

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Robert Gattie :
d/b/a Slumber Shop : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of :
Sales & Use Tax :
under Article 28 & 29 of the Tax Law :
for the Period 3/1/76-11/30/76. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 5th day of September, 1980, he served the within notice of Decision by mail upon Robert Gattie, d/b/a Slumber Shop, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Robert Gattie
d/b/a Slumber Shop
238 River Heights
Rochester, NY 14612

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
5th day of September, 1980.

Debbie Bank

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Robert Gattie :
d/b/a Slumber Shop : AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
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Sales & Use Tax :
under Article 28 & 29 of the Tax Law :
for the Period 3/1/76-11/30/76. :

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 5th day of September, 1980, he served the within notice of Decision by mail upon Martin S. Handelman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Martin S. Handelman
Handleman & Manioci
16 Main St. E.
Rochester, NY 14614

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
5th day of September, 1980.

Debbie Bank

Jay Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

September 5, 1980

Robert Gattie
d/b/a Slumber Shop
238 River Heights
Rochester, NY 14612

Dear Mr. Gattie:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1138 & 1243 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Martin S. Handelman
Handleman & Manioci
16 Main St. E.
Rochester, NY 14614
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
ROBERT GATTIE	:	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, 1976	:	
through November 30, 1976.	:	

Petitioner, Robert Gattie, 238 River Heights, Rochester, New York 14612, 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, 1976 through November 30, 1976 (File No. 27997).

A formal hearing was held before David Evans, Hearing Officer, at the offices of the State Tax Commission, 1300 Marine Midland Plaza, Rochester, New York, on February 8, 1980, at 10:00 A.M. Petitioner appeared by Handelman and Manioci, Esqs. (Martin S. Handelman, Esq., of counsel). The Audit Division appeared by Ralph J. Vecchio, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUE

Whether petitioner, Robert Gattie, was a person required to collect tax on behalf of the corporate taxpayer, Gattie & St. Louis, Inc. d/b/a Slumber Shop, and thus was personally liable for sales taxes assessed against and unpaid by said corporation for the quarterly periods March 1, 1976 through November 30, 1976.

FINDINGS OF FACT

1. Gattie & St. Louis, Inc., d/b/a Slumber Shop, filed Sales and Use Tax Returns for the quarterly periods March 1, 1976 through November 30, 1976, showing sales taxes due, including late filing charges, in the following

amounts: for March 1, 1976 to May 31, 1976, \$3,887.19; for June 1, 1976 to August 31, 1976, \$3,764.78; and for September 1, 1976 to November 30, 1976, \$2,413.86.

2. On August 9, 1977, the Audit Division issued to Slumber Shop (sic), Robert Gattie and L.J. St. Louis, three notices and demands for payment of sales and use taxes due for the abovementioned quarterly periods, in the total amount of \$10,397.79, including interest due and crediting amounts paid.

3. On August 18, 1979, warrants were issued against Gattie & St. Louis, Inc. d/b/a Slumber Shop and against Robert Gattie d/b/a Slumber Shop, asserting liability for sales taxes due in the total amount of \$10,941.90.

4. Robert Gattie moved in the Supreme Court, County of Monroe, to vacate the judgment docketed against him, which action was settled by stipulation. Pursuant to said stipulation, it was agreed by the attorneys of record for the State Tax Commission and for the petitioner that a hearing would be held before the Commission for the purpose of determining whether petitioner was individually liable for taxes due and owing from Gattie & St. Louis, Inc.

5. Gattie & St. Louis, Inc. was a corporation incorporated under the laws of New York on August 4, 1975 for the purpose of engaging in the retail furniture and bedding business. The officers of the corporation were Robert Gattie, petitioner herein, and L. James St. Louis, both of whom were also employees of the corporation.

6. Petitioner's duties in the corporation consisted of driving a truck and making deliveries of furniture and bedding. His employment with the corporation was part-time in nature, as he was employed elsewhere on a full-time basis.

7. In connection with making deliveries, petitioner possessed authority to write on one of the corporation's checking accounts in order to purchase gasoline for the truck.

8. Mr. St. Louis was responsible for the daily operation of the store and for maintaining the corporation's financial records. He had control over the corporation's checking accounts, against which were charged bills, wages and taxes. As to these latter accounts, petitioner had no signatory authority.

9. Sales and Use Tax Returns for the quarterly periods at issue, as well as for the periods ending August 31, 1975, November 30, 1975, February 29, 1976 and February 28, 1977 were signed by L. James St. Louis. Petitioner took no part in the preparation of these returns.

10. When petitioner on occasion made inquiries of Mr. St. Louis concerning whether payment of bills and taxes had been timely made, Mr. St. Louis informed petitioner that the bills were "up to date."

11. Approximately one month prior to the time the corporation ceased doing business in August, 1978, petitioner became aware that the corporation had not been paying its creditors. He received notification from various creditors that the corporation's checks had not been honored by the bank.

CONCLUSIONS OF LAW

A. That section 1133(a) of the Tax Law imposes upon any person required to collect tax, personal liability for the tax imposed, collected, or required to be collected.

B. That section 1131(1) of the Tax Law in defining persons required to collect tax, includes those corporate officers who are under a duty to act for such corporation in complying with any requirement of Article 28.

C. That the resolution of whether petitioner is a person required to collect tax turns upon a factual determination in each case. Chevlowe v. Koerner, 407 N.Y.S.2d 427 (Sup. Ct. Queens Co., 1978); Vogel v. Department of Taxation and Finance, 413 N.Y.S.2d 862 (Sup. Ct. Monroe Co., 1979).

D. That relevant factors in such a determination include, but are not limited to, the following: the officer's day to day responsibilities in the corporation; the officer's involvement in and knowledge of the financial affairs of the corporation; the identity of the officer who prepared and signed Sales and Use Tax Returns; the officer's authority to sign checks on the corporation's bank accounts; and in the case of a closely held corporation, the officer's knowledge of corporate affairs and benefits he received from the corporate profits.

E. That petitioner was not an officer under a duty to act for Gattie & St. Louis, Inc. d/b/a Slumber Shop, in complying with the requirements of Article 28 of the Tax Law.

Petitioner was not involved in the operation and management of the corporation, nor was he in charge of the financial affairs of the firm. Petitioner did not maintain the financial records and did not prepare the sales tax returns for the business. Petitioner had authority to draw only upon the corporate checking account utilized for operation of the delivery truck. Further, the holding of corporate office is not sufficient in and of itself to impose liability upon the office holder.

F. That petitioner, insofar as he had no control over the financial affairs of the corporation, was not a person required to collect tax and is not personally liable for sales taxes unpaid during the time he served as corporate officer. See In the Matter of Rocco Termini, State Tax Commission,

August 16, 1977; and In the Matter of Milton Miller, State Tax Commission,
September 12, 1974.

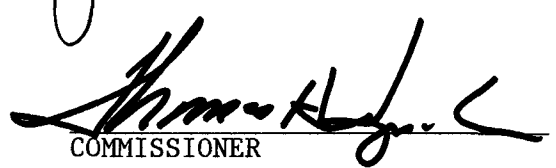
G. That the petition of Robert Gattie is granted; the Notices and Demands
for Payment of Sales and Use Taxes Due issued against Robert Gattie for the
quarterly periods ended May 31, 1976, August 31, 1976 and November 30, 1976
are hereby cancelled; and the warrant issued against petitioner is vacated.

DATED: Albany, New York

SEP 05 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER