

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ERNEST M. YOUNG,	:	DECISION
OFFICER OF HI LITE WINES AND LIQUORS, INC.	:	DTA No. 805934
	:	
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 March 1, 1981 through February 29, 1984	:	

Petitioner Ernest M. Young, officer of Hi Lite Wines and Liquors, Inc., P.O. Box 1039, Ridgefield, Connecticut 06877 filed an exception to the determination of the Administrative Law Judge issued on June 7, 1990 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 March 1, 1981 through February 29, 1984. Petitioner appeared by Hodgson, Russ, Andrews, Woods & Goodyear, Esqs. (Mark S. Klein, Christopher L. Doyle and Robert D. Plattner, Esqs., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a brief in opposition. Oral argument was held on April 25, 1991.

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

ISSUE

Whether petitioner was a person required to collect tax on behalf of Hi Lite Wines and Liquors, Inc. during the period in issue pursuant to Tax Law § 1131(1) and, therefore, personally liable for the sales tax, penalty and interest due from the corporation for said period pursuant to Tax Law § 1133(a).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "4" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

On September 20, 1984, the Division of Taxation issued to petitioner, Ernest M. Young, as an officer of Hi Lite Wines and Liquors, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due setting forth total tax due of \$61,358.07, penalty of \$13,066.04 and interest of \$16,423.24, for a total amount due of \$90,847.35 for the period March 1, 1981 through February 29, 1984. On May 13, 1988, the Bureau of Conciliation and Mediation Services issued a conciliation order which reduced the tax, penalty and interest due for the period March 1, 1981 through August 31, 1982 as assessed against Ernest M. Young to zero and which also reduced the amount of tax, penalty and interest assessed against petitioner for the period September 1, 1982 through February 29, 1984 to \$12,208.18, plus penalty and statutory interest.

Hi Lite Wines and Liquors, Inc. was a New York corporation which operated a retail wine and liquor store at 253 West 72nd Street in New York City. The corporation was owned by one Helen Herschorn, who was president and 100 percent stockholder of the corporation up until the time of her death on July 26, 1982. On August 30, 1982, Ernest M. Young, petitioner herein, was appointed executor of the estate of Helen Herschorn by the Queens County Surrogate's Court.

During the period preceding Mrs. Herschorn's demise and for the subsequent period until the closing of the store in 1984, her son, Alan Hunter, managed the store or was the direct supervisor of the store manager. Mr. Hunter was not an officer of the corporation. The Federal income tax returns, Forms 1120, filed on behalf of Hi Lite Wines and Liquors, Inc. indicate the history of the shareholders in the business. For the fiscal years ended July 31, 1981 and 1982, the Federal income tax returns indicate that Helen Herschorn was the sole stockholder of the

business. However, the Federal income tax returns for the fiscal years ended July 31, 1983 and 1984 indicate that there were four new officers with various stock ownerships. For both periods the officers were listed as E. M. Young, A. E. Hunter, N. Underwood and D. Levasseur. Stock ownership was listed as 33% for A. E. Hunter, N. Underwood and D. Levasseur. Both returns also indicate in their schedule E that E. M. Young, A. E. Hunter and N. Underwood devoted part of their time to the business, while D. Levasseur devoted no time to the business.¹

We modify finding of fact "4" of the Administrative Law Judge's determination to read as follows:

Sometime after his appointment as executor of the estate of Helen Herschorn on August 30, 1982, Ernest M. Young applied to the State Liquor Authority for an "Approval of Corporate Change" indicating that he was executor of the estate of Helen Herschorn, that he had assumed the office of president and director of Hi Lite Wines and Liquors, Inc. and that he owned five shares of stock. The Notice of Approval of Corporate Change, received by the corporation on May 18, 1983, also indicated that Norma Underwood was added as the secretary, treasurer and a director of the corporation. The Notice of Approval indicates that a single request was filed for both changes on January 1, 1983. Other than on the application, the record does not indicate that Mr. Young was ever elected president or director of the corporation or that he owned stock in the corporation.²

¹This last fact was contradicted by testimony at hearing which revealed that Ms. Levasseur occasionally worked in the store as a clerk.

²The Administrative Law Judge's finding of fact "4" read as follows:

"4. Sometime after his appointment as executor of the estate of Helen Herschorn on August 30, 1982, Ernest M. Young applied to the State Liquor Authority for an "Approval of Corporate Change" indicating that he was executor of the estate of Helen Herschorn, that he had assumed the office of president and director of Hi Lite Wines and Liquors, Inc. and that he owned five shares of stock. The Notice of Approval of Corporate Change received by the corporation on May 18, 1983 also indicated that Norma Underwood was secretary, treasurer and a director of the corporation. Other than on the application, the record does not indicate that Mr. Young was ever elected president or director of the corporation or that he owned stock in the corporation.

We have modified this fact to clearly state that Norma Underwood was added as an officer at the same time as petitioner.

It appears that no shares of stock of the corporation were ever transferred to petitioner by virtue of the fact that all of Mrs. Herschorn's assets, including her 100% stock ownership in the corporation, passed to her three heirs, to wit: Alan Hunter, Norma Underwood and Deborah Levasseur.

After Mrs. Herschorn's death on July 26, 1982, petitioner assumed the decedent's duties with regard to Hi Lite Wines and Liquors, Inc. and held himself out to creditors, the Division of Taxation and other taxing authorities as president of the corporation. He signed all checks and payroll, sales and occupancy tax returns. He also signed a consent to extend the period of limitation on assessment as president of the corporation.

Alan Hunter, the decedent's son, managed the store on a day-to-day basis during the decedent's final illness and continued to do so shortly after her death. He then appointed another store manager, Ron Hess, to operate it on a daily basis. Petitioner acquiesced in these business decisions.

Both Mrs. Underwood and Mrs. Levasseur worked at various times as sales personnel in the operation of the business.

At most times relevant herein, the corporation employed a bookkeeper, Mrs. Herschorn's sister, Edna Legon, who handled the daily and weekly bookkeeping duties of the corporation. Mrs. Legon accumulated the information from the daily cash receipt reports and prepared for payment all the invoices sent to her by the store manager. Checks, previously signed by petitioner, were made out to the various creditors and mailed.

The accounting firm of Ernest M. Young, C.P.A., P.C. or its successor firm, Marinan and Young, reviewed the corporation's Federal income tax returns during the years in issue.

OPINION

In his determination below, the Administrative Law Judge concluded that petitioner was a person under a duty to act for the corporation and, therefore, personally liable for the tax imposed. The Administrative Law Judge concluded that although petitioner was a de facto

officer, who also was the executor of the estate, this status did not preclude petitioner from personal liability under Tax Law § 1133(a). In his determination, the Administrative Law Judge reasoned that the fact that an officer fails to exercise his share of responsibility does not operate to shed him of liability. The Administrative Law Judge stated that based on the totality of the circumstances, including petitioner's status as a fiduciary of the decedent's estate charged with the duty of protecting and preserving the assets of the estate, he cannot deny his involvement in or knowledge of the business. Furthermore, the Administrative Law Judge noted that petitioner was cognizant of the business operations and acquiesced in the business decisions made in its behalf, as was his duty as both president of the corporation and as fiduciary of the estate.

On exception, petitioner argues that whether an individual is a person required to collect tax depends on the particular facts of each case and that merely holding a corporate office does not impose liability. Further, petitioner contends that he did not have sufficient involvement in the affairs of the corporation to be deemed a person required to collect taxes. Moreover, petitioner argues that an individual who signs checks and tax returns for a corporation, without any actual authority or involvement in the corporation, is not a person required to collect tax. Lastly, petitioner argues that he has shown the presence of another individual who should properly be held accountable as a person required to collect tax on behalf of the corporation.

In response, the Division of Taxation (hereinafter the "Division") agrees with petitioner that whether an individual is a responsible officer depends upon the particular facts of each case. The Division argues that the Administrative Law Judge's determination is wholly supported by the record. The Division points to such factors as petitioner was president of the corporation and controlled the corporate stock, he was the sole person authorized to sign checks on behalf of the corporation, and he signed all tax returns filed by the corporation during the period at issue. The Division contends that the most significant facts regarding petitioner's involvement with the corporation during the period at issue are the extent of petitioner's authority to act on behalf of the corporation with regard to its finances and tax matters.

Furthermore, the Division argues that petitioner's status as executor of the estate does not preclude responsible officer status. The Division states that the concept that an executor may be liable for sales tax as a responsible officer is consistent with general principles of law.

We affirm the determination of the Administrative Law Judge for the reasons set forth below.

Section 1133(a) of the Tax Law imposes upon any person required to collect tax imposed by Article 28, personal liability for the tax imposed, collected or required to be collected. Section 1131(1) of the Tax Law defines persons required to collect tax to include, among others, corporate officers and employees who are under a duty to act for such corporations in complying with the requirements of Article 28.

In Matter of Autex Corp. (Tax Appeals Tribunal, November 23, 1988), we summarized the factors which are considered in determining whether an individual is responsible for the sales and use taxes due from a corporation. Such factors include:

"[T]he 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, 429)" (Matter of Autex Corp., *supra*).

Focusing on the above factors, we conclude that petitioner was a responsible person within the purview of Tax Law § 1131(1).

Petitioner was the president of the corporation. Although he claims that he maintained this corporate office solely because he was the executor of the estate, such claim is not supported by

the evidence. Petitioner contends that the State Liquor Authority required that the executor be named as president of the corporation to enable the corporation to continue operating under its liquor license and that only registered officers could sign checks. Petitioner also contends that Mr. Hunter, the individual allegedly responsible for running the business, was not added as an officer on the license because this change would have taken a long time to be approved.

However, there was not sufficient evidence submitted by petitioner to support these contentions.

First, petitioner has directed us to no statute, regulation or statement from the State Liquor Authority which confirms his description of the requirements of the State Liquor Authority.

Second, petitioner's explanation that Alan Hunter could not be named as an officer because it would have delayed the license transfer process is undermined by the fact that Norma Underwood was added as a corporation officer at the same time as petitioner.

Moreover, petitioner was authorized, and did, sign all checks and payroll on behalf of the corporation. Petitioner also signed sales tax returns and signed a consent to extend the period of limitations on assessment as president of the corporation.

Petitioner argues that although he did sign checks and certain tax returns on behalf of the corporation, such actions were solely ministerial. Furthermore, petitioner emphasizes that he did not have the authority to hire or fire any employees, nor did he have any authority with respect to the day-to-day management of the corporation. However, petitioner acknowledged that he never, in fact, read the bylaws of the corporation. As president of the corporation, he must have had duties and responsibilities. Such duties would be outlined in the bylaws of the corporation. His failure to learn what duties and responsibilities are assumed by the president of the corporation does not establish that the corporate office of president had no duties or responsibilities associated with it.

Petitioner was also the executor of the estate of Mrs. Herschorn, the prior president of the corporation. We agree with the Administrative Law Judge that an executor is a fiduciary owing certain responsibilities to the estate. One of the responsibilities owed by a fiduciary is to

preserve and protect the assets of the estate. Clearly, the corporation was an asset of the estate, and petitioner was under a duty to maintain the corporation. Therefore, petitioner's contention that he had no authority with respect to the day-to-day management of the corporation is not persuasive.

Furthermore, as executor of the estate of Mrs. Herschorn, petitioner controlled 100% of the stock of the corporation. This control, coupled with petitioner's position as president, gave petitioner the power and responsibility to ensure that the taxes of the corporation were paid.

Lastly, petitioner argues that he has shown the presence of another individual who should properly be held accountable as a person required to collect tax on behalf of the corporation. Petitioner alleges that Alan Hunter, Mrs. Herschorn's son, ran or oversaw the operation of the business and was a major shareholder with a significant financial interest. Petitioner argues that Mr. Hunter hired and fired, approved bills for payment, and prepared the corporate sales tax return. Although this may be an accurate portrayal of Mr. Hunter's role in the corporation, it is important to emphasize that more than one person can be held liable as a responsible officer (see, Matter of Blodnick v. New York State Tax Commn., supra [where both of the petitioners were held liable]; Matter of LaPenna, Tax Appeals Tribunal, March 14, 1991 [where both of the petitioners were held liable]). Therefore, merely pointing to one individual and alleging such individual is a responsible officer does not necessarily establish that other individuals are not responsible officers as well (Matter of LaPenna, supra).

Further, petitioner has not demonstrated that he was precluded from exercising his authority by the acts of Mr. Hunter (see, Matter of LaPenna, supra; cf., Matter of Constantino, Tax Appeals Tribunal, September 27, 1990 [where we concluded that a minority shareholder did not simply fail to act, but was prevented from acting by the power of another in the corporation]). Instead, petitioner has established only that he declined to exercise any responsibility over the corporation (see, Matter of LaPenna, supra).

Therefore, we conclude that petitioner was a person required to collect tax on behalf of the corporation and, therefore, is personally liable for the sales tax, penalty and interest due for said period.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Ernest M. Young, officer of Hi Lite Wines and Liquors, Inc., is denied;
 2. The determination of the Administrative Law Judge is affirmed;
 3. The petition of Ernest M. Young, officer of Hi Lite Wines and Liquors, Inc., is denied;
- and
4. The Notice of Determination and Demand for Payment of Sales and Use Taxes Due, issued on September 20, 1984, as modified by the Bureau of Conciliation and Mediation Services, is sustained.

DATED: Troy, New York
September 19, 1991

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

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

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