

STATE OF NEW YORK

APPEALS TRIBUNAL

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In The Matter of the Petition :  
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 of :  
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 **ROBERT STERN** :  
 **OFFICER OF BRIDGES SUMMIT PARK JEWELRY INC.** :  
 for Redetermination of a Deficiency or Revision of a :  
 Determination or Refund of Sales and Use Tax under Articles :  
 28 and 29 of the Tax Law for Period December 1, 1981 to :  
 May 31, 1982. :  

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Petitioner, Robert Stern, Officer of Bridges Summit Park Jewelry, Inc., 908 South Manlius Road, Fayetteville, New York 13066, filed an exception to the determination of the Administrative Law Judge issued on October 16, 1987 with respect to his petition for redetermination of a deficiency or revision of a determination or refund of sales and use tax under Articles 28 and 29 of the Tax Law for the period December 1, 1981 to May 31, 1982 (File No. 801488). Petitioner appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

Neither party filed a brief on exception. Oral argument at the request of the petitioner, was heard on March 15, 1988.

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

***ISSUES***

I. Whether the Division of Taxation had authority to administratively determine petitioner's liability for unpaid sales taxes of Bridges Summit Park Jewelry, Inc. for the period December 1, 1981 through February 28, 1982.

II. Whether petitioner is personally liable for sales taxes determined due from Bridges Summit Park Jewelry, Inc. for the period March 1, 1982 through May 31, 1982 and, if so, whether the penalty and that portion of interest exceeding the minimum interest should be canceled.

***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. These facts may be summarized as follows.

In the latter part of 1979, petitioner, together with Joel Jaffe, formed Bridges Summit Park Jewelry, Inc. ("Bridges"). Petitioner became the secretary-treasurer and owned 50 percent of the stock. Mr. Jaffe was also an officer and owned the other 50 percent of the stock. There were no other officers of the corporation. Bridges operated a retail jewelry store located in Niagara Falls, New York. Petitioner and Mr. Jaffe were also the sole officers and stockholders of Shaws Millcreek Mall Jewelry, Inc. ("Shaws") which operated a jewelry store in Erie, Pennsylvania. This corporation was formed in 1981.

On November 20, 1983, the Division of Taxation issued a Notice and Demand for Payment of Sales and Use Taxes Due against petitioner, Robert S. Stern, for the period December 1, 1981 through February 28, 1982. Said notice assessed tax due of \$6,663.13, plus penalty and interest of \$3,139.49, for a total of \$9,802.62. Petitioner was held personally liable as a responsible

officer of Bridges for taxes determined due from said corporation. The liability of the corporation resulted from its filing of a sales tax return for the above period without remitting the amount of tax due shown thereon.

The Division of Taxation also issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due on November 20, 1983 against petitioner covering the period March 1, 1982 through May 31, 1982 for taxes due of \$9,296.25, plus penalty and interest of \$3,764.97, for a total of \$13,061.22. Bridges failed to file a sales tax return for this period, and the Division of Taxation estimated the tax due from the corporation in accordance with section 1138(a) of the Tax Law. Petitioner was again held personally liable as a responsible officer of the corporation.

In May 1982, Shaws obtained a loan for \$60,000.00 from the First National Bank of Pennsylvania. The note was executed by petitioner and Mr. Jaffe in their capacity as officers of the corporation. Petitioner individually executed an Agreement of Guaranty in favor of the bank. The entire proceeds of the loan were deposited in Shaws checking account although petitioner intended the money to be used to pay outstanding debts of both Shaws and Bridges, including unpaid taxes.

In approximately May 1982 petitioner and Mr. Jaffe had a falling out over business operations. This was due in part to financial difficulties of Mr. Jaffe and suspicions by petitioner that Mr. Jaffe was misappropriating funds from Bridges.

The books and records of Bridges were maintained at a jewelry store in Niagara Falls which Mr. Jaffe operated as a sole proprietor. In May 1982, petitioner removed the business records from these premises to the offices of Bridges. When this happened, Mr. Jaffe contacted

the banks that held the checking accounts of Bridges and Shaws and told them not to honor any checks drawn on those accounts.

On June 9, 1982 and June 15, 1982, the First National Bank of Pennsylvania seized the inventories of Shaws and Bridges, respectively. The retail value of the inventory at Bridges was \$168,776.00. After the seizure, the bank denied petitioner's request for access to Bridges' premises so that he could obtain possession of the books and records.

Petitioner's responsibilities in the operation of Bridges and Shaws were to see that merchandise was properly displayed, that personnel were performing their duties and to order merchandise. Petitioner signed checks and received income from the business. He was aware that Bridges did not file a sales tax return for the period ending May 31, 1982.

### ***OPINION***

We deal first with the authority of the Division of Taxation to administratively determine petitioner's liability for the period December 1, 1981 through February 28, 1982. We affirm the determination of the Administrative Law Judge on this issue. Parsons v. State Tax Commn. (34 NY2d 190) and Hall v. New York State Tax Commn. (108 AD2d 488) are dispositive of the issue that where timely and correct returns were filed for the period at issue, without remittance of tax due, the Division was without power to issue a Notice of Determination and Demand for Taxes Due (compare, L. 1985, ch 65 which amended section 1138[a] to provide the Commissioner of Taxation and Finance with such authority).

We next address the issue of whether petitioner is personally liable for taxes due for the period March 1, 1982 through May 31, 1982. Tax Law section 1133(a) provides, in pertinent

part, that every person required to collect sales taxes imposed under Article 28 of the Tax Law is also personally liable for the tax imposed, collected or required to be collected under such law.

Section 1131(l) of the Tax Law defines "[p]ersons" required to collect tax "as used in section 1133(a) to include any officer or employee of a corporation, or a dissolved corporation, who as such officer or employee is under a duty to act for the corporation in complying with any requirement of Article 28 of the Tax Law."

The holding of corporate office does not per se impose tax liability upon the office holder (Chevlowe v. Koerner, 95 Misc2d 388; Blodnick v. State Tax Commn., 124 AD2d 437). The determination of whether an individual is a person or officer under duty to act for the corporation is based upon the facts presented (Vogel v. New York State Department of Taxation and Finance, 98 Misc2d 222; Blodnick v. State Tax Commn., supra). The relevant factors include, but are not limited to, the individual's daily involvement in the corporation; the individual participation and involvement in the financial affairs of the corporation; whether the individual prepared and signed the sales and use tax returns; the individual's authority to draft checks on the firm's bank account; and in the case of a closely held corporation, the individual's knowledge of the affairs of the firm and the firm's profits.

Application of the above factors to the facts in this case indicate that petitioner, for a portion of the period at issue, was involved in the business operation: he was an officer and stockholder; he signed checks; exercised authority over employees; realized income and was aware of Bridges' sales tax obligations. However, beginning in May of 1982, petitioner was deprived of control of the corporation and from exercising his responsibilities as an officer thereof by the actions of his partner, Mr. Jaffe and the banks with which the corporation dealt.

Mr. Jaffe instructed the banks that held the checking account of the corporation not to honor checks drawn on the corporation's account; the banks acquiesced to such direction. The First National Bank of Pennsylvania, a creditor of the corporation, seized the corporation's inventory on June 9 and June 15, 1982 and subsequently denied the petitioner's request for access to the corporation's premises so that he could obtain possession of the books and records. In short, petitioner had completely lost control of the corporation by the time the sale tax-return and remittance were due, June 20, 1982. Petitioner had no privileges of operation much less responsibility for the taxes due (Matter of Rocco Termini, Officer, Julie's Emporium of Buffalo, Inc., State Tax Commn., October 27, 1977).

The instant facts are similar to those in Chevlowe v. Koerner (supra) where the Supreme Court found that an officer ceased to be responsible for the payment of sales taxes due when he lost control, as a result of a corporate merger, to a parent corporation and to a receiver appointed to oversee the operations of the parent. The court noted that "When the receiver stepped in and stopped payment on the checks sent to [the State Tax Commission] any manifestations of control by the plaintiff ceased to exist." (Chevlowe v. Koerner, supra at 392.)

Since the petitioner is not liable for the sales taxes due for the period March 1, 1982 through May 31, 1982, the issue of imposition of penalty and interest for failure to file a return or pay over the tax when due is moot.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of the Robert Stern, Officer of Bridges Summit Park Jewelry, Inc. is granted to the extent conclusion of law "E" of the Administrative Law Judge's determination is reversed, but except as so granted is in all other respects denied;

2. The determination of the Administrative Law Judge is modified as indicated in paragraph "1" above, but is in all other respects affirmed; and 3. The petition of Robert Stern, Officer of Bridges Summit Park Jewelry, Inc. is granted to the extent indicated in paragraph "1" above and the Notice of Determination and Demand issued on November 20, 1983 is cancelled, but except as so granted is in all other respects denied and with respect to the period December 1, 1981 through February 28, 1982 is dismissed for lack of jurisdiction.

Dated: Albany, New York  
September 01, 1988

/s/ John P. Dugan  
President

/s/ Francis R. Koenig  
Commissioner