

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition

of

EPHRAIM DAVIDOWICZ
OFFICER OF MONSEY 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 December 1, 1980
through November 30, 1982.

Petitioner, Ephraim Davidowicz, Officer of Monsey Service Center, Inc.,
251-H Kearsing Parkway, Monsey, New York 10952, 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 December 1, 1980 through November 30, 1982
(File No. 64716).

A hearing was held before Robert F. Mulligan, Hearing Officer at the
offices of the State Tax Commission, Two World Trade Center, New York, New
York, on May 5, 1987 at 2:45 P.M. Petitioner appeared by Sydell J. Green, Esq.
The Audit Division appeared by John P. Dugan, Esq. (Michael J. Glannon, Esq.,
of counsel).

ISSUES

I. Whether petitioner was a person required to collect sales and use
taxes on behalf of Monsey Service Center, Inc.

11. If so, whether the assessment of sales and use taxes due was properly
computed.

FINDINGS OF FACT

1. Monsey Service Center, Inc. ("the corporation") operated a Texaco
service station at 45 Main Street, Monsey, New York during the period at issue.

2. The corporation was founded by Joseph Davidowicz and Sy Goldberg in 1976. Mr. Goldberg left the business a few years later and during the period at issue the stock of the corporation was owned by Joseph Davidowicz and Yonah Davidowicz, his wife.

3. In 1980, Joseph Davidowicz and Yonah Davidowicz moved to Israel and placed their son Moshe Davidowicz (also known as Mike) in charge of the station.

4. Mike Davidowicz had worked at the station for several years prior to 1980 and had been trained in a three week course at the Amoco Managerial School in Baltimore, Maryland.

5. At the time that Joseph Davidowicz and Yonah Davidowicz left for Israel, their son Ephraim Davidowicz, the petitioner herein, was approximately 20 years old and was employed as a mechanic at the station. He had started working at the station pumping gas in the afternoon, while in high school.

6. During the period at issue, Mike Davidowicz acted as manager of the station, prepared all invoices and checks and made all managerial decisions.

7. During the period at issue, petitioner Ephraim Davidowicz worked as a mechanic at the station and attended Rockland Community College in the evenings.

8. The corporation had two checking accounts during the period at issue:

(a) One account was at Union State Bank, Monsey, New York. The signature card on this account listed three signatories: Joseph Davidowicz, President, Mike Davidowicz, Vice President and Ephraim Davidowicz, Vice President.

(b) The other checking account was at the Bank of New York, Monsey, New York. There were two signatories listed, one being Ephraim Davidowicz, President, the other being Mike Davidowicz, Secretary.

9. Ephraim Davidowicz was never an officer of the corporation but signed the signature cards as an accommodation to his parents, as they wanted checks to be signed by both brothers in the absence of Joseph Davidowicz.

10. The corporation properly filed sales and use tax returns up to the quarter ending November 30, 1981, at which point filing became inconsistent:

- (a) For the quarter ending November 30, 1981, no return was filed.
- (b) For the quarter ending February 28, 1982, no return was filed.
- (c) For the quarter ending May 31, 1982, a return was filed late and the tax shown as due, \$1,217.18, was paid late.
- (d) For the quarter ending August 31, 1982, a return was timely filed showing \$1,272.49 in tax due, but only \$424.16 was remitted.
- (e) For the quarter ending November 30, 1982, no return was filed.

11. On May 29, 1985, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner, Ephraim Davidowicz, individually and as officer of Monsey Service Center, Inc., for the period December 1, 1980 through November 30, 1982 in the amount of \$14,600.83 in tax due, \$1,485.75 in penalty and \$1,860.12 in interest, for a total of \$17,946.70. Tax for each of the three quarters for which no return had been filed was computed at \$3,873.30, apparently based on applying a factor of 125 percent to the highest quarterly tax reported by the corporation. It is unclear which return was used for this calculation, but it evidently was a return which had been filed for a quarter prior to the period at issue. It appears that records of the earlier returns had been purged from the Audit Division's computer system prior to the hearing.

CONCLUSIONS OF LAW

- A. That Tax Law § 1133(a) provides, in pertinent part, as follows:

"Except as otherwise provided in section eleven hundred thirty-seven, 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."

B. That during the period at issue, Tax Law § 1131(1) provided as follows:

" '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."

C. That petitioner, Ephraim Davidowicz, was not a person required to collect tax on behalf of Monsey Service Center, Inc. He was between 20 and 22 years of age during the period at issue and did not participate in the management of the business. He signed the bank signature cards as an accommodation to his family and was not an officer of the corporation.

D. That in view of the foregoing, Issue II is moot.

E. That the petition of Ephraim Davidowicz is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 29, 1985, is cancelled.

DATED: Albany, New York

SEP 11 1987


ADMINISTRATIVE LAW JUDGE