

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	DECISION
JERRY GAROFOLO	:	
OFFICER OF TRIPLE J. SERVICE STATION, 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 December 1, 1979	:	
through December 31, 1981.	:	

Petitioner, Jerry Garofolo, Officer of Triple J. Service Station, Inc., 15 Adams Drive, Stony Point, New York 10980, 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 December 1, 1979 through December 31, 1981 (File No. 46098).

A hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 6, 1985 at 9:15 A.M. Petitioner appeared by Bernard Preskin, CPA. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect and pay over sales taxes on behalf of Triple J. Service Station, Inc. within the meaning and intent of sections 1131(1) and 1133(a) of the Tax Law during the periods at issue herein.

FINDINGS OF FACT

1. On March 20, 1983, the Audit Division issued to petitioner, Jerry Garofolo, a Notice of Determination and Demand for Payment of Sales and Use

Taxes Due assessing tax due for the period December 1, 1979 through December 31, 1981 in the amount of \$73,535.03, plus penalty and interest. This assessment was premised upon the assertion that petitioner was a person responsible to collect and remit sales and use taxes on behalf of Triple J. Service Station, Inc., ("Triple J") during the noted time period.

2. Triple J, a Power Test Service Station, was owned prior to February 15, 1979 by petitioner, who was then Triple J's only officer and shareholder.

3. On February 15, 1979, Triple J was sold by petitioner to one Fred Costello, who then became Triple J's president and only officer and shareholder. However, petitioner remained associated with Triple J subsequent to the sale as an employee, managing its entire day-to-day operations as before the sale, including handling receipts and bank deposits, paying bills and signing checks.

4. Sales and use tax returns (Forms ST-100) were filed during the period in question on behalf of Triple J bearing petitioner's signature and the title "president".

5. It is petitioner's assertion that since he was no longer an officer of Triple J after February 15, 1979, he is absolved of liability for taxes due for periods subsequent thereto. Petitioner did not appear or give testimony at the hearing.

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 Articles 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 partnership." (Emphasis supplied).

B. That resolution of the issue of personal liability for sales tax due turns upon a factual determination in each case (Vogel v. Dep't. of Taxation and Finance, 98 Misc.2d 222; Chevlowe v. Koerner, 95 Misc.2d 388). Relevant factors in making such determination include, inter alia, day to day responsibilities in the corporation, involvement in and knowledge of the corporation's financial affairs and its management, the identity of who prepared and signed tax returns and the authority to sign checks [Vogel, supra; see also 20 NYCRR 526.11(b)]. It is noted, in contrast to petitioner's assertion, that the fact that one is not an officer of a corporation does not absolutely absolve that individual of responsibility.

C. That in view of his authority and responsibility, as exercised in carrying on Triple J's ongoing operations, petitioner was a person under a duty to collect, truthfully account for and pay over sales and use taxes within the meaning and intent of Tax Law sections 1131(1) and 1133(a) for the period at issue.

D. That the petition of Gerry Garofolo, officer of Triple J Service Station, Inc. is hereby denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated March 20, 1983 is sustained.

DATED: Albany, New York

NOV 07 1985

STATE TAX COMMISSION

Roderic A. Allen
PRESIDENT

Francis R. Koening
COMMISSIONER

W. J. [Signature]
COMMISSIONER