

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petitions	:	
of	:	
<b>DONALD SIEGEL, OFFICER OF</b>	:	DECISION
<b>CHARISMA BUSINESS SUPPLY CO., INC.</b>	:	DTA Nos. 807082
<b>AND CHARISMA LEGAL SUPPLY CO., INC.</b>	:	and 807083
for Revisions of Determinations or for Refunds of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period March 1, 1982 through May 31, 1982.	:	

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Petitioner Donald Siegel, officer of Charisma Business Supply Co., Inc. and Charisma Legal Supply Co., Inc., 2128 Oliver Way, Merrick, New York 11566, filed an exception to the determination of the Administrative Law Judge issued on March 11, 1993. Petitioner appeared by Morris P. Silver, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Kathleen D. Church, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation filed a letter brief in opposition to the exception. The six-month period to issue this decision began on August 1, 1994, the date by which petitioner could submit a reply brief. Oral argument, requested by petitioner, was denied. On January 5, 1995, the Division of Taxation submitted a letter of clarification.

Commissioner Koenig delivered the decision of the Tax Appeals Tribunal. Commissioner Dugan concurs.

***ISSUES***

I. Whether petitioner, Donald Siegel, was a person under a duty to collect and remit sales and use taxes on behalf of two corporations known as Charisma Business Supply Co., Inc. and Charisma Legal Supply Co., Inc., pursuant to Tax Law §§ 1133(a) and 1131(1), during the period March 1, 1982 through May 31, 1982.

II. Whether, if so, the dollar amounts of tax due are the amounts shown on two notices of determination issued to petitioner rather than the amounts shown as due on sales and use tax returns late-filed by the corporations.

III. Whether petitioner has advanced any grounds sufficient to warrant abatement of penalties imposed.

### ***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

On September 15, 1987, the Division of Taxation ("Division") issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Donald Siegel as an officer of Charisma Business Supply Co., Inc. ("Business"). This notice pertained to the sales tax quarterly period spanning March 1, 1982 through May 31, 1982, and assessed Mr. Siegel for additional sales tax allegedly owed by Business in the amount of \$29,856.43, plus penalty and interest. On the same September 15, 1987 date, a second Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued to Mr. Siegel as an officer of Charisma Legal Supply Co., Inc. ("Legal"). This notice assessed Mr. Siegel for additional tax allegedly due from Legal for the sales tax quarterly period spanning March 1, 1982 through May 31, 1982 in the amount of \$12,300.07, plus penalty and interest.

Each of the corporate entities named above was engaged in the sale of business machines, equipment, and supplies, and also was involved in brokering printing jobs for various law firms.

The record does not specify when the corporate entities commenced doing business. However, during at least the early part of 1982, and apparently prior thereto, the businesses were encountering financial difficulties. On May 5, 1982 an assignment for the benefit of creditors was filed on behalf of each corporate entity. The assignment documents, dated May 4, 1982, were executed by petitioner, Donald A. Siegel, as president of Business and of Legal. An

original assignee, one Robert Rubinger, was named, and was later replaced by one John R. Marvin as successor assignee.

As a part of the assignment for the benefit of creditors, an auction of the assets of the businesses was conducted by Martin Fein and Co., Inc. as auctioneers. The gross auction proceeds amounted to \$29,027.65 for Business and \$12,775.00 for Legal. However, the auction proceeds were allegedly not turned over to the original assignee (Robert Rubinger), but rather were dissipated by the auctioneer or auctioneering firm. In turn, an action to compel payment of the proceeds of the auction was commenced by the assignee. The auctioneering firm thereafter filed for protection under the bankruptcy code, and this status has apparently continued to date.

According to testimony by the successor assignee (Mr. Marvin) accounts receivable were also collected on behalf of Business in the amount of approximately \$43,000.00, and Legal in the amount of approximately \$35,500.00. These amounts are being held in certificates of deposit pending action in the bankruptcy and assignment proceedings.

Petitioner Donald Siegel did not appear and give testimony at the hearing. However, petitioner presented one Allen Zuness as a witness. Mr. Zuness commenced employment with the two corporate entities in or about December of 1980. Mr. Zuness testified that for some 12 years prior to his association with the corporate entities here, he had been an office manager for various law firms. In the course of that employment he met Mr. Siegel and was offered a position with the two corporate entities. Mr. Zuness explained that he loaned some \$30,000.00 to the businesses when he first became an employee. Shortly thereafter, he also guaranteed a bank loan to the businesses in the amount of \$100,000.00. He testified that his intent in joining these businesses in this fashion was that eventually he would acquire a part-ownership interest in the businesses.

Mr. Zuness received an annual salary from the businesses in the amount of approximately \$60,000.00. By contrast, he testified that Donald Siegel's salary was initially in the range of \$200,000.00, but was thereafter reduced by some \$30,000.00 annually at the suggestion of Mr. Zuness and in light of the businesses' financial difficulties.

Mr. Zuness described Donald Siegel as the president and sole shareholder of both corporations who came to the businesses' location nearly every day to see the general operation of the businesses. Mr. Siegel was apparently most directly involved with sales, and had hired Mr. Zuness as an inside office administrator. Mr. Zuness described his primary role as taking care of the daily office administrative functions.

Both Mr. Zuness and Mr. Siegel were authorized signatories to the corporate checking accounts. Mr. Zuness signed checks, including checks in payment of sales tax, and also signed tax returns, including sales tax returns. He described his signings as occurring either at the direction of Mr. Siegel or taking place when Mr. Siegel was not physically present at the businesses. From time to time, Mr. Zuness utilized the title of vice-president, although he testified that he was never formally appointed to such position and that he used the title merely for appearance purposes in dealing with other persons. He described himself as under the supervision of Mr. Siegel, and noted that any questions regarding business matters, such as priority in payment of bills including, specifically, taxes would be directed to Mr. Siegel.

Mr. Zuness described the two corporate entities as being run essentially as one company. There was a total of approximately 18 employees, hired and fired by Mr. Siegel. Mr. Zuness specifically testified that he would have had to ask Mr. Siegel before hiring or firing anyone. It appears, although it is not entirely clear, that Mr. Zuness never hired or fired any employees of either corporation.

At some point in 1981, shortly after becoming involved with the companies, Mr. Zuness determined that certain obligations, including sales tax payments, were delinquent. He advised Mr. Siegel to this effect, suggesting that Mr. Siegel should go to the Division and attempt to work out a payment schedule. According to Mr. Zuness, Mr. Siegel approved of the idea and a meeting was scheduled. However, Mr. Siegel did not appear at or accompany Mr. Zuness to the meeting. From documents in evidence, it appears that a payment arrangement was agreed to, at least for delinquent taxes owed for quarterly periods during 1981. It also appears that some payments were made pursuant to this agreement, as evidenced by a check to the Division signed

by Mr. Zuness in an amount equal to that amount shown as the monthly payment due under the payment arrangement.

Mr. Zuness testified that the businesses eventually defaulted on the \$100,000.00 loan and that, pursuant to his guarantee, he was required to pay some \$30,000.00 on such loan, with Mr. Siegel paying the other \$70,000.00. At or about the same time, Mr. Zuness also paid one half of a \$12,000.00 Internal Revenue Service withholding tax assessment. Mr. Zuness never received repayment of his own \$30,000.00 initial loan to the businesses nor has he recovered any of the amounts he paid on the defaulted bank loan or withholding tax assessment.

Introduced in evidence was a letter dated March 30, 1989, written by petitioner's former representative (Mr. Newman), and accompanied by sales tax returns (Forms ST-100) for the sales tax quarterly period in question. These returns are dated March 23, 1989 and bear a signature appearing to be that of Donald Siegel. Mr. Newman's letter indicates that the returns were being filed after the conduct of a conciliation conference and pursuant to leave granted by the conciliation conferee. The return filed for Business indicates a sales tax liability of \$5,431.04, while that filed for Legal indicates a sales tax liability of \$1,242.41. Mr. Newman's letter claims the delay in filing such returns post conference was occasioned by petitioner's accountant's need to review old records in order to compute accurate returns.

Also offered in evidence in connection with the returns described above were responding letters dated January 31, 1990 and April 25, 1990, respectively, from Vera R. Johnson, Esq., the Division's then-representative in this matter. Ms. Johnson's January 31, 1990 letter references receipt of the returns in question, noting that "[i]f your client remits payment for the taxes due as noted [on such returns], I will arrange to cancel [the notices at issue herein]." Ms. Johnson's April 25, 1990 letter references the prior January 31, 1990 letter, noting specifically that "payment of tax, penalty and interest will be needed to cancel [the notices at issue herein]." [Ms. Johnson's January 3, 1990] letter inadvertently refers to payment of taxes due only."

There is no evidence in the record that any payments have been received by the Division with respect to either of the sales tax returns described above or with respect to the notices of

determination at issue herein, from either Mr. Siegel or from the proceeds of the auction and/or collection of accounts receivable. Further, there is no evidence that any of the gross proceeds of the auction of assets has been recovered (via Supreme Court or bankruptcy actions) from the auctioneering firm of Martin Fein and Co., Inc.

### ***OPINION***

In the determination below, the Administrative Law Judge, after reviewing Tax Law §§ 1131(1) and 1133(a), and referencing various Tax Appeals Tribunal decisions, held:

"[i]n this case, there is more than ample evidence to support a conclusion that petitioner was a person under a duty to collect and remit taxes due on behalf of the two corporations . . . . Accordingly, petitioner was properly assessed for the unpaid sales tax liabilities of the two corporations for the period at issue" (Determination, conclusion of law "D").

Specifically, the Administrative Law Judge noted that petitioner was described by his own witness as the president and sole shareholder of the corporation, as well as the individual in charge of the business, who hired and fired employees, directed payment of liabilities, and received a sizeable salary.

The Administrative Law Judge, with reference to whether the amounts shown on late filed returns were the amounts due as opposed to the amounts assessed on the notices of determination, also held that:

"[h]owever, these communications [the Division's letters of January 31, 1990 and April 25, 1990] not only appear to represent offers in the nature of settlement but also, clearly, make payment of tax (as shown on the returns), plus penalty and interest due, a prerequisite to cancelling the notices in question. Since there is no evidence that any payments have been made, the question of acceptance of the terms of the settlement is not reached and is rendered moot. Further, given no evidence to refute or reduce the amounts shown on the notices leaves such amounts to be sustained" (Determination, conclusion of law "E").

The Administrative Law Judge also upheld the imposition of the penalties assessed and sustained the notices of determination and demand for payment of sales and use taxes due dated September 15, 1987.

On exception, petitioner argues that: 1) he was no longer a responsible party after May 5, 1982 when a Receiver for the benefit of creditors was appointed who had sufficient assets to pay the sales tax due; 2) he is able to accept the Offer in Compromise made plus interest at the lowest rate from the due date of the returns; 3) no penalties should be assessed; and 4) the State Sales Tax Bureau should collect all taxes, penalties and interest from the receivers of each corporation and then refund any excess funds collected on account of tax to petitioner.

Petitioner's exception included copies of two checks made payable to the "New York State Dept. of Taxation" in the amount of \$1,242.41 and \$5,431.04, both dated the same day as the Notice of Exception. The checks were forwarded with a copy of the exception to the Division's representative. The checks were described as being the amounts shown on the amended returns as contained in an offer in compromise between the Division and petitioner.

Petitioner also submitted a copy of a letter from the Division, dated April 19, 1993, which acknowledged receipt of the two checks. The letter stated that:

"[t]he checks enclosed in the letter have been applied to outstanding sales tax liability of Mr. Siegel, as Officer of Charisma Business Supply Co., Inc. and Charisma Legal Supply Co., Inc. for the quarter ending May 31, 1982. Please note that tax due from Charisma Business Supply Co., Inc. for this quarter is \$5,341.04 but that the check tendered in payment of this tax liability is in the amount of \$5,431.04. The excess amount will be applied to interest due on the tax liability."

The Division, in reply, argues that although petitioner alleges he was not a responsible person after the assignments for the benefit of creditors were filed:

"[t]he facts clearly demonstrate that the assignments were **voluntarily** acts done by Petitioner as president of the corporations, and such action was taken by Petitioner as the controlling person of both corporations. Such voluntary acts should not cut off the obligations of the Petitioner, whatever they may be, to the corporate creditors" (Division's brief, Point I, pp. 2-3).

The Division argues that it is not obligated to attempt to collect sales and use taxes due equally from all persons required to collect tax before it collects the entire amount due from

petitioner, thus, assuming a receiver is a person required to collect sales tax, the Division is not required to look to the receiver before it collects the tax, penalty and interest from petitioner as a responsible person of the corporations.

The Division also argues that since petitioner gave no evidence to refute or reduce the amount of tax shown on the notices, the amounts set forth on the notices should be sustained and, further, petitioner has not shown reasonable cause for the abatement of penalties.

The Division further argues that because petitioner did not offer a brief in support of his exception he failed to detail how the Administrative Law Judge erred in finding him a responsible person of the corporations and, thus, the Administrative Law Judge should be sustained on the law and facts as set forth in his determination.

By letter dated January 3, 1995, the Division informed us as follows:

"I send this letter as a follow up to the brief filed in this matter. One of the issues was whether the assessments should be reduced to the amounts shown on late filed returns. Although the ALJ did not find that the amounts should be reduced, the computer system of the Department of Taxation and Finance automatically reduced the assessments when the late returns were filed. Therefore, I believe this issue is moot.

"In addition, there have been payments on these liabilities, and the tax has been paid in full on both, with the penalties and interest paid in full on Charisma Legal Supply Co., Inc., DTA # 807083. Therefore, the only outstanding liability is on the Charisma Business Supply Co., Inc. for penalties and interest."

Accordingly, we affirm the determination of the Administrative Law Judge as it relates to penalty and interest on Charisma Business Supply Co., Inc.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Donald Siegel, officer of Charisma Business Supply Co., Inc. and Charisma Legal Supply Co., Inc., is denied to the extent that penalty and interest remains due on the late payment of \$5,431.04 by Charisma Business Supply Co., Inc., but is in all other respects granted;



2. The determination of the Administrative Law Judge is modified to the extent indicated in paragraph "1" above;

3. The petition of Donald Siegel, officer of Charisma Business Supply Co., Inc. and Charisma Legal Supply Co., Inc., is granted to the extent indicated in paragraph "1" above, but is otherwise denied; and

4. The Division of Taxation is directed to modify the notices of determination and demand for payment of sales and use taxes due dated September 15, 1987 in accordance with paragraph "1" above, but such notices are otherwise sustained.

DATED: Troy, New York  
January 26, 1995

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

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