

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

DAVID SCHROEDER
OFFICER OF THE PARTY PEOPLE, INC.

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 June 1, 1976
through November 30, 1978.

Petitioner, David Schroeder, officer of The Party People, Inc., 2610 Mill Avenue, Brooklyn, New York 11234, 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, 1976 through November 30, 1978 (File No. 45846).

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 January 14, 1987 at 1:15 P.M., with all briefs to be submitted by April 29, 1987. Petitioner appeared by Murray Appleman, Esq. The Audit Division appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUES

I. Whether petitioner is personally liable for payment of sales taxes determined to be due from The Party People, Inc.

11. Whether the Audit Division properly estimated the amount of sales tax due from The Party People, Inc. for the period September 1, 1977 through November 30, 1978.

FINDINGS OF FACT

1. On July 29, 1983, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to David Schroeder as officer

of The Party People, Inc. (hereinafter "Party People"). Said notice, which encompassed the period June 1, 1976 through November 30, 1978, determined additional sales tax due of \$72,666.56, plus penalty of \$18,166.64 and interest of \$53,797.30, for a total amount due of \$144,630.50. The notice also contained the following explanation:

"You are personally liable as Officer of The Party People, Inc., under Sections 1131(1) and 1133 of the Tax Law for the following taxes determined to be due in accordance with Section 1138(a) of the Tax Law."

2. Included in the \$72,666.56 of tax asserted due in the notice dated July 29, 1983 was the sum of \$35,866.56, which amount represents tax shown due on returns timely filed by Party People for the period June 1, 1976 through August 31, 1977. At the hearing held herein, the Audit Division conceded that the \$35,866.56 must be deleted from the notice dated July 29, 1983 since said amount was not assessed within the statute of limitations for assessment.

3. It is undisputed that the balance of tax due still at issue, i.e., \$36,800.00 for the period September 1, 1977 through November 30, 1978, was timely assessed inasmuch as Party People had failed to file returns for these quarters and therefore the tax due may be assessed at any time. The \$36,800.00 which remains in dispute is an amount which the Audit Division estimated to be due based on a review of the tax due shown on returns filed by Party People for prior quarters. The Audit Division resorted to the use of an estimated amount since it had been unable to locate Party People or any of its officers and was therefore unable to review any of Party People's books or records.

4. Party People was formed sometime in 1974. Martin Hyman was its president and David Schroeder its secretary-treasurer and each contributed \$3,000.00 to the corporation upon its formation. Petitioner owned one-half of the outstanding stock of Party People and he was active in the day-to-day

management and operation of said corporation from its inception to the date it ceased doing business.

5. Due to several armed robberies and other factors, Party People ceased all business activities on or about September 30, 1977. After said date, no sales were made by Party People.

6. For the month of September 1977, Party People's sales averaged approximately \$3,000.00 per week or \$12,000.00 for the month. Petitioner asserts that a portion of the \$3,000.00 in weekly sales were nontaxable; however, the evidence submitted was insufficient to support the existence or dollar amount of nontaxable sales.

CONCLUSIONS OF LAW

A. That section 1133(a) of the Tax Law places personal liability for the tax imposed, collected or required to be collected under Article 28 upon "every person required to collect any tax" imposed by said article. Tax Law § 1131(1) furnishes the following definition for the term "person 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 in the instant matter petitioner was an officer and stockholder of Party People and was also active in its day-to-day operations. Accordingly, petitioner is personally liable, pursuant to Tax Law §§ 1131(1) and 1133(a), for payment of any sales tax due from Party People.

C. That pursuant to Finding of Fact "2", supra, the tax asserted due for the period June 1, 1976 through August 31, 1977 in the sum of \$35,866.56 must

be deleted from the notice dated July 29, 1983 since the statute of limitations for assessment had expired.


D. That with respect to the remaining period at issue herein (September 1, 1977 through November 30, 1978) petitioner has substantiated that Party People ceased all business activities as of September 30, 1977 and that total sales for the month of September 1977 equalled \$12,000.00. Petitioner has failed to show that any part of said \$12,000.00 was nontaxable sales. Accordingly, the additional tax due as assessed in the notice dated July 29, 1983 is reduced to \$960.00 ($\$12,000.00 \times .08$).

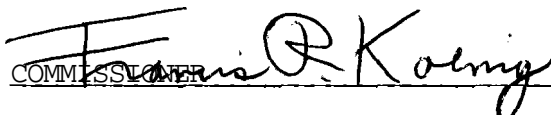
E. That the petition of David Schroeder is granted to the extent indicated in Conclusions of Law "C" and "D", supra, and that the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated July 29, 1983 is, except as so modified, in all other respects sustained.

DATED: Albany, New York

STATE TAX COMMISSION

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PRESIDENT


COMMISSIONER


COMMISSIONER