

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
D & W AUTO SERVICE CENTER, INC. :
AND PAUL WEHR, AS OFFICER : DECISION
for Revision of a Determination or for Refund : DTA NO. 801484
of Sales and Use Taxes under Articles 28 and :
29 of the Tax Law for the Period December 1, :
1980 through February 28, 1982. :
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The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on July 8, 1988 with respect to the petition of D & W Auto Service Center, Inc. and Paul Wehr, as officer, 3263 Bertha Drive, Baldwin, New York 11510 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 February 28, 1982 (File No. 801484). Petitioners appeared by Marc S. Krieg, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Herbert Kamrass, Esq., of counsel).

Both petitioners and the Division filed briefs on exception.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner Paul Wehr was a person required to collect tax on behalf of the corporate petitioner.

FINDINGS OF FACT

We find the facts as stated in the Administrative Law Judge's determination and such facts are incorporated herein by this reference and we find certain additional facts as indicated below. All of such facts are set forth below.

Petitioner D & W Auto Service Center, Inc. ("the corporation") operated an automobile service station at 605 Merrick Road, Rockville Centre, New York during the period at issue.

An audit of the corporation for the period January 1 through December 23, 1981 was conducted by the Division. The business was closed at the time of the audit, which took place in the first half of 1983. The audit method was as follows:

- (a) The corporation had filed sales tax returns only for the quarters ending May 31, 1981 and August 31, 1981.
- (b) Books and records available for audit consisted of a record of deposits to and disbursements from the corporation's checking account.
- (c) Records requested but not made available included sales and purchase invoices, Federal and State income tax returns and related worksheets, purchases journal, record of cash payouts and sales tax worksheets.
- (d) Reconciliation of gross sales per the corporation's records for the audit period of \$77,898.00 with gross sales per the sales tax returns filed of \$62,655.00 indicated unreported sales of \$15,243.00.
- (e) Reconciliation of gasoline and diesel fuel purchases per records of \$58,145.60 with third-party verification from the corporation's supplier, Amtec Petroleum, Inc. ("Amtec") of \$205,966.32 indicated unreported purchases of \$147,820.72, for a 254.23% margin of error.
- (f) The auditor used the Amtec purchases of \$205,966.32 plus a gross profit of 12 cents per gallon (based on office experience) for 172,758 gallons. After allowing for nontaxable State and Federal excise taxes, the audited taxable gasoline and diesel fuel sales were \$210,002.52.
- (g) Repair sales were estimated at \$1,500.00 per week for each of two service bays for 48 weeks, as the station was determined to have been open for 51 weeks and an allowance of three weeks was made for vacations and holidays. This resulted in audited repair sales of \$144,000.00.
- (h) Total audited sales were \$354,002.73. Reported sales were \$62,655.00, resulting in unreported taxable sales of \$291,347.73 and additional tax due of \$20,671.99.

On September 20, 1983 the Division issued identical notices of determination and demand for payment of sales and use taxes due to the corporation and to petitioner Paul Wehr, as officer. The assessments covered the period January 1, 1981 through December 31, 1981 and claimed tax due of \$20,671.99, penalty due of \$5,122.69 and interest due of \$5,438.97 for a total due of \$31,233.65.

Prior to the period at issue, petitioner Paul Wehr worked for Diocledes Dominguez as a gas station attendant at a filling station operated by Mr. Dominguez in Hempstead, New York. After that station closed, Diocledes Dominguez and petitioner Paul Wehr decided to open the Merrick Road station. Diocledes Dominguez and Paul Wehr formed the corporation, each receiving 50% of the capital stock. Mr. Dominguez was president and Paul Wehr was secretary. Paul Wehr and his father, Roman Wehr,¹ contributed \$8,000.00 in cash to the venture and Mr. Dominguez contributed a tow truck and tools also valued at \$8,000.00. Roman Wehr contributed an additional sum totalling approximately \$19,000.00 for purchase of gasoline. The corporation leased the station from Amtec. When Diocledes Dominguez and Paul Wehr opened the station in January 1981, Mr. Dominguez was about 45 years of age and Paul Wehr was 20 years of age.

The corporation's checking account required two signatures: those of Diocledes Dominguez and Paul Wehr. Mr. Dominguez induced Paul Wehr to sign ten to twelve checks at a time, in blank. Mr. Dominguez would then draw the checks as they were needed. The station had been closed for nine months to a year prior to the time that the corporation took it over in January 1981. For the first few weeks, very little was done except to clean and repair the premises. The hydraulic lifts in the service bays were at first inoperable and virtually no repairs were performed until April 1981. In fact, Amtec granted the corporation a rent concession because of the problem with the service bays. The station was open from 7:00 A.M. to 8:00 P.M. daily. One of the principals would come in early in the day and then leave early; the other would come in later and leave at closing. The station employed no one except Mr. Dominguez and Paul Wehr. One day in the latter part of 1981, Diocledes Dominguez left the business, taking his truck, his tools and his equipment and most of the business records. According to Amtec records attached to the field audit report, no gasoline or diesel fuel was delivered to the station after October 1981. The lease for the station was terminated as of December 23, 1981.

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A "partnership" agreement among Diocledes Dominguez, Paul Wehr and Roman Wehr indicates that Roman Wehr was to be an equal partner. It appears that Roman Wehr's role in the business, however, was as an investor. There is nothing in the record to indicate that Roman Wehr was a shareholder in, or officer or director of the corporation.

On November 26, 1982 petitioner Paul Wehr and his father Roman Wehr won an arbitration award against Diocledes Dominguez in the amount of \$8,000.00 for damages connected with the operation of the station. The award was confirmed by the Supreme Court of the State of New York, Nassau County. However, as of the date of the hearing, Paul Wehr and Roman Wehr had not been successful in collecting any part of the award.

In addition to the facts found by the Administrative Law Judge, we find that D & W Auto Service Center, Inc. filed sales tax returns for only two quarters of the audit period. Petitioner Paul Wehr signed one of these returns, for the quarter ending August 31, 1981. Although this return reported that \$2,616.32 in sales tax was due, only \$300.00 was remitted with the return.

OPINION

In the decision below the Administrative Law Judge determined that petitioner Paul Wehr was not a person required to collect tax on behalf of D & W Auto Service Center, Inc. Specifically, it was held that the petitioner's age contributed to petitioner becoming an unwitting victim of the individual who actually controlled the business.

On exception the Division contends that petitioner Paul Wehr was an officer responsible for the corporation's sales tax liability. In particular, the Division argues that certain facts, such as petitioner Paul Wehr's check signing authority and day-to-day involvement with the business, clearly indicate responsible officer status. Further, the Division argues that there is no authority for holding that a young adult should not be held responsible merely because of his age.

In response petitioner Paul Wehr argues that the determination of the Administrative Law Judge was correct. Specifically, petitioner Paul Wehr argues that he was a victim of the individual who actually controlled the business. The fact that petitioner Paul Wehr signed checks is attributed to inducement and intimidation. As a result, petitioner Paul Wehr seeks to have the determination below sustained.

We reverse the determination of the Administrative Law Judge.

Tax Law section 1133(a) imposes personal liability for taxes required to be collected under Article 28 of the Tax Law upon a person required to collect such tax. A person required to collect

such tax is defined as "any officer, director or employee of a corporation . . . who as such officer, director or employee is under a duty to act for such corporation . . . in complying with any requirement of [article 28]" (Tax Law { 1131[1]}). The determination that an individual is a responsible officer depends upon the particular facts of each case (Stacy v. State, 82 Misc 2d 181, 183; Matter of Autex Corp., Tax Appeals Tribunal, November 23, 1988). The relevant factors to consider when determining whether a person has such a duty to act for the corporation include, inter alia, authorization to sign the corporate tax return, responsibility for management or maintenance of the corporate books, authorization to hire and fire employees and derivation of substantial income from the corporation or stock ownership (see, 20 NYCRR 526.11[b][2]; Matter of Cohen v. State Tax Commn., 128 AD2d 1022; Matter of Blodnick v. State Tax Commn., 124 AD2d 437; Matter of Rosenblatt v. State Tax Commn., 114 AD2d 127, revd in part on dissenting opn below 68 NY2d 775).

Applying these criteria to the circumstances before us, we find that petitioner Paul Wehr was a responsible officer of D & W Auto Service Center, Inc. The facts indicate that petitioner owned 50% of the stock of the corporation, had invested in the corporation, was a required signatory to the corporation's checks, signed a sales tax return, earned income from the corporation and was secretary of the corporation. Furthermore, petitioner Paul Wehr was involved in the day-to-day operations of the corporation, working at the station every day and operating the station alone for part of each day. Such facts clearly demonstrate that petitioner Paul Wehr was a responsible officer of the corporation. While it is unfortunate that petitioner Paul Wehr's partner may have taken advantage of him, that does not diminish petitioner Paul Wehr's status as a responsible officer. Additionally, petitioner Paul Wehr's youth at the time the corporation was organized does not provide a basis for absolving him of his duties as a responsible officer. Thus, we conclude that petitioner Paul Wehr was in fact a responsible officer of D & W Auto Service Center, Inc. and as a result he is liable for the resulting tax, penalty and interest.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted;
2. The determination of the Administrative Law Judge that Paul Wehr was not a responsible officer is reversed; and
3. The petition of D & W Auto Service Center, Inc. and Paul Wehr as officer is granted to the extent indicated in conclusion of law "C" of the Administrative Law Judge's determination and the notices of determination issued to said petitioners on September 20, 1983 are modified accordingly, but except as so granted the petition is in all other respects denied.

Dated: Albany, New York
April 20, 1989

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner