

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
WILLIAM FINGER,	:	DECISION
OFFICER OF CLARK SMATHERS LAKEVILLE MANOR, LTD.	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Periods March 1, 1976	:	
through May 31, 1976 and December 1, 1980	:	
through May 31, 1981.	:	

Petitioner, William Finger, officer of Clark Smathers Lakeville Manor, Ltd., 209 Lagoon Drive East, Lido Beach, New York 11561, 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 periods March 1, 1976 through May 31, 1976 and December 1, 1980 through May 31, 1981 (File No. 48320).

A formal hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 19, 1984 at 9:00 A.M. Petitioner appeared pro se. The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUES

I. Whether petitioner timely filed a petition for revision of determinations issued against him as an officer of Clark Smathers Lakeville Manor, Ltd.

II. If so, whether petitioner is personally liable for the sales tax obligations of Clark Smathers Lakeville Manor, Ltd. for the periods March 1, 1976 through May 31, 1976 and December 1, 1980 through May 31, 1981.

FINDINGS OF FACT

1. On November 9, 1981, the Audit Division issued to petitioner, William Finger, as an officer of Clark Smathers Lakeville Manor, Ltd. ("Clark Smathers"), a Notice and Demand for Payment of Sales and Use Taxes Due, assessing sales tax under Article 28 of the Tax Law for the periods March 1, 1976 through May 31, 1976 and December 1, 1980 through February 28, 1981, plus penalty and interest, scheduled as follows:

<u>PERIOD</u>	<u>TAX</u>	<u>PENALTY</u>	<u>INTEREST</u>	<u>TOTAL</u>
3/1/76-5/31/76	\$ 5,000.00	\$1,250.00	\$3,262.30	\$ 9,512.30
12/1/80-2/28/81	7,426.23	891.15	612.37	8,929.75
	<u>\$12,426.23</u>	<u>\$2,141.15</u>	<u>\$3,874.67</u>	<u>\$18,442.05</u>

The Notice and Demand was addressed to petitioner at 125-10 Queens Boulevard, Kew Gardens, New York and stated, in part, "This tax has also been determined by Notice Nos. S0091785479 and S8106151558 dated 6/15/81 against Clark Smathers Lakeville Manor, Ltd., which is now in an arrangement, and of which the taxpayer is an officer."

On November 9, 1981, the Audit Division issued to petitioner, as an officer of Clark Smathers, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, assessing sales tax for the period March 1, 1981 through May 31, 1981 in the amount of \$4,000.00, plus penalty and interest. The Notice of Determination and Demand was similarly addressed to petitioner at 125-10 Queens Boulevard, Kew Gardens, New York and stated, in part:

"Because a Sales and Use Tax Return was not received, this amount has been determined due based on the average taxable sales as reported on previous returns filed. Upon receipt of the required tax return, this amount will be amended accordingly. This tax has also been determined by Notice No. S810720453C dated 07/29/81 against Clark Smathers Lakeville Manor, Ltd., which is now in an arrangement, and of which the taxpayer is an officer."

Petitioner maintains that he did not receive actual notice of the two assessments until August 9, 1983 (under circumstances described infra). The Audit Division offered in evidence the original Notice of Determination and Demand issued to petitioner for the period March 1, 1981 through May 31, 1981 and the envelope in which it was mailed to him; the envelope bears certified mail number 499274 and is stamped, "Return to sender" and "Forwarding order expired."

2. On July 29, 1981, the Audit Division issued to Clark Smathers a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, assessing sales and use taxes for the period March 1, 1981 through April 23, 1981 in the amount of \$4,000.00; no penalty or interest was assessed. The Notice of Determination and Demand was addressed to the corporation at 69 North Service Road, Lake Success, New York 11020, and stated that because a return had not been filed, the taxes due were estimated using average taxable sales as reported on returns previously filed. This assessment against the corporation was later cancelled, after the corporation filed a return for the quarterly period ended May 31, 1981 and paid the taxes required to be shown thereon.

3. Clark Smathers operated a nightclub and restaurant at 69 North Service Road, Lake Success, New York, from 1974 until approximately April, 1981. The corporation employed a full-time bookkeeping staff at the Lake Success premises to maintain its books and records.

4. Petitioner practices law with the firm of Salaway & Schreiber. He was an officer, director and shareholder in Clark Smathers and rendered legal services for the corporation in exchange for office space at the corporation's business premises. This arrangement was convenient for petitioner when he was engaged in trial in Nassau County. Petitioner's professional stationery indicated his address as Silver Towers, 125-10 Queens Boulevard, Kew Gardens,

New York 11415, and an alternate address as 69 North Service Road, Lake Success, New York 11020. On at least two occasions, May 7 and May 28, 1980, petitioner corresponded with the Audit Division as attorney for Clark Smathers, using his professional stationery.

5. Petitioner signed at least five checks on the Clark Smathers corporate account for the payment of sales and use taxes; these checks were dated March 1, March 8, July 20, July 26 and July 30, 1976.

6. On August 13, 1980, Salaway & Schreiber moved from the Kew Gardens offices. Petitioner filed with the Post Office a mail forwarding request, effective for one year, in order that all mail addressed to him at the law offices in Kew Gardens would be forwarded to him at his residence in Lido Beach. As the agent for service of process of various corporations (including Clark Smathers), petitioner also notified the Secretary of State regarding the address change.

7. On December 9, 1980, petitioner resigned his position as officer and director of Clark Smathers. On December 12, 1980, petitioner tendered to Broder & Farley, Esqs., as escrow agents, the 66-2/3 shares he held in the corporation.

8. On February 28, 1981, petitioner signed a check on the Clark Smathers corporate account for sales and use taxes in the sum of \$7,426.23. The check was apparently submitted with the return for the quarterly period ended February 28, 1981 but was dishonored due to insufficient funds. Petitioner explained that after submitting his resignation, he endeavored nonetheless to pay the corporation's creditors so as not to jeopardize his personal credit and also because of certain moral obligations he felt toward his associates who were still involved in the business.

9. On April 23, 1981, Clark Smathers filed a petition in bankruptcy under Chapter 11 of the United States Bankruptcy Code. On July 31, 1981, the State Tax Commission filed a claim in the bankruptcy proceeding for sales and use taxes due from the corporation in the amount of \$19,412.67. Thereafter, on October 9, 1981, the Commission filed an amended claim for \$15,412.67 "based on new information received"; the amounts of tax and interest as detailed in the amended claim were as follows:

<u>PERIOD</u>	<u>ASSESSMENT</u>	<u>TAX</u>	<u>INTEREST</u>	<u>TOTAL</u>
3/1/76-5/31/76	S0091785479	\$ 5,000.00	\$2,904.90	\$ 7,904.90
12/1/80-2/28/81	S8106151558	7,426.23	81.54	7,507.77
		<u>\$12,426.23</u>	<u>\$2,986.44</u>	<u>\$15,412.67</u>

After the bankruptcy proceeding was commenced, petitioner was not permitted to enter the Clark Smathers business premises nor was he permitted any access to the corporate books and records.

10. In approximately mid-June, 1983, petitioner applied for a personal loan. In the course of investigating petitioner's credit worthiness, a credit reporting agency discovered that on June 23, 1983, the Tax Compliance Bureau had issued a warrant against petitioner, individually and as an officer of Clark Smathers, for sales tax for the period ended February 28, 1981 in the amount of \$12,426.23, plus penalty and interest of \$9,592.34; said warrant was filed for entry in the Docket of Judgments in the Office of the Clerk of Queens County on June 27, 1983. The credit reporting agency informed petitioner of the warrant and judgment against him on August 9, 1983. Petitioner began immediately thereafter to make inquiries of the Processing Division and the Nassau County District Office, among others, regarding the warrant and any underlying assessment. On or about October 25, 1983, petitioner wrote a letter of protest to the Tax Compliance Bureau, objecting to the assessment on the

merits and also to the mailing of the assessment to 125-10 Queens Boulevard, Kew Gardens. His letter of protest was forwarded to the Tax Appeals Bureau, which determined that it did not constitute a petition filed within the time limitations prescribed by Tax Law section 1138(a)(1). The controversy, including the issue of whether a timely petition had been filed, was later set down for hearing.

CONCLUSIONS OF LAW

A. That insofar as the assessment against Clark Smathers Lakeville Manor, Ltd. for the quarterly period ended May 31, 1981 in the estimated amount of \$4,000.00 has been cancelled, the assessment against petitioner for the same period and in the same amount, issued on the theory that he was a person required to collect tax on behalf of the corporation, must likewise be cancelled.

B. That section 1138(a)(1) of Article 28 of the Tax Law provides that a notice of determination finally and irrevocably fixes the tax unless the person against whom the tax is assessed makes an application for hearing within 90 days "after the giving of notice of such determination." Section 1147(a)(1) sets forth certain requirements for the service of notices issued under the authority of Article 28, as follows:

"Any notice authorized or required under the provisions of this article may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this article or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable. The notice of determination shall be mailed promptly by registered or certified mail.¹ The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined

1 Section 1147(a)(1) was amended by the Laws of 1981, Chapter 760, §1 to require that service be made by registered or certified mail rather than ordinary mail; the amendment became effective July 27, 1981.

according to the provisions of this article by the giving of notice shall commence to run from the date of mailing of such notice."

There is no evidence whatsoever in the record to establish that the assessment against petitioner for the periods March 1, 1976 through May 31, 1976 and December 1, 1980 through February 28, 1981 was mailed by registered or certified mail in accordance with the statutory mandate. Consequently, Mr. Finger's petition, filed within 90 days after he actually received notice of the assessment, must be deemed to have been filed within the prescribed limitation of time.

C. That turning now to the merits of the assessment, section 1133(a) imposes on any person required to collect sales tax personal liability for the tax imposed, collected or required to be collected. Section 1131(1), in defining persons required to collect the tax, includes corporate officers who are under a duty to act for the corporation in complying with any requirement of Article 28. The resolution of whether an officer was under such a duty turns upon a factual determination in each instance. The relevant factors in the determination include, but are not limited to, the following: the officer's day-to-day responsibilities in the corporation; the officer's involvement in and knowledge of the financial affairs of the corporation; the identity of the person who prepared and signed the sales and use tax returns; the officer's authority to sign checks on the corporation's accounts; and in the case of a closely-held corporation, the benefits the officer received from corporate profits. Vogel v. N.Y.S. Dept. of Taxation, 413 N.Y.S.2d 862 (Sup. Ct. Monroe Co. 1979); Chevlowe v. Koerner, 407 N.Y.S.2d 427 (Sup. Ct. Queens Co. 1978).

D. That for the earlier period covered by the assessment, March 1, 1976 through May 31, 1976, petitioner was clearly an officer, director and shareholder of Clark Smathers, who was authorized to draw checks on the corporate account and who in fact signed checks for the payment of the sales and use tax obligations

of the corporation. With respect to the later period, December 1, 1980 through February 28, 1981, petitioner tendered his resignation as an officer and director on December 9, 1980 and surrendered his shares in Clark Smathers on December 12, 1980, but continued to involve himself in the corporation's financial affairs, as evidenced by his signature on a corporate check dated February 28, 1981 again for payment of sales and use taxes. The Audit Division therefore properly imposed upon him personal liability for the sales tax obligations of Clark Smathers Lakeville Manor, Ltd. for the periods March 1, 1976 through May 31, 1976 and December 1, 1980 through February 28, 1981.

E. That the petition of William Finger, as an officer of Clark Smathers Lakeville Manor, Ltd., is granted to the extent indicated in Conclusions of Law "A" and "B"; the assessment issued against him for the period ended May 31, 1981 is cancelled; and the assessment for the periods March 1, 1976 through May 31, 1976 and December 1, 1980 through February 28, 1981 is sustained.


DATED: Albany, New York

STATE TAX COMMISSION

FEB 15 1985


PRESIDENT


COMMISSIONER


COMMISSIONER