tax" imposed by said article. Section 1131, subdivision (1) furnishes the following definition for the term "persons required to collect tax":

"'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; every recipient of amusement charges; and every operator of a hotel. 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 the documentary evidence submitted, as well as the credible testimony offered in support thereof, establish the fact that petitioner's

entire relationship with M & B had been (non-voluntarily) terminated as of January 31, 1979, which date is prior to the period in question. Accordingly, petitioner was not a person under a duty to collect and pay taxes on behalf of M & B during the period at issue.

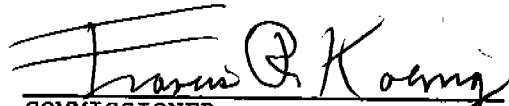
C. That the petition of Francis J. Maguire is hereby granted and the Notice of Determination dated May 13, 1983 is cancelled.


DATED: Albany, New York

STATE TAX COMMISSION

**MAY 23 1985**

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER