

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition

of :

WILLIAM NESTVED,
OFFICER OF WILL CARL SERVICE CENTER, INC.

DETERMINATION

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, 1981
through November 30, 1982.

Petitioner, William Nestved, officer of Will Carl Service Center, Inc., 19 Edwin Street, Staten Island, New York 10312, 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, 1981 through November 30, 1982 (File No. 55574).

A hearing was commenced before Joseph W. Pinto, Jr., Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 15, 1986 at 9:15 A.M. and continued to conclusion at the same offices and before the same hearing officer on June 16, 1987 at 9:15 A.M. Petitioner appeared by Philip J. Fitzpatrick, Esq. The Audit Division appeared by John P. Dugan, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined additional sales taxes due from Will Carl Service Center, Inc. based upon an examination of available books and records and external indices.

11. Whether petitioner is personally liable for payment of taxes determined to be due from Will Carl Service Center, Inc.

FINDINGS OF FACT

1. On June 20, 1984, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes due to petitioner William Nestved, as officer of Will Carl Service Center, Inc., stating total tax due of \$40,916.54 and interest of \$11,548.41 for a total amount due of \$52,517.95 for the period March 1, 1981 through November 30, 1982 ("the audit period").

2. Petitioner, along with another person, Carl Erickson, operated a service station under the corporate name Will Carl Service Center, Inc. ("the corporation"), making retail sales of gasoline, repairs, tires, batteries and accessories ("TBA"). Each of the principals owned 50 percent of the business, represented by 10 shares of the stock of the corporation.

3. A buy-out agreement introduced by petitioner indicated that William Nestved's participation in the business and status as an officer of the corporation ended as of March 12, 1982. Hence, the Audit Division conceded that petitioner was liable only for the following four periods:

<u>Period Ended</u>	<u>Tax Due</u>
5/31/81	\$ 7,399.36
8/31/81	8,737.84
11/30/81	4,426.46
2/28/82	4,642.85

4. On January 11, 1984, the Audit Division requested from petitioner all books and records pertaining to the corporation's sales tax liability, including journals, ledgers, sales invoices, purchase invoices, cash register tapes, exemption certificates and all other sales tax records. The auditor arranged for an appointment date of January 25, 1984 at which time either Mr. Erickson or Mr. Nestved appeared with very limited records. The only records produced were sales tax returns and related worksheets, Federal and State income tax returns, a sales schedule for the period October 1, 1980 through

September 30, 1981, purchase invoices for the period February 15, 1982 through May 1, 1982, a voucher register and monthly bank statements. No general ledger, cash receipts journal, depreciation schedules, purchase journal or sales invoices were produced and it was determined that the records produced were inadequate for determining petitioner's sales tax liability.

5. The Audit Division chose to utilize third-party purchase records obtained from Amoco Oil Company, the corporation's supplier, and selling prices from the corporation's workpapers used in preparing sales tax returns, to determine sales of regular and premium gasoline. Said sales were determined to be \$402,023.00 for regular gas and \$157,692.00 for premium gasoline. The auditor noticed, on an observation of the corporation's premises, that there was a diesel fuel pump and two lifts. Therefore, it was assumed diesel fuel was sold by petitioner and diesel fuel purchases were estimated to be 10 percent of the total purchases for regular and premium gasoline. The selling price used was that indicated on the diesel fuel pump at the time of the observation. Resulting sales of diesel fuel for the the audit period were determined to be \$51,179.00. Repair and TBA sales were estimated at \$200.00 per lift per day for 6 days per week, resulting in repair and TBA sales for the audit period of \$218,400.00. Total audited taxable sales for the audit period were estimated to be \$829,294.00, compared to the corporation's taxable sales reported of \$326,581.00, yielding additional taxable sales for the audit period of \$502,713.00. Additional sales tax due on these additional taxable sales was calculated to be \$40,969.54.

6. Since the expense purchases were negligible they were not tested. Also, the lack of depreciation schedules precluded any determination with

regard to the corporation's acquisition of fixed assets. Therefore, fixed assets were not tested.

7. During the period March 1, 1981 through March 12, 1982, William Nestved was an officer and devoted 100 percent of his time to the business of the corporation as reflected in his testimony and the United States corporation income tax returns filed for the years 1980 and 1981. During said period Mr. Nestved signed checks and at least one New York State and local sales and use tax return on behalf of the business, owned 50 percent of the stock of the corporation and made a substantial contribution to the capital of the business upon its inception.

CONCLUSIONS OF LAW

A. That Tax Law § 1138(a)(1) provides that:

"if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors."

B. That Tax Law § 1135(a) provides that every person required to collect tax shall keep records of every sale and all amounts paid, charged or due thereon and of the tax payable thereon. Such records shall include a true copy of each sales slip, invoice, receipt or statement.

C. That petitioner did not have books and records available for audit nor did he produce books and records sufficient to determine the corporation's tax liability. When records are not provided or are incomplete or insufficient, it is the duty of the Audit Division to select a method of audit reasonably calculated to reflect taxes due (Matter of Urban Liquors, Inc. v. State Tax

Commission, 90 AD2d 576). The Audit Division properly determined petitioner's sales on the basis of purchase records from Amoco Oil Company and Certified Heating Oils, Inc. and the Audit Division's past experience with audits of similar businesses in accordance with Tax Law § 1138(a).

D. That the buy-out agreement presented by petitioner, however, demonstrated that his liability should be limited ~~to~~ the period March 1, 1981 through March 12, 1982, since that was the time period he was an officer and shareholder in the corporation.

E. That Will Carl Service Center, Inc. never made sales of diesel fuel. Other than the observation of a diesel pump years after the business terminated, there was no evidence to substantiate sales of diesel fuel. Therefore, additional taxable sales calculated by the Audit Division for diesel sales should be subtracted from the additional taxable sales figures compiled by the Audit Division and each quarter modified downward accordingly.

F. That Tax Law § 1133(a) provides that "every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article".

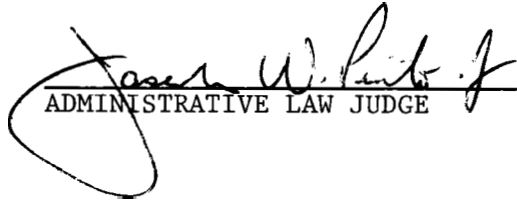
G. That petitioner William Nestved was a person required to collect tax within the meaning and intent of Tax Law § 1131(1) and, therefore, is personally liable for the sales and use taxes due from Will Carl Service Center, Inc. in accordance with Tax Law § 1133(a) (Matter of A-1 Fence Company, Inc., State Tax Commission, August 7, 1981).

H. That the petition of William Nestved as officer of Will Carl Service Center, Inc. is granted to the extent set forth in Conclusions of Law "D" and "E"; the Notice of Determination and Demand for Payment of Sales and Use Taxes

Due issued on June 20, 1984 is to be modified accordingly; and that except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

SEP 03 1987


ADMINISTRATIVE LAW JUDGE