

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
JAMES S. NISBET, Officer of	:	DECISION
ABC FURNITURE WAREHOUSE CO., and Officer	:	
of INTEGRITY DIVERSIFIED SERVICES, 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 Periods September 1,	:	
1975 through November 30, 1975, and June 1, 1975	:	
through November 30, 1975, respectively.	:	

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Petitioner, James S. Nisbet, officer of ABC Furniture Warehouse Co., and officer of Integrity Diversified Services, Inc., 1551 Charlesgate Circle, East Amherst, New York 14221, 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 September 1, 1975 through November 30, 1975 and June 1, 1975 through November 30, 1975, respectively (File Nos. 51323 and 51324).

A formal hearing was commenced before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on May 25, 1984 at 9:00 A.M., and was continued to conclusion before the same Hearing Officer at the same location on August 23, 1984 at 9:15 A.M. Petitioner appeared by Silverberg, Yood, Sellers & Ramm, Esqs. (Jeffrey A. Sellers, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUES

I. Whether the notices issued against petitioner should be cancelled as beyond the allowable period of limitations.

II. Whether petitioner is a person responsible for the unpaid taxes at issue pursuant to Tax Law sections 1131 and 1133.

FINDINGS OF FACT

1. On May 28, 1980, the Audit Division issued a Notice and Demand for Payment of Sales and Use Taxes Due for the quarterly periods June 1, 1975 through August 31, 1975 and September 1, 1975 through November 30, 1975 to "James S. Nisbet - V. President, Integrity Diversified Service, Inc., 43 Chasewood Lane, E. Amherst, New York, 14221", reflecting amounts due as follows:

<u>Period Ended</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>
8/31/75	\$ -0-	\$ 203.43	\$ 40.69
11/30/75	4,859.02	1,214.75	2,623.87
TOTALS	\$4,859.02	\$1,418.18	\$2,664.56

2. On November 19, 1980, the Audit Division issued a Notice and Demand for Payment of Sales and Use Taxes Due for the quarterly period September 1, 1975 through November 30, 1975 in the amount of \$11,954.59, plus penalty and interest, to "James Nisbet - Responsible Officer, A.B.C. Warehouse Furniture Co. of Buffalo, Inc., 43 Chasewood Lane, East Amherst, New York, 14221."

3. On December 12, 1983, petitioner filed a petition for a hearing to contest the aforementioned notices, which petition was rejected as untimely since it was not filed within ninety days of the issuance dates of the notices. Thereafter, petitioner commenced a proceeding pursuant to C.P.L.R. Article 78, challenging the denial of his petition for a hearing and alleging, inter alia, that petitioner first received the notices at issue on September 26, 1983, when he received an income execution with the subject notices attached. The court determined, based on the facts presented, that there was no assurance that the notices were mailed in accordance with the dates specified thereon, that there was thus no presumption of receipt of such notices (prior to September 26, 1983), and that the ninety day period within which to request a hearing [Tax

Law §1138(a)] did not commence to run as of the dates on the notices. The Court directed the State Tax Commission to conduct a hearing to review the subject notices [Matter of James S. Nisbet, et al v. State Tax Commission, \_\_\_\_\_ Misc.2d \_\_\_\_\_, Sup. Ct., Albany County, April 9, 1984, Williams, J.]. The instant proceedings followed.

4. A.B.C. Furniture Warehouse Company ("Furniture") and Integrity Diversified Services, Inc. ("Services") were, until they ceased operations, corporations engaged in the respective businesses of retail furniture and carpeting sales and providing carpet installation services. Petitioner and his father-in-law were the principal owners of Furniture, which employed 15 persons, and Services, which employed 4 or 5 persons. Petitioner held the title of vice-president of both entities.

5. Some time prior to November 24, 1975, Furniture and Services defaulted on a note payable to and held by Manufacturers and Traders Trust Company ("the Bank"). This note was secured by all of the assets, including inventory, owned by Furniture and Services. Pursuant to its security agreement under the note the Bank, at or about the time of default, seized the assets and assumed complete control over the operations of the two entities.

6. On or about November 24, 1975, James S. Nisbet was effectively removed as an officer of Furniture and Services, but was retained as an employee of these entities in order that he could continue to receive a paycheck and support his family. He functioned and performed solely at the direction of the Bank, its officers and agents. In his capacity as an employee of Furniture and Services subsequent to November 24, 1975, Mr. Nisbet exercised no control of any kind or nature over the financial activities of the two entities.

7. During the period between seizure and actual closing of the businesses, the Bank controlled the flow of the corporations' funds, paid all wages (including petitioner's), hired its own security personnel for the premises and the loading docks and directed that the corporations' assets be sold off. After seizure by the Bank, control, possession and access to the corporations' check books and records was denied petitioner. There was no advertisement of seizure or liquidation of the businesses by the Bank, ostensibly to maintain a facade of business as usual and maximize selling prices on the assets being liquidated.

8. Petitioner signed checks from time to time after the Bank had seized the businesses. These checks were presented to petitioner for signature by one Earl J. Boebel, who was present at the premises on behalf of the Bank.

9. Sales and use tax returns were prepared and filed for Furniture and Services for the period September 1, 1975 through November 25, 1975. Petitioner did not participate in preparing or filing such returns nor did he sign the returns. Checks were drawn on the business bank accounts, payable to the New York State Department of Taxation and Finance, in payment of the sales tax obligation of both Furniture and Services for the period at issue. Petitioner signed the checks but did not prepare them.

10. Subsequent to issuance, the Bank dishonored the above checks, and seized the funds which were in the noted business bank accounts and applied the same funds to the outstanding balance due on the notes owed by the businesses to the Bank.

11. The dishonored check drawn on Furniture's account was submitted in evidence. This check was dated one month after the businesses were seized, and reflected on its face, in addition to the petitioner's signature, the signature of Earl J. Boebel. Mr. Boebel's signature was not on the check at the time

when petitioner signed the check. None of the writing on the check, other than petitioner's signature, is petitioner's writing.

12. The sales tax returns for Services and for Furniture were undated, unsigned, not in petitioner's handwriting, did not bear petitioner's name and reflected the address 1738 Elmwood Avenue, Buffalo, New York. Petitioner did not fill out or file any sales tax returns subsequent to the bank's seizure of the businesses.

13. A January 2, 1976 memorandum from Earl J. Boebel reflects that after the Bank's intervention on November 25, 1975, \$101,851.07 out of \$111,706.47 of available funds were paid out to various business creditors by direction of the bank, and that \$7,641.24 of such available funds were otherwise encumbered, thus leaving \$2,214.16 after payouts. State taxes were not among those items paid by the bank.

14. Petitioner sold his 43 Chasewood Lane home (to which the notices at issue were addressed), in or about June 1975, purchased premises at 89 Montbleu Drive, Amherst, New York, and thereafter sold this home and moved to the Charlesgate Circle address. Petitioner filed change of address notices with the Postal Service when he made each of these moves.

15. The notice of income execution dated September 26, 1983 (see Finding of Fact "3") was addressed to 43 Chasewood Lane and to petitioner's current employer, Nothing, Inc., 1738 Elmwood Avenue, Buffalo, New York, a furniture company for which he is manager. The latter address is the same address as that on the sales tax returns filed on behalf of Furniture and Services.

16. Prior to seizure, petitioner and/or his father-in-law operated both businesses, signed checks including payroll checks, hired and fired personnel, and signed tax returns.

17. Petitioner never formally resigned from either corporation.

18. Petitioner asserts that since actual notice of the unpaid taxes was not received within three years of the period at issue, the notices must be cancelled as untimely.

#### 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 Article 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 a partnership."

B. That the notices issued to petitioner were not assessments against petitioner issued pursuant to section 1138(a) [notices of determination and demand], but rather were notices and demands for payment; i.e., bills demanding that petitioner, assertedly a responsible officer of Furniture and Services, pay the taxes due with respect to these entities for the periods at issue.

C. That the instant bills issued to petitioner do not seek the collection of additional tax, but rather seek only the payment of that tax due and owing but remaining unpaid by Furniture and Services. Accordingly, the provisions of Tax Law section 1147(b), which limit the assessment of additional tax to a period of no more than three years from the date of the filing of a return are inapplicable, and the notices issued against petitioner are not barred by

operation of the statute of limitations (see Cadalso v. State Tax Commission, Misc. 2d, Sup. Ct., Albany County, November 27, 1978).

D. That finally, 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)].

E. That during the period in question, petitioner was not a person responsible for payment of the taxes at issue. He was, as a result of the Bank's takeover as described, effectively precluded from carrying out the steps necessary to comply with the requirements of Article 28. Petitioner's role was reduced to that of an employee acting under the supervision of others. Although he was an authorized signatory and did sign business checks, this was done under the control and instruction of other persons who, rather than petitioner, exercised complete control over the financial aspects of Furniture and Service.

F. That the petition of James S. Nisbet, officer of ABC Furniture Warehouse Co., and officer of Integrity Diversified Services, Inc., is hereby granted and the notices and demand dated November 19, 1980 and May 28, 1980, respectively, are cancelled.

DATED: Albany, New York

APR 15 1985

STATE TAX COMMISSION

Richard W. Chur  
PRESIDENT

Francis R. Koony  
COMMISSIONER

Mark J. [Signature]  
COMMISSIONER