

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition  
of

RAYMOND CAREY, JR.  
OFFICER OF R. CAREY AUTO, INC.

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, 1980  
through February 28, 1982.

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Petitioner, Raymond Carey, Jr., Officer of R. Carey Auto, Inc., 119  
Pilgrim Court, Pearl River, New York 10965, filed a petition for revision of a  
determination or for refund of sales and use taxes under Articles 28 & 29 of  
the Tax Law for the period March 1, 1980 through February 28, 1982 (File No.  
54940).

A hearing was held before Dennis M. Galliher, Hearing Officer, at the  
offices of the State Tax Commission, Two World Trade Center, New York, New  
York, on October 23, 1986 at 9:15 A.M., with all briefs to be submitted by  
February 6, 1987. Petitioner appeared by Mario Procaccino, Esq. (Morris D.  
Weintraub, Esq., of counsel). The Audit Division appeared by John P. Dugan,  
Esq. (Michael Gitter, Esq., of counsel).

#### ISSUES

I. Whether petitioner was a person under a duty to collect and pay over  
sales and use taxes on behalf of R. Carey Auto, Inc. within the meaning and  
intent of sections 1131(1) and 1133(a) of the Tax Law during the period at  
issue herein.

II. Whether, if so, petitioner has established that the dollar amount or  
method of determining the assessment against him is erroneous.

III. Whether the assessment of a fraud penalty against petitioner **is** warranted.

FINDINGS OF FACT

1. On May 30, 1984, the Audit Division issued to petitioner, Raymond Carey, Jr., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period March 1, 1980 through February 28, 1982 in the amount of \$126,128.13, plus a fraud penalty of fifty percent of said amount per Tax Law § 1145(a)(2), plus 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 R. Carey Auto, Inc. ("the corporation") during the noted time period.

2. R. Carey Auto, Inc. ("the corporation") operated a Shell gasoline service station located at 673 West 125th Street, New York, New York. Upon noting that the corporation was not a registered vendor for sales tax purposes and that neither sales nor other tax returns had ever been filed by or **on** behalf of the corporation, the Audit Division scheduled an audit of the corporation.

3. Attempts were made to identify and contact the operators and/or principals of the corporation, which attempts proved unsuccessful. A March 15, 1982 visit to the corporation's 673 West 125th Street location revealed nothing further as to the operators or principals of the corporation, but revealed a physical setup of two pump islands with four gasoline pumps **on** each island. Gasoline prices of \$1.599 for super-unleaded, \$1.499 for regular unleaded and \$1.399 for regular were observed for the then-operator of the station, one Jessill Service Station.

4. Further inquiry revealed that for the period April 1, 1974 through November 1979, the service station at 673 West 125th Street had been operated by Hudson View Service Station, Inc. ("Hudson View"), and that petitioner Raymond Carey, Jr. had been vice-president of Hudson View. Also, the Audit Division found in the New York County Clerk's Office a certificate of incorporation for R. Carey Auto, Inc., which unsigned certificate listed one R. Carey as the incorporator. Two Shell invoices indicated that gasoline was delivered under the name "R. Carey Auto, Inc., R. Carey", at the station location and payment was made at the time the product was delivered (C.O.D.).

5. Upon failing to discover any further information as to the principals of the corporation, and without having access to or even any indication of the existence of books and records for the corporation, the Audit Division requested and received information as to the number of gallons of gas purchased by the corporation from Shell during the audit period. Such total gallonage (1,093,000 gallons) was multiplied by a net price of \$1.25 per gallon to arrive at projected gasoline sales of \$1,366,250.00. In addition, taxable repairs were estimated, based on audit experience, to have been \$25,000.00 per quarter or \$200,000.00 for the audit period. In sum, total taxable sales were thus computed to have been \$1,566,250.00 for the audit period, giving rise to the tax deficiency of \$126,128.13 at issue herein. Prior to estimating the deficiency, letters requesting information on the corporation had been issued to R. Carey Auto, Inc. at 673 West 125th Street (the station location) and 606 West 131st Street (the significance of this address was not specified). No response was received in either case.

6. At the hearing, petitioner presented no records or evidence to refute the amount of the deficiency, other than general testimony to the effect that

the station was located in an area very prone to theft and that for such an area, the estimated repair sales of \$25,000.00 per quarter seemed excessive.

7. Petitioner's position with respect to the issue of his personal responsibility for the tax, interest and penalty in question, is that he was not a person involved with the operation of the corporation's business and was not under a duty to collect and ensure the payment of taxes due under Articles 28 and 29.

8. In or about April of 1974, petitioner together with one John Nevins as his co-owner, operated a Shell Service Station located at 673 West 125th Street known as Hudson View Service Station, Inc. ("Hudson View"). Sometime during the latter part of 1977, petitioner ceased his association with Hudson View, citing differences of opinion with Mr. Nevins, and Mr. Nevins continued to operate Hudson View for some time thereafter.

9. Shell Oil Company had leased the 673 West 125th Street station location for a period of ten years from a third party lessor. It appears that sometime between 1977 and 1980, Mr. Nevins ceased operation of Hudson View, at which time Shell still had a substantial period of time remaining on its lease. Shell, through its marketing representative, one James Finch, and others, sought to find someone to operate a service station at the location. In order to qualify, the person had to have completed certain requisite schooling as offered by Shell, which schooling petitioner had previously completed.

10. Petitioner was asked by Shell's representatives to operate the station, but petitioner declined, indicating he had no interest in being involved with the service station business. In turn, Shell's representatives asked petitioner if he knew of anyone who would be interested in operating the station.

11. Petitioner suggested to Shell one Louis Aponte, described as a service station "buff". Mr. Aponte, who lived in the area of the station, took an interest in the business and had in prior years pumped gas and done odd jobs for petitioner during petitioner's involvement with Hudson View. Petitioner described Mr. Aponte as "a friend" and "someone who was always around the station".

12. Mr. Aponte had not passed Shell's required schooling and thus did not technically qualify to be an operator of a Shell station. After contacting Mr. Aponte, Shell, by its representative Mr. Finch, had reservations about Mr. Aponte's ability to pass the schooling. In addition, Shell conducted its schools at sporadic intervals and the next class available to Mr. Aponte was not for two or three months. Accordingly, Shell's regional representatives approached petitioner requesting him to "allow the use of his name", as one who had qualified by passing Shell's schooling, so that Mr. Aponte could be allowed to operate the station and so that Shell could get the leased location in business without delay. In turn, at Shell's request and as "a favor to Shell" and "to help out his friend Louis Aponte", petitioner agreed that "they could use his name".

13. Petitioner's only involvement with Mr. Aponte and R. Carey Auto, Inc. after the above-described events was to stop by the station every few weeks and sign sheets of blank checks. This was done at Mr. Aponte's request, and petitioner never filled in any amounts or payees on any of such checks nor did he have knowledge of or inquire into the payments made or to be made with such checks.

14. Petitioner had no knowledge of or involvement in the formation of the corporation. He did not know what an incorporator was or that he was listed as incorporator of the corporation.

15. There is no evidence that petitioner was an officer, shareholder, director or employee of the corporation. Petitioner was not physically present at the station and did not perform any work duties there. Petitioner invested no money in the corporation, and had no power or authority over or within the corporation (that he was aware of). He neither prepared nor signed any tax returns or reports for the corporation, had no involvement in the financial or operational aspects of the corporation, was not involved in its organization and incorporation and received no remuneration nor any other benefit in connection with the corporation from either the corporation or from Shell.

16. Petitioner has a high school education with no background in accounting or bookkeeping.. During his years in business with Hudson View, petitioner relied upon Hudson View's accountants to handle all financial and reporting aspects of the business. Petitioner injured his back at about the time he left Hudson View (1977). He did not work at all between such time and early 1986 when he was able to resume light carpentry work. Throughout such time, as well as at present, petitioner has resided with his parents at their 119 Pilgrim Court, Pearl River, New York home. Petitioner first became aware of the tax audit and its consequences when he received the Notice of Determination at issue herein at his parents' home.

#### 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(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 resolution of the issue of personal liability for sales tax due turns upon a factual determination in each case (Vogel v. Department of Taxation and Finance, 98 Misc2d 222; Chevlowe v. Koerner, 95 Misc2d 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, preparation and signing of tax returns and authority to sign checks (Vogel, supra ~~See also~~ 20 NYCRR 526.11[b]).

C. That based on the totality of the evidence presented, including the credible testimony offered by petitioner and by James Finch, petitioner was not, under the facts presented in this case, a person subject to personal liability for the tax, penalty and interest as assessed by the Audit Division. It is clear that petitioner received no benefit from and had **no** involvement in, knowledge of or authority (to his knowledge) over the affairs and operations of the corporation.


D. That in view of the foregoing, Issues "II" and "III" are rendered moot ■

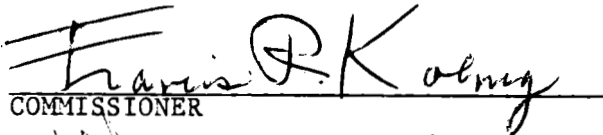
E. That the petition of Raymond Carey, Jr. officer of R. Carey Auto, Inc. is hereby granted and the Notice of Determination and Demand dated May 30, 1984 is cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

MAR 20 1987

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER