

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :

of :

RICHARD MOSKOWITZ  
D/B/A RAM SERVICE STATION :

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 March 1, 1979 :  
through August 31, 1982. :

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Petitioner, Richard Moskowitz, 1870 East 35th Street, 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 March 1, 1979 through August 31, 1982 (File No. 50889).

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 November 19, 1985 at 2:45 P.M. Petitioner appeared by Barry Smith, Esq. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

#### ISSUES

- I. Whether petitioner timely applied for a hearing.
- II. Whether the Audit Division properly estimated additional sales taxes due from petitioner based on an examination of available books and records.
- III. Whether petitioner is personally liable for the taxes determined due by the Audit Division.

#### FINDINGS OF FACT

1. Petitioner, Richard Moskowitz d/b/a Ram Service Station, operated a gasoline service station located at 2489 Coney Island Avenue, Brooklyn, New York.

2. Petitioner provided the Audit Division with incomplete and inadequate books and records to conduct an audit. As a result, the Audit Division estimated the taxes due from petitioner and issued the following notices of determination and demand for payment of sales and use taxes due:

| <u>Date of Notice</u> | <u>Period</u>     | <u>Tax</u>   | <u>Penalty</u> | <u>Interest</u> | <u>Total</u> |
|-----------------------|-------------------|--------------|----------------|-----------------|--------------|
| June 18, 1982         | 3/1/79 to 5/31/80 | \$ 56,379.82 | \$28,189.92    | \$17,846.65     | \$102,416.39 |
| December 20, 1983     | 9/1/80 to 2/28/81 | 38,573.61    | 19,286.81      | 14,795.18       | 72,655.60    |
| March 20, 1984        | 6/1/80 to 8/31/80 | 18,278.11    | 9,139.06       | 8,656.39        | 36,073.56    |
| March 20, 1984        | 3/1/81 to 3/31/82 | 112,978.17   | 56,489.10      | 32,638.69       | 202,105.96   |

3. The above notices were sent registered mail and petitioner admitted receipt thereof. Petitioner did not file petitions with respect to the notices dated June 18, 1982 and March 20, 1984. A timely petition was filed for the notice dated December 20, 1983 which covered the period September 1, 1980 through February 28, 1981.

4. For approximately four months in 1977, Richard Moskowitz pumped gasoline at a service station operated by Nicholas Rositano which was at the same location later occupied by Ram Service Station. In December, 1977, petitioner filed a certificate of doing business under the name Ram Service Station. He also opened a checking account under that name. Petitioner was the only authorized signatory on the bank account. Petitioner paid the bills, signed checks and sales tax returns. The tax returns were prepared by an accountant, Charles Harrary, who also maintained the books and records.

5. Petitioner took the position that the gas station was owned by Nicholas Rositano and that he was only employed as the manager. Petitioner argued that his actions were directed by Mr. Rositano and his accountant, Mr. Harrary, and that he had no knowledge of the financial affairs of the business.

6. The Audit Division estimated the taxable sales by applying markup percentages to purchases of gasoline and oil obtained from the books and

records which amounted to \$953,365.91 and \$29,485.54, respectively, for the period March 1, 1979 through May 31, 1980. Gasoline purchases were marked up 15 percent and oil purchases were marked up 50 percent. These percentages were based on prior audit experience with similar businesses. The additional taxable sales were \$704,657.68 with tax due thereon of \$56,379.82. The underreporting factor for this period was 190.34 percent. This percentage was used to determine the additional taxes due for the periods indicated in Finding of Fact "2". Because of the substantial underreporting, the Audit Division asserted the fraud penalty under section 1145(a)(2) of the Tax Law.

7. Petitioner did not contest the method of audit or the amount of tax and penalties assessed.

#### CONCLUSIONS OF LAW

A. That section 1138(a)(1) of the Tax Law provides, in pertinent part, that a notice of determination of tax due shall be given to the person liable for the collection or payment of the tax and such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination shall apply to the tax commission for a hearing, or unless the Tax Commission of its own motion shall redetermine the same.

B. That section 1147(a)(1) of the Tax Law provides that a notice of determination shall be mailed promptly by registered or certified mail and that any period of time which is determined according to the provisions of Article 28 by the giving of notice shall commence to run from the date of mailing of such notice. The Audit Division properly notified petitioner of the additional taxes due on the dates set forth in Finding of Fact "2". A timely petition was filed only for the notice issued December 20, 1983. Since no petitions were

filed with respect to the other notices, the tax assessed thereon was finally and irrevocably fixed.

C. That since petitioner maintained inadequate and incomplete books and records, the Audit Division properly determined taxable sales based on available information and external indices as provided in section 1138(a) of the Tax Law.

D. 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) provides 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."

E. 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 the person who prepared and signed tax returns and the authority to sign checks [Vogel, supra; see also 20 NYCRR 526.11(b)].

F. That petitioner was a person required to collect tax within the meaning and intent of sections 1131(1) and 1133(a) of the Tax Law and therefore is personally liable for the taxes due.

G. That the petition of Richard Moskowitz d/b/a Ram Service Station is denied and the notices of determination and demand for payment of sales and use taxes due issued June 18, 1982, December 20, 1983 and March 20, 1984 are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

APR 04 1986

Roderick W. Clun  
PRESIDENT

Francis R. K. O'Leary  
COMMISSIONER

Mark J. Smith  
COMMISSIONER