

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
ZEFANIA BAUMVOLL : **DECISION**
AS OFFICER OF JAZ SERVICE CENTER, INC. :
: :
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 June 1, 1979 through August 31, 1982. :

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on November 23, 1988 with respect to the petition of Zefania Baumvoll, as officer of Jaz Service Center, Inc., 1364 East 89th Street, Brooklyn, New York 11236, 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 June 1, 1979 through August 31, 1982 (File No. 800731). Petitioner appeared by Gerald I. Steinhaus, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Irwin A. Levy, Esq., of counsel).

The Division of Taxation filed a brief on exception. Petitioner filed a brief in opposition to the exception. Oral argument at the request of the Division was heard on May 24, 1989.

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

ISSUE

Whether petitioner is a "person required to collect tax" within the meaning of section 1131(1) of the Tax Law who, therefore, would be personally liable for such tax under section 1133(a) of the Tax Law.

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 "3" and "6". We also find additional facts as indicated below.

Jaz Service Center, Inc. ("Jaz") operated a gas station at 2800 Bruckner Boulevard, Bronx, New York which sold "Efco" gas. Jaz acquired the station in 1979 and closed the station in 1982. The station had two service bays. Checks could be signed by any two of the three officers (one of whom was petitioner). The business had an accountant, Nat Roberts, who was hired by Mr. Shamir and Mr. Waide, two of the owners of Jaz.

Petitioner, Zefania Baumvoll, came to this country from Israel in 1973. He became a cab driver. In 1979, petitioner invested \$7,000.00 in Jaz Service Center, Inc., a corporation owned by two friends, Ari Shamir and Jacob Waide, who had themselves owned stations before. In 1980, Mr. Waide left the business. On October 12, 1981, petitioner left the business. Also on October 12, 1981 Mr. Shamir, representing the business, agreed to pay petitioner \$180.00 a week to pay off petitioner's investment, which arrangement continued for about six months. The business ceased operations in 1982. Petitioner was required to make payments on a loan of the corporation which he had guaranteed.

We find as an additional fact that petitioner, when testifying as to how he became involved in the Bronx stated "since we were friends and they wanted to leave the previous station and they were offered that station in the Bronx, they were short with money and they asked me if I want to join them. I was happy to join them. I thought of them doing really good, I would leave the driver's seat" (transcript p. 62, emphasis added). We modify finding of fact "3" of the Administrative Law Judge to read as follows:

Petitioner was a full-time cab driver in 1979, 1980 and 1981. He occasionally helped out at the gas station by pumping gas. Almost every day he passed by the station while driving his cab.¹ He also occasionally made bank deposits for the business.

¹The Administrative Law Judge's finding of fact "3", 3rd sentence, read as follows:
"3". "He usually drove his cab by the station about once a day."

We have modified this finding of fact to reflect the direct testimony of the petitioner.

The Federal income tax return of the corporation for 1980 listed petitioner as one of the officers and indicated his annual compensation as \$14,300.00.

We find as an additional fact that petitioner admitted to receiving a partial salary, but not the full amount like everybody else.

Mr. Baumvoll signed some of the sales tax returns of Jaz as secretary of the corporation. These returns were for the five quarterly periods ending May 31, 1980 through May 31, 1981. For other periods, Mr. Shamir signed as president of the corporation. In all cases, the accountant, Nat Roberts, also signed the returns. For at least the last period, no tax was remitted with the return.

We modify finding of fact "6" of the Administrative Law Judge to read as follows:

Because adequate books and records were not available,² a test audit had been done for the sales tax quarter ending November 30, 1980. Sun Oil Company had been asked to furnish gallonage information for the station at 2800 Bruckner Boulevard. The station was then in the name of Andrew Caso. The amount delivered was 98,263 gallons. The auditor assumed a selling price of \$1.27 a gallon, which resulted in sales of \$124,794.00. A credit was given against this amount of \$7,861.00 reducing gas sales to \$116,933.00. Since this figure included sales tax, it was divided by 1.08 to arrive at a figure for taxable sales of \$108,271.00, on which a tax was calculated to be due of \$8,662.00. Only \$4,156.00 had been paid with the tax return for that quarter. The tax due divided by the tax paid resulted in a margin of error of 2.0842 which was applied to all sales tax quarters in the audit period.

The Division of Taxation issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated June 20, 1983 for the period June 1, 1979 through August 31, 1982, in the amount of \$83,078.78, plus penalty of \$19,127.97 and interest of \$22,391.31, for a total of \$124,598.07.³ The Division of Taxation has conceded that petitioner is not responsible for the taxes due for the period June 1, 1979 through February 29, 1980 (because of the three-year statute of limitations) and for the period September 1, 1981 through August 31, 1982 (because of petitioner's leaving the business).

²Because adequate books and records were not available" - has been added to clarify the record concerning the audit.

³A typographical error in the ALJ determination showed this as \$127,598.07.

OPINION

The Administrative Law Judge determined that petitioner had shown that his role in Jaz Service Center, Inc. was minimal and that he was not responsible for the financial or tax affairs of Jaz. The Administrative Law Judge concluded that petitioner was not a person required to collect such tax under Tax Law section 1131 and, therefore, was not liable for such tax under Tax Law section 1133.

On exception the Division contends that petitioner Zefania Baumvoll had sufficient connections with the business activities to warrant a determination that he, as an officer, and an investor in the corporation, was under a duty to act for the corporation in the collection and payment of tax. The Division argues that certain facts, such as petitioner's check signing authority, earning money from the business, signing sales tax returns, working at the gas station and making payments on a loan of the corporation which he had personally guaranteed necessitate his being held liable as a responsible officer.

In response, petitioner Zefania Baumvoll argues that the facts as established show he is not liable for such tax under Tax Law section 1133. Thus, the determination of the Administrative Law Judge was correct and should not be overturned.

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, 368 NYS2d 448, 451; Matter of Autex Corp., Tax Appeals Tribunal, November 23, 1988; Matter of D. & W Auto Service Center, Inc. and Paul Wehr, as Officer, Tax Appeals Tribunal, April 20, 1989; Matter of William F. Martin, Officer of Rainbow Food Marts, Inc., Tax Appeals Tribunal, July 20, 1989). 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, 513 NYS2d 564; Matter of Blodnick v. State Tax Commn., 124 AD2d 437, 507 NYS2d 536; Matter of Rosenblatt v. State Tax Commn., 114 AD2d 127, 498 NYS2d 529, revd in part on dissenting opn below 68 NY2d 775, 506 NYS2d 675).

Applying these criteria to the circumstances before us, we find that petitioner Zefania Baumvoll was a responsible officer of Jaz Service Center, Inc. Not only was petitioner an officer of Jaz Service Center, Inc. with check signing authority, he also signed several sales tax returns as secretary of the corporation, occasionally helped out at the gas station by pumping gas and making bank deposits, received a salary, invested \$7,000.00 in the business hoping the station would do well so he could stop driving his cab, and personally guaranteed a loan of the corporation. The fact that he, as an officer, failed to exercise his share of the responsibility does not operate to shed him of liability since "corporate officials responsible as fiduciaries for tax revenues cannot absolve themselves merely by disregarding their duty and leaving it to someone else to discharge" (Matter of Blodnick v. State Tax Commn., supra, 507 NYS2d 536, 538 quoting Ragonesi v. State Tax Commn., 88 AD2d 707, 708, 451 NYS2d 301, 303). Thus, we conclude that petitioner Zefania Baumvoll was in fact a responsible officer of Jaz 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 Zefania Baumvoll was not a responsible officer is reversed;
3. The petition of Zefania Baumvoll as Officer of Jaz Service Center, Inc. is granted to the extent indicated in Finding of Fact "7" of the Administrative Law Judge's determination in that

petitioner is responsible for the taxes, penalty and interest for the period March 1, 1980 through August 31, 1981 but the petition is in all other respects denied; and

4. The Division of Taxation shall modify the Notice of Determination issued June 20, 1983 accordingly but the Notice is in all other respects sustained.

DATED: Troy, New York
November 22, 1989

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

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

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