

STATE OF NEW YORK

DIVISION OF **TAX** APPEALS

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In the Matter of the Petition

of

FRANCIS COONEY,  
OFFICER OF SILDA ENTERPRISES, INC.  
T/A CAMPBELLS MARKETS

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 September 1, 1980 :  
through May 31, 1982.

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Petitioner, Francis Cooney, Officer of Silda Enterprises, Inc., t/a Campbells Markets, 1511 Fifteenth Lane, Lake Worth, Florida 33463, 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 September 1, 1980 through May 31, 1982 (File No. 59411).

A hearing was held before Timothy J. Alston, Hearing Officer, at the offices of the State Tax Commission, 65 Court Street, Buffalo, New York, on May 20, 1987 at 10:45 A.M. Petitioner appeared by Jack O. Gaylord, Esq. The Audit Division appeared by John P. Dugan, Esq. (Deborah J. Dwyer, Esq., of counsel).

#### ISSUE

Whether petitioner is personally liable pursuant to sections 1131(1) and 1133(a) of the Tax Law for the sales and use tax due from Silda Enterprises, Inc., t/a Campbells Markets.

#### FINDINGS OF FACT

1. On March 20, 1985, the Audit Division issued to petitioner, Francis Cooney, a Notice of Determination and Demand for Payment of Sales and Use Taxes

Due for the period September 1, 1980 through May 31, 1982, asserting \$5,659.00 in sales tax due, plus interest.

2. The sales tax assessed against petitioner was derived from the sales tax liability of Silda Enterprises, Inc., t/a Campbells Markets ("the corporation"). The Audit Division assessed petitioner as a responsible officer of the corporation pursuant to sections 1131(1) and 1133(a) of the Tax Law.

3. The amount of tax at issue herein arose from the Audit Division's denial of credits claimed on sales tax returns filed by the corporation during the period at issue. Petitioner did not dispute the amount of the assessment.

4. During the period at issue petitioner was president of the corporation and as such, he signed all sales tax returns filed by the corporation during that period. Petitioner does not dispute that he was a responsible officer of the corporation as asserted by the Audit Division.

5. During the period at issue, the corporation operated a supermarket and was experiencing financial difficulties. On March 31, 1982 the corporation entered into an agreement with its major creditor, S.M. Flickinger Co., Inc., by which the corporation transferred all of its merchandise and accounts receivable to S.M. Flickinger Co., Inc. Petitioner contends that the corporation was forced into the agreement and that the transfer was a fraudulent conveyance by an insolvent within the meaning of section 273 of the Debtor and Creditor Law which improperly gave S.M. Flickinger Co., Inc. a preferred status over all other creditors of the corporation, including the Department of Taxation and Finance. Petitioner questions the propriety of the transfer of property from the corporation to S.M. Flickinger Co., Inc. in light of Debtor and Creditor Law § 273 and maintains that, as a result, he should not remain liable for the tax asserted herein. Petitioner further argues that he owns no assets and

assets and cannot satisfy the amount assessed against him. He maintains that the Audit Division should proceed against **S.M. Flickinger Co., Inc.**, the entity in possession of the corporation's assets, to satisfy its claim.

6. Petitioner resigned as president of the corporation as of November 16, 1982. He had no further association with the corporation subsequent to that date.

#### CONCLUSIONS OF LAW

A. That section 1131(1) of the Tax Law, as in effect during the period in issue, defines "persons required to collect tax" under Article 28 as including inter alia:

"[A]ny 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".

B. That section 1133(a) of the Tax Law imposes personal liability upon such "persons required to collect tax" for "the tax imposed, collected or required to be collected" under Article 28.

C. That in view of Finding of Fact "4" petitioner was clearly a person required to collect tax on behalf of the corporation within the meaning of Tax Law § 1131(1). He was therefore personally liable for the amount of the tax at issue herein.

D. That petitioner's liability pursuant to section 1133(a) of the Tax Law is unaffected by petitioner's contentions set forth in Finding of Fact "5". As a "person required to collect tax" pursuant to section 1131(1) of the Tax Law, petitioner was under an obligation to collect and remit said tax as "trustee for and on account of the state" (Tax Law § 1132[a]), irrespective of any transfers of assets, fraudulent or otherwise, made by the corporation. Similarly,

petitioner's claimed lack of assets does not affect his liability for the tax at issue herein.

E. That the petition of Francis Cooney is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes, dated March 20, 1985, is sustained.

DATED: Albany, New York

SEP 17 1987

A handwritten signature in dark ink, appearing to be 'C. J. [unclear]', written over a horizontal line.

ADMINISTRATIVE LAW JUDGE