

STATE OF NEW YORK

STATE TAX COMMISSION

---

In the Matter of the Petition

of

RICHARD L. MARTIN  
D/B/A RICO'S TRUCKS-N-STUFF

DECISION

for Revision of Determinations or for Refunds :  
of Sales and Use Taxes under Articles 28 and 29  
of the Tax Law for the Period December 1, 1978 :  
through February 28, 1982.

---

Petitioner, Richard L. Martin d/b/a Rico's Trucks-N-Stuff, 11406 Howe Road, Akron, New York 14001, filed a petition for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1978 through February 28, 1982 (File No. 47026).

A hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on March 10, 1987 at 1:15 P.M., with all evidence to be submitted by April 12, 1987. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

#### ISSUE

Whether the Audit Division properly asserted additional sales tax due from petitioner and whether such tax was properly determined.

#### FINDINGS OF FACT

1. On March 18, 1983, following an audit, the Audit Division issued to Rico's Trucks-N-Stuff, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period December 1, 1978 through February 28, 1980 asserting \$25,416.03 in additional tax due, plus interest.

2. On June 20, 1983, following the same audit, the Audit Division issued to Joseph Caputy and Richard Martin d/b/a Rico's Trucks-N-Stuff, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period March 1, 1980 through February 28, 1982 asserting \$190,461.51 in additional tax due, plus interest.

3. During the period at issue, Rico's Trucks-N-Stuff operated as a partnership consisting of petitioner and a Mr. Joseph Caputy as partners. The business was engaged in the retail sale of gasoline and auto and truck repair services.

4. The partnership between petitioner and Mr. Caputy began with the commencement of business operations in February 1979. Mr. Caputy actively ran the business on a daily basis. Petitioner did not take an active role in the day-to-day running of the business. Petitioner was, however, a signatory on the partnership bank accounts and was also a signatory on all loan obligations incurred by the partnership.

5. On audit, the Audit Division was advised by Mr. Caputy that the partnership had been dissolved as of March 1, 1982 and that he had destroyed all records of the partnership. The Audit Division subsequently contacted the partnership's accountant and obtained copies of the partnership's 1979 New York partnership return and 1980 Federal partnership return.

6. The Audit Division subsequently determined additional tax due on the partnership's sales of gasoline by obtaining the partnership's gasoline purchase information from the partnership's supplier. Gallons purchased were multiplied by the partnership's average selling price per quarter to determine gross sales of gasoline, and additional sales tax due on sales of gasoline was computed accordingly.

7. The partnership did not sell gasoline in 1979; consequently, the Audit Division determined that the partnership's total gross sales for 1979 represented repair service sales. The 1979 total gross sales were divided by four to determine quarterly gross sales. This quarterly amount was then applied throughout the audit period to determine sales tax due on sales of repairs and service.

8. The Audit Division also found additional tax due on the partnership's rental of equipment from 1520 Niagara Falls Boulevard, Inc. The amount of rental payments made by the partnership was determined from its Federal return. Additionally, the Audit Division found additional tax due on certain fixed asset acquisitions of the partnership during the audit period. The additional tax due with respect to this component of the audit was based upon the depreciation schedule attached to the partnership's Federal return.

9. Petitioner contended that the audit results were in error, and that the partnership had sold a large quantity of gasoline wholesale during the audit period. Petitioner produced no documentation or specific testimony to refute the results of the audit.

10. During the period at issue, petitioner was employed full time as a professional hockey player. As stated previously, he did not participate in the day-to-day management of the partnership. His contact with the affairs of the partnership was limited to occasional visits to the business premises and reports from Mr. Caputy and petitioner's accountant regarding the partnership's finances. Petitioner visited the business premises approximately once per week when the professional hockey season was not in progress and less frequently during the season.

11. Petitioner never worked for the partnership. The partnership never earned a profit.

12. Petitioner became disenchanted with Mr. Caputy's handling of the business in 1981. He subsequently sought to dissolve the partnership and to terminate his relationship with Mr. Caputy. The partnership was ultimately dissolved in October 1982, and, at that time, petitioner sold his interest in the partnership to Mr. Caputy.

13. The audit was commenced subsequent to the dissolution of the partnership and petitioner's sale of his interest therein.

#### CONCLUSIONS OF LAW

A. That since the partnership failed to provide the Audit Division with complete and adequate records, the Audit Division properly and reasonably determined additional taxes due from the partnership from such information as was available in accordance with section 1138(a)(1) of the Tax Law (Matter of Korba v. State Tax Commission, 84 AD2d 655). Petitioner has failed to demonstrate that the audit method or the amount of tax asserted due was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858). Under the circumstances herein, petitioner has failed to meet his burden of proof with respect to his contentions as discussed in Finding of Fact "9".

B. That, in general, section 1133(a) of the Tax Law imposes upon any person required to collect tax imposed by Article 28 of the Tax Law, personal liability for the tax imposed, collected, or required to be collected. Section 1131(1) of the Tax Law defines persons required to collect tax to include, among others, "any member of a partnership".

C. That inasmuch as petitioner was a member of the partnership which was engaged in business as Rico's Trucks-N-Stuff, he was a person required to collect tax on behalf of the partnership within the meaning of section 1131(1)

of the Tax Law and was therefore personally liable pursuant to Tax Law § 1133(a) for the tax required to be collected by the partnership. Accordingly, the Audit Division's issuance of the notices of determination herein was in all respects proper. That petitioner was not actively involved in the day-to-day affairs of the partnership does not affect his liability for the tax asserted due herein in light of section 1131(1)'s specific inclusion of "any member of a partnership" within the definition of "persons required to collect tax" imposed by Article 28.


D. That the petition of Richard L. Martin d/b/a Rico's Trucks-N-Stuff is in all respects denied and the notices of determination and demands for payment of sales and use taxes due, dated March 18, 1983 and June 20, 1983, respectively, are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

**AUG 12 1987**

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER