

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
WILLIAM R. HALL, JR.	:	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 December 1,	:	
1975 through October 9, 1980	:	

Petitioner, William R. Hall, Jr., c/o Jeffrey Armstrong, Esq., 22 First Street, P.O. Box 208, Troy, New York 12181, filed an exception to the determination of the Administrative Law Judge issued on February 9, 1989 with respect to his 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, 1975 through October 9, 1980 (File Nos. 800481 and 805587). Petitioner appeared by Pattison, Sampson, Ginsberg & Griffin, P.C., Esqs. (Jeffrey R. Armstrong, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Carroll R. Jenkins, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation filed a letter in response to the petitioner's exception and brief. Oral argument, at the request of the petitioner, was heard on September 26, 1989.

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

ISSUES

I. Whether petitioner, William R. Hall, Jr., was a person required to collect and pay over sales tax on behalf of Old Homestead Country Kitchen, Inc. within the meaning and intent of Tax Law §§ 1131(1) and 1133(a) during the period at issue.

II. Whether penalties and interest in excess of the minimum, which were imposed against petitioner, should be waived.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and such facts are stated below except that we modify Findings of Fact "20", "21" and "22" as indicated.

On December 29, 1982, the Division of Taxation issued two notices of determination and demands for payment of sales and use taxes due to petitioner, William R. Hall, Jr. The first notice assessed sales and use taxes for the period December 1, 1975 through May 31, 1979 in the amount of \$25,558.81 plus penalty of \$6,389.70 and interest of \$13,033.68 for a total amount due of \$44,982.19. The second notice assessed sales and use taxes for the period June 1, 1979 through October 9, 1980 in the amount of \$36,919.01 plus penalty of \$9,229.75 and interest of \$12,579.20 for a total amount due of \$58,727.96. In each instance, the notice stated that petitioner was personally liable for the taxes determined to be due from Old Homestead Country Kitchen, Inc. ("Old Homestead").

On July 6, 1984, the Division issued three notices and demands for payment of sales and use taxes due to petitioner as follows:

<u>Period Ending</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
5/31/78	\$ 5,669.80	\$ 1,417.45	\$ 4,683.13	\$11,770.38
8/31/78-11/30/79				
and 10/9/80	31,915.79	7,978.95	22,074.36	61,969.10
2/29/80-8/31/80	24,754.23	6,188.55	13,870.37	44,813.15

Although there are slight discrepancies between the amounts assessed by the notices of determination and demands for payment of sales and use taxes due and the notices and demands for payment of sales and use taxes due, they were premised on the same liability.

On June 6, 1985, the Appellate Division issued its decision in Matter of William R. Hall, Jr. v. State Tax Commn. (108 AD2d 488, 489 NYS2d 787). In this decision, which considered only the notices dated December 29, 1982, the court concluded that administrative hearings

were authorized only for the periods ending May 31, 1978, February 29, 1980 and May 31, 1980 because no tax returns were filed for these periods. The court further held that an administrative hearing should be conducted for the period ending August 31, 1980 because the return filed for this period was incorrect or insufficient.

On February 12, 1988, the Bureau of Conciliation and Mediation Services issued a Conciliation Order which dismissed the Notice and Demand dated July 6, 1984 pertaining to the periods ending August 31, 1978 through November 30, 1979 and the period ending October 9, 1980. The other notices dated July 6, 1984 were sustained in full by the Conciliation Order.

At the hearing, the parties stipulated that if Mr. Hall is found responsible for the taxes due from Old Homestead, the amount of the tax liability is \$19,182.99. This liability arises from the quarterly periods ending May 31, 1978, February 29, 1980, May 31, 1980 and August 31, 1980.

During the years 1973 through 1976, while petitioner attended college, he was employed at the Old Homestead during the summers.

Most, if not all, of the outstanding stock of the restaurant was owned by a Mr. Kenneth Renaud,¹ who also held the office of president.

In 1976 petitioner completed college and began working as manager of the restaurant for a weekly salary. In this capacity, petitioner had numerous duties. Depending on the level of staffing, petitioner would cook or perform occasional bartending duties. For a period of time, petitioner signed payroll checks, but at some juncture, it was no longer necessary for petitioner to sign checks because the restaurant began using a computerized payroll system. As manager, petitioner supervised the performance of the dishwashers, and in connection with this duty, had the authority to hire and fire employees. The other individuals who worked in the kitchen were hired either by petitioner or Mr. Renaud. With respect to employment of waitresses, petitioner participated in the interview process and had input as to who would be hired; however, it was ultimately the responsibility of the head waitress to hire for the shift she supervised.

¹It is unclear from the record whether Mr. Renaud's first or second wife owned stock in the restaurant during the periods in issue.

As manager, petitioner was responsible for controlling inventory. This function involved ordering food, wine and also small equipment such as pots and pans. Mr. Renaud made the decisions whether to purchase large equipment such as an oven or refrigerator.

Petitioner shared responsibility with the head waitress for counting the cash in the cash register at the end of the shift and verifying it against the sales for the day. The following day, petitioner would ascertain the portion of the cash receipts attributable to bar sales and the portion derived from beer sales. If the cash in the register did not equal the day's sales, petitioner attempted to determine why there was a shortage or overage. On occasion, petitioner deposited the day's receipts in the bank.

Petitioner was a signatory on the corporate checking account and had the authority to pay recurring bills. Thus, when a supplier of food made a delivery, petitioner was responsible for paying the bill. In addition, if a payment schedule was established with a supplier, petitioner made payments in accordance with that schedule. When certain suppliers required payment in cash, petitioner paid the invoices from these suppliers as well.

It was petitioner's understanding that he was expected to check with Mr. Renaud before drafting checks for large sums of money (unless the expense was recurring) or for unusual expenditures. Thus, it was petitioner's practice to confer with Mr. Renaud before drafting a check for more than \$1,000.00, unless it was for a recurring item. Petitioner also felt that he was required to obtain Mr. Renaud's approval before drafting a check for taxes. Consequently, whenever petitioner drafted a check for taxes, it was at the direction of Mr. Renaud.

At one time, Mr. Renaud told petitioner that if a document had to be signed by a corporate officer and he was not available, petitioner was to sign as vice-president. Nevertheless, petitioner never received formal notification that he was appointed vice-president.

The sales and use tax returns of the restaurant for the period December 1, 1975 through November 30, 1977 were signed by Mr. Renaud as president with the exception of the period

ended August 31, 1976 for which no return is in the record.² Commencing with the part-quarterly period ending December 31, 1977 and continuing through the quarterly period ending November 30, 1979, all of the sales and use tax returns filed by the restaurant (that is, nine returns) were signed by Mr. Hall as vice president, except for the period ending May 31, 1979 which he signed without the use of a title. The return for the period ending August 31, 1980 was signed by petitioner as president. However, this return listed the establishment as the Old Homestead Country Kitchen of Burnt Hills, Inc.

It was the bookkeeper's practice to prepare the sales and use tax returns and then send them to Mr. Renaud for his signature. At the hearing, the bookkeeper acknowledged that she was surprised to learn of the number of sales tax returns signed by Mr. Hall.

The bookkeeper also had the authority to draft checks. However, she would not draft a check for a large bill or for taxes without the approval of Mr. Renaud.

On one occasion the restaurant's bookkeeper advised Mr. Renaud that money should be set aside for taxes. In response, Mr. Renaud just shrugged his shoulders.

Prior to August 25, 1980, Mr. Renaud exercised substantial authority over the assets and activities of the restaurant. For example, Mr. Renaud took money from the cash register for his own use and used a credit card issued in the name of the business to purchase personal items. Mr. Renaud's wife periodically stocked their personal refrigerator with items from the restaurant's kitchen.

It was Mr. Renaud's practice to make business decisions without seeking the advice of anyone employed by the restaurant. Thus, he agreed to a payment schedule with the Internal Revenue Service and directed that petitioner send a weekly check in satisfaction of this schedule. Mr. Renaud purchased another restaurant, using the shrimp and lobster from the Old Homestead to stock the second restaurant. At another time, he purchased the

²The original return for the quarterly period ended February 28, 1977 was signed by Mr. Renaud as president. An amended return for this period was also signed by Mr. Renaud but did not list a title.

building next door and used the receipts from the Old Homestead to purchase inventory for a new establishment.

We modify Findings of Fact "20", "21" and "22" to read as follows:³

On August 25, 1980 petitioner purchased the restaurant from Mr. Renaud. In connection with this purchase, petitioner applied for a liquor license from the New York State Liquor Authority ("SLA"). The application resulted in an investigation by the SLA. In a report attached to a Notice of Disapproval of the Application (Exhibit G) it is stated that in conjunction with the application and investigation, petitioner produced statements from his checking account which disclosed regular deposits in the low thousand dollar range. The report also states: "The executive officer asked Mr. Hall how he was able to make such large deposits on a salary of \$200.00 per week. Mr. Hall did not give the executive officer an answer to the question. Mr. Hall's attorney, present at the interview, reviewed the statements from the account and did not find such deposits to be unusual. The interview concluded. Approximately one hour later, Mr. Hall reentered the A.B.C. Board office and explained that he had in fact co-mingled the business funds of the Old

Homestead Country Kitchen, Inc. (Saratoga RL 950) with the funds in his personal account."

Petitioner testified at the hearing that he commingled funds only on two separate occasions when the restaurant's checking account was frozen. On the first occasion the commingling occurred for one or two days. On both occasions, petitioner was careful to account for all of the money from the restaurant. There were other times when a payment to a supplier had to be made and the restaurant did not have the cash available to make the required payment. At those times petitioner drafted a check from his personal checking account and thereafter reimbursed himself from that evening's restaurant receipts.

³Findings of Fact "20", "21" and "22" of the Administrative Law Judge read as follows:

20. On August 25, 1980 petitioner purchased the restaurant from Mr. Renaud. In conjunction with this purchase, petitioner applied for a liquor license from the New York State Liquor Authority ("SLA"). The application resulted in an investigation by the SLA. In conjunction with this investigation, petitioner produced statements from his checking account which disclosed regular deposits in the low thousand dollar range. When asked how he was able to make such large deposits on a purported salary of \$200.00 a week, petitioner explained that he commingled the business funds of the restaurant with the funds in his personal checking account.

21. Petitioner commingled funds on two separate occasions when the restaurant's checking account was frozen. On the first occasion the commingling occurred for one or two days. On both occasions, petitioner was careful to account for all of the money from the restaurant. There were other times when a payment to a supplier had to be made and the restaurant did not have the cash available to make the required payment. At those times petitioner drafted a check from his personal checking account and thereafter reimbursed himself from that evening's restaurant receipts.

22. Petitioner did not own any stock in the corporation.

We modified these facts to reflect the record in more detail.

Petitioner did not own any stock in the corporation until August 25, 1980.

OPINION

In the determination below the Administrative Law Judge denied the petition of William R. Hall, Jr. and in so doing determined that petitioner was a person required to collect, truthfully account for and pay over sales tax on behalf of Old Homestead Country Kitchen, Inc. within the meaning and intent of Tax Law §§ 1131(1) and 1133(a). The Administrative Law Judge found as unpersuasive, petitioner's position that his authority with respect to the payment of taxes was very limited as well as petitioner's assertion that he signed sales and use tax returns only when Mr. Renaud was unavailable. The Administrative Law Judge also sustained the imposition of penalty and interest in excess of the minimum statutory interest.

I The Division argues that petitioner was a responsible officer or employee of "Old Homestead" within the meaning of Tax Law §§ 1131(1) and 1133(a) liable for tax, as well as for penalties and interest. The Division, while arguing that the Administrative Law Judge erred in cancelling the Notices and Demand issued to petitioner,⁴ requests affirmation of the other aspects of the determination of the Administrative Law Judge.

Petitioner argues that these proceedings attempt to move responsibility down the ladder past the only individual in ultimate and complete control to place the enormous burden upon the shoulders of an individual who never had the duty nor the real ability to insure compliance with the state tax laws. Petitioner argues that he is not a responsible person as defined by § 1133(a) of the Tax Law as pertaining to the sales tax obligation of the Old Homestead Country Kitchen, Inc., and further, that if he is found to be a responsible person for the aforementioned sales tax obligation, no penalty or additional interest should be imposed pursuant to § 1145 of the Tax Law.

We affirm the determination of the Administrative Law Judge.

⁴We note that the Division has not filed an exception and, thus, has waived its right to require us to review this issue (Matter of Klein's Bailey Foods, Tax Appeals Tribunal, August 4, 1989). We decline to exercise our discretion to review the Division's assertion on these facts that we have no jurisdiction to review a notice and demand improperly issued.

We first address whether petitioner is a responsible person as defined by § 1133(a) of the Tax Law which imposes personal liability for taxes required to be collected under Tax Law Article 28 upon a person required to collect such tax (Tax Law § 1133[a]).

"Persons required to collect tax" and a "person required to collect any tax imposed by this article [Article 28]" include any officer or employee of a corporation who, as such officer or employee, is "under a duty to act for such corporation in complying with any requirement of [Article 28]" (Tax Law § 1131[1]) (hereinafter "responsible person").

The determination that an individual is a responsible person depends upon the particular facts of each case (Stacy v. State of New York, 82 Misc 2d 181, 368 NYS2d 448, 451). Factors stated by the Division's regulations are: whether the person was authorized to sign the corporate tax return, was responsible for managing or maintaining the corporate books or was permitted to generally manage the corporation (20 NYCRR 526.11[B][2]).

Other indicia developed by the case law are: the authorization to hire or fire employees, the derivation of substantial income from the corporation or stock ownership (Matter of Blodnick v. State Tax Commn., 124 AD2d 437, 507 NYS2d 536); the individual's possible shared status as an officer, director or stockholder (Matter of Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564, 565); the individual's day-to-day responsibilities, involvement with, knowledge of and control over the financial affairs and management of the corporation, the duties and functions as outlined in the certificate of incorporation and the bylaws, the preparation and filing of sales tax forms and returns (Vogel v. New York State Dept. of Taxation & Fin., 98 Misc 2d 222, 413 NYS2d 862, 865); and the payment, including the authorization to write checks on behalf of the corporation, of other creditors other than the State of New York and the United States (Chevlowe v. Koerner, 95 Misc 2d 388, 407 NYS2d 427, 430). Within closely held corporations, "an officer's knowledge of the corporate affairs and his benefits received from corporate profits (are) extremely important considerations" (Vogel v. New York State Dept. of Taxation & Fin., *supra*, 413 NYS2d 862, 865).

Applying these criteria to petitioner William R. Hall Jr.'s circumstances, we find that he was a responsible person who was under a duty to act for the restaurant with respect to the sales and use taxes due. Furthermore, petitioner William R. Hall, Jr.'s youth does not absolve him of his duties as a responsible person just as an employee of a corporation under a duty to act for a corporation, cannot shed his liability for failing to exercise his share of the responsibility (see, Matter of D & W Auto Service, Tax Appeals Tribunal, April 20, 1989; Matter of William F. Martin, Officer of Rainbow Food Marts, Tax Appeals Tribunal, July 20, 1989).

The petitioner was an active manager who participated in the interview process for the hiring of employees and in fact had authority to hire some employees, shared responsibility for verifying sales and counting daily receipts, occasionally made bank deposits, controlled inventory (ordering food, wine and small equipment), made payments to suppliers in accordance with an established payment schedule or to suppliers who required cash payments. Further, petitioner signed payroll checks until such time as the restaurant began using a computerized payroll system and personally derived substantial income from the corporation. Additionally, petitioner had check signing authority, knowledge of and control over the financial affairs of the corporation and responsibility for the payment of recurring expenses. Petitioner also signed sales tax returns and held himself out to be an officer of the corporation by signing the sales tax returns over a two year period as vice-president, commencing with the part-quarterly period ending December 31, 1977 and continuing through the quarterly period ending December 31, 1979 with the exception of the period ending May 31, 1979, which return he signed without the use of a title. And finally, when the restaurant's checking account was frozen, petitioner made deposits in the low thousand dollar range into his personal checking account commingling the business funds and his personal funds and drafting checks from his personal account to pay suppliers when the restaurant lacked cash.

Thus, we conclude that petitioner William R. Hall, Jr. was in fact a responsible person liable for the sales taxes of Old Homestead Country Kitchen, Inc. because he was a "person

required to collect any tax imposed and was further under a duty to act for such corporation in complying with any requirement of Article 28" (Tax Law § 1131[1]).

Petitioner's second argument is that penalties and interest in excess of the minimum which were imposed against petitioner pursuant to § 1145 of the Tax Law should be waived.

Petitioner argues: 1) that the Division of Taxation has no statutory authority to assess penalties and interest upon a person who is not the taxpayer; 2) he acted in good faith and, therefore, should not be liable for penalties and additional interest; 3) "reasonable cause" exists by reason of the pending petition herein.

Tax Law § 1145(a)(1)(i) authorizes the imposition of a penalty for failure to file a return or to pay or to pay over any tax under Article 28 in a timely manner. Tax Law § 1145(a)(1)(iii) further provides that if the failure or delay was due to reasonable cause and not willful neglect, penalty and that portion of interest which exceeds the minimum amount of interest prescribed by law shall be remitted.

In order for the penalties to be abated, the burden is on petitioner to establish reasonable cause as well as the absence of willful neglect. We find petitioner did not meet this burden. Therefore, we reject all three of petitioner's arguments relating to the issue of penalty and excess interest and address each argument individually.

First, we address whether there is statutory authority to hold petitioner personally liable for the penalty and interest due from the corporation. As support for his position, petitioner cites the recent decision by the Appellate Division, Third Department in Matter of Velez v. Division of Taxation of Dept. of Taxation & Fin. (152 AD2d 87, 547 NYS2d 444).⁵ The court held in Velez that a bulk purchaser liable for the seller's taxes pursuant to § 1141(c) of the Tax Law could not be held liable for the penalty and interest assessed against the seller. Petitioner argues that Velez and the instant case present the same issue of statutory construction, that is, that § 1133(a), like § 1141(c), specifically imposes liability only for tax and not for penalty and interest.

⁵We note the Velez decision was issued after the oral argument was heard in this case.

Although petitioner's argument is interesting, we conclude that the Velez decision indicates several reasons why it does not control the result here. First, the decision rests in part on the legislative intent expressed in § 1141(c) to insulate the bulk purchaser from total liability for the seller's failure to pay by limiting the purchaser's liability to the fair market value of the assets transferred in the bulk sale or their purchase price, whichever is higher (Matter of Velez v. Division of Taxation of Dept. of Taxation & Fin., supra). There is nothing in § 1133(a) which expressly limits the responsible person's liability and, thus, no evidence of legislative intent to do so.

Second, the conclusion in Velez was motivated in some part by the Court's recognition that a bulk purchaser was in a difficult position to establish grounds for abatement of penalty since the purchaser would have to prove that another, the seller, had reasonable cause for the failure to pay (Matter of Velez v. Division of Taxation of Dept. of Taxation & Fin., supra). This problem does not exist in the responsible person context, for if it is established that the person was responsible for the failure of the corporation, the person either knows or should know why the corporation failed to pay.

In addition to these bases to distinguish the Velez decision, we find affirmative evidence in the Tax Law that a responsible person can be liable for the penalty and interest assessed against the corporation. As noted above, an officer or employee is held liable because he satisfies the definition of "persons required to collect tax" set forth in § 1131(1) of the Tax Law as an officer or employee who is under a duty to act for the corporation in complying with any provision of the sales tax law. The penalties and interest at issue are imposed, by § 1145(a)(1)(i) of the Tax Law, on any person failing to file a return or to pay over any tax. Since the requirements to file a return and pay over tax are among the most essential to comply with the sales tax law, there is a clear and logical integration between the responsible person provisions of § 1131(1) and the penalty and interest provisions of § 1145(a)(1).

We also note that the Appellate Division, Third Department, has already explicitly held that penalty and interest can be assessed against a customer pursuant to § 1133(b) of the Tax Law (Matter of Food Concepts v. State Tax Commn., 122 AD2d 371, 503 NYS2d 928, 930, lv denied 68 NY2d 610, 508 NYS2d 1027).⁶ Since § 1133(b) only specifically refers to "tax", this indicates that the use of the term "tax" in § 1133(a) also includes penalty and interest.

Next, petitioner argues that he acted in good faith at all times and for that reason should not be held responsible for penalties and additional interest.

As previously pointed out, Tax Law § 1145(a)(1)(iii) provides that penalties could be abated if the failure to pay tax was due to reasonable cause and not willful neglect. While petitioner argues there was no "willful neglect" on his part and further that he did not have the ability to pay the sales taxes in question, the record before us shows clearly that petitioner in addition to signing sales tax returns, actively managed the business with check signing authority. He further commingled business funds in his own personal checking account paying business bills from said account. While petitioner relies to a great extent on the testimony of the bookkeeper who petitioner states was intimately familiar with the finances and the operation of the business (petitioner's brief p. 23), this witness testified that she was "kind of surprised that Bill's [Hall] signature was on sales tax returns" (Tr. p. 59). Further, this same witness was not even employed at the "Old Homestead" during three of the four tax periods in question as she had left her bookkeeping position at the restaurant in February, 1979 and had no association whatsoever with the restaurant after that time (Tr. p. 48). Based on the above, this Tribunal would be hard pressed to conclude that petitioner proved that he acted in good faith at all times and, therefore, should not be held responsible for penalties and additional interest.

⁶ In Matter of Blodnick v. State Tax Commn. (124 AD2d 437, 507 NYS2d 536, 538) the Appellate Division upheld the imposition of penalty against a responsible person under Tax Law § 1133(a). However, the court discussed only whether reasonable cause had been established, not whether the penalties assessed against the corporation could be collected from the responsible officers.

Next, petitioner, relying on Higgins & McLaughlin v. State Tax Commn. (109 AD2d 1029, 487 NYS2d 144) asserts that "reasonable cause" exists by reason of the pending petition herein. We disagree. Petitioner's reliance on Higgins is misplaced. Higgins involved a situation where the original sales tax file of the petitioner in that case was lost from June 6, 1978, the time when petitioner was afforded a conference by the State Tax Commission, until March 16, 1981, the date on which the decision of the conferee was rendered (id., at 146). It was for this period only that the court determined that respondent should have remitted penalties and interest in excess of the statutory minimum (id.). We have no such facts in the instant case and, thus, view the decision of the court as not applicable.

For all of the above reasons, we conclude that petitioner has properly been held liable for the penalty and interest assessed against the corporation.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner William R. Hall, Jr. is in all respects denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of William R. Hall, Jr. is granted to the extent indicated in conclusions of law "A", "F" and "G" of the Administrative Law Judge's determination but the petition is in all other respects denied; and

4. The Division of Taxation shall modify the notices of determination dated December 29, 1982 in accordance with paragraph "3" above but such notices are otherwise sustained and the Division of Taxation shall cancel the notices and demands dated July 6, 1984.

DATED: Troy, New York
March 22, 1990

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

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

/s/Maria T. Jones
Maria T. Jones
Commissioner