

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
VALERIAN C. PAIS,	:	DECISION
OFFICER OF DOROTHEA LANCE, 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 March 1, 1985	:	
through February 28, 1987	:	

Petitioner Valerian C. Pais, officer of Dorothea Lance, Inc., 78 Patrice Terrace, Williamsville, New York 14221 filed an exception to the determination of the Administrative Law Judge issued on December 13, 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, 1985 through February 28, 1987 (File No. 806711). Petitioner appeared by David M. Franz, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation filed a letter in lieu of a brief. Petitioner's request for oral argument was denied.

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

ISSUE

Whether petitioner was a person responsible for the collection and payment of sales tax due on behalf of Dorothea Lance, Inc. within the meaning and intent of Tax Law §§ 1131(1) and 1133(a) for the period at issue herein.

FINDINGS OF FACT

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

On November 23, 1987, the Division of Taxation issued to petitioner, Valerian Pais, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due which assessed \$37,391.26 in tax due, plus penalty and interest, for the period March 1, 1985 through February 28, 1987. The notice advised petitioner as follows:

"You are liable individually and as officer of Dorothea Lance Inc. under Sections 1131(1) and 1133 of the Tax Law for the following taxes determined to be due in accordance with Section 1138(a) of the law."

The assessment herein was based upon filed sales tax returns of Dorothea Lance, Inc. ("the corporation"), which returns were accepted as correct by the Division, but with respect to which payment of the tax shown due had not been made (or had not been made in full) by the corporation.

Dorothea Lance, Inc. was a subchapter S corporation formed in 1982. During the period at issue, the corporation's sole business activity was the operation of a bar/restaurant known as "Scruples" in Niagara Falls, New York. Scruples began operations in November 1982.

Petitioner and his wife came to the United States from Bombay, India in 1980 at the age of 67. Petitioner's four sons, Roy, Alan, Ivor and Lester Pais, had previously come to the United States to further their education and had later become involved in various restaurant businesses.

In 1978, petitioner's sons, Roy and Ivor Pais, went into business operating a Sizzler Restaurant franchise in the Buffalo area. Later, this franchise operation was dropped in favor of an independent operation known as Southfork Restaurant. Throughout the period at issue petitioner was employed by and received a salary from the Sizzler/Southfork restaurant operation. Petitioner worked at this restaurant on a daily basis.

In 1982, petitioner's son, Lester Pais, sought to start his own business. Specifically, Lester wanted to run a bar/restaurant/night club in the Rainbow Mall in Niagara Falls, New York. Lester was unable, however, to obtain bank financing for this venture. Lester therefore turned to his father (petitioner herein) for money necessary to start up his business. Petitioner subsequently provided his son Lester with \$75,000.00 to start up the business, which later

became known as Scruples. In exchange, petitioner received 75% of the stock of Dorothea Lance, Inc., the corporation that owned the Scruples operation. Petitioner was also named president of Dorothea Lance, Inc. It was understood between petitioner and his son Lester that petitioner would be reimbursed for his \$75,000.00 investment from corporate profits. The corporation never made a profit and petitioner never received any return on his \$75,000.00 investment.

Lester Pais was secretary-treasurer of the corporation and owned 25% of its stock. He was also general manager of Scruples and was in charge of day-to-day operations. Lester dealt with the corporation's creditors, including banks, and determined which creditors were to be paid. Lester also ordered beer, wine and liquor for the bar.

Ivor Pais was food manager of Scruples and was in charge of the food operation, including the ordering of food.

The corporation's sales tax returns were prepared by Lester Pais along with a corporate employee and were signed by Lester Pais.

Petitioner had no involvement in the day-to-day operations of Scruples. Petitioner was on the Scruples premises only on the occasion of its grand opening. He had no involvement in the hiring and firing of employees or the preparation of any tax returns. Except for signing a few checks for the corporation in Lester and Ivor's absence, petitioner had no involvement in the corporation's payment of its creditors. Petitioner did not receive a salary from the corporation.

Petitioner, along with sons Lester and Ivor, was an authorized signatory on the corporation's checking accounts. Petitioner signed checks for the corporation only in the absence of Lester or Ivor and only under exigent circumstances. Petitioner signed three or four checks on the corporation's behalf during the period at issue. One of the checks so signed by petitioner was a payment of sales taxes.

Petitioner considered himself an investor in Scruples. He did not advise his son Lester regarding the restaurant operation. His knowledge of the corporation's finances was limited to

very general discussions with his sons as to how the business was doing. Petitioner was aware that the corporation was operating at a loss from its inception.

Petitioner claimed a distributive share of the S corporation's ordinary losses on his personal income tax returns with respect to the period the corporation was active. On his 1983 personal income tax return, petitioner claimed \$11,441.00 in ordinary losses with respect to Dorothea Lance, Inc. With respect to the corporation's fiscal year ended November 30, 1982, petitioner received the benefit of \$26,750.00 in corporate losses, and for the fiscal year ended November 30, 1985, petitioner received the benefit of \$121,986.00 in corporate losses.

OPINION

The Administrative Law Judge held that petitioner had a duty to act for the corporation in complying with the requirements of Article 28 of the Tax Law. The Administrative Law Judge based his conclusion on the facts that petitioner was president and majority stockholder of the corporation, an authorized signatory on the corporate checking accounts, and because petitioner derived substantial economic benefit from his stock ownership by the pass-through of the S corporation's ordinary losses. The Administrative Law Judge believed that these facts compelled him to conclude that petitioner had or could have had sufficient authority and control over the affairs of the corporation such that he was a person responsible for the collection and payment of sales tax on behalf of the corporation.

In his exception, petitioner argues that he is not a person responsible for the collection and payment of the sales tax as defined in Tax Law § 1131(1). Petitioner contends that he was a lender of funds to his son, not an investor, and he asserts that as a mere lender he had no duty to act on the corporation's behalf. Petitioner argues that the responsible officer here is his son, Lester, the individual in control of the financial operations of the corporation. Petitioner asserts that his case is like that of Matter of Amengual v. State Tax Commn. (95 AD2d 949, 464 NYS2d 272) and Matter of Fisher v. State Tax Commn. (90 AD2d 910, 456 NYS2d 881), two cases which held the corporate officers not liable for the collection and payment of withholding taxes.

In response, the Division of Taxation (hereinafter the "Division") asks that the facts and conclusions of the Administrative Law Judge be upheld. The Division states that the statutes and case law do not imply a degree of exclusivity in determining who is a responsible officer. The Division asserts that section 1131(1) indicates a joint and several liability because it speaks of "any" officer under a duty to act. The Division also asserts that the criteria used in determining who is a responsible officer, as set forth by the Administrative Law Judge, was met and that the Administrative Law Judge was correct in concluding that petitioner achieved de jure control of the corporation and thereby assumed a duty to act.

We uphold the determination of the Administrative Law Judge.

Section 1133(a) of the Tax Law imposes personal liability for the tax imposed, collected or required to be collected under Article 28 upon every person required to collect any tax imposed. Section 1131(1) defines persons required to collect such tax and includes any officer who is under a duty to act for the corporation in complying with any requirement of Article 28. The question to be resolved here is whether petitioner had sufficient authority and control over the affairs of the corporation to be considered a responsible officer thereof (Matter of Constantino, Tax Appeals Tribunal, September 27, 1990). Factors identified as indicia of responsibility include:

"the individual's status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual's knowledge and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; (and) the individual's economic interests in the corporation (citations omitted)" (Matter of Constantino, *supra*).

Petitioner meets most of the criteria used in determining whether an individual is a responsible officer of the corporation. Petitioner was president of the corporation, the majority stockholder and an authorized signatory on the corporate checking accounts. Petitioner discussed the business with his sons and he was aware that the corporation was operating at a loss from its inception. Finally, petitioner claimed a distributive share of the S corporation's ordinary losses on his personal income tax return and thereby derived economic benefit from his stock

ownership. Thus, the evidence here supports the conclusion rendered below that petitioner had or could have had sufficient authority and control over corporate affairs and, therefore, was under a duty to act for the corporation in complying with Article 28 of the Tax Law.

Petitioner asserts two cases involving withholding taxes as controlling here. Although the definition of a "responsible officer" under Article 22 is similar to the one at issue here, the cases cited by petitioner may be distinguished from the instant facts. The case Matter of Amengual v. State Tax Commn. (supra) involved an officer who did not have stock or signatory authority. The court there found that the officer had only "inconsiderable corporate involvement" and the fact that she had access to the corporate books was insufficient to hold her liable for the withholding taxes (Matter of Amengual v. State Tax Commn., supra, 464 NYS2d 272, 274). Petitioner here was the majority stockholder of the close corporation as well as an authorized signatory on the corporate accounts.

The case Matter of Fisher v. State Tax Commn. (supra) may also be distinguished. The court in Fisher considered the officer's actions to be more like those of an attorney (Matter of Fisher v. State Tax Commn., supra, 456 NYS2d 881, 883). In Fisher, the court emphasized the test of willfulness that exists in withholding tax cases and it found no proof in the record to show that the petitioner there was a responsible officer who tried to absolve himself by disregarding his duty (Matter of Fisher v. State Tax Commn., supra). Petitioner here is not an attorney and because this case involves sales tax and not withholding tax, the test of willfulness is not at issue.

Petitioner asserts that his son is the responsible officer here. However, more than one person can be held liable as a responsible officer under the statute (Matter of LaPenna, Tax Appeals Tribunal, March 14, 1991; see, Matter of Blodnick v. New York State Tax Commn., 124 AD2d 437, 507 NYS2d 536). The fact that petitioner failed to exercise his responsibility is irrelevant (Matter of Blodnick v. New York State Tax Commn., supra, 507 NYS2d 536, 538; Matter of LaPenna, supra).

Finally, petitioner's officer and shareholder status is not offset by circumstances relating to control of the corporation (cf., Matter of Constantino, supra [where we concluded that the

minority shareholder was precluded from corporate management and financial activities by the power of another in the corporation])). Petitioner did not participate in the daily activities of the business, but no evidence suggests his sons prevented him from exercising his corporate duties. The evidence here supports the conclusion that petitioner could have acted but chose not to.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Valerian C. Pais, Officer of Dorothea Lane, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Valerian C. Pais, Officer of Dorothea Lance is denied; and
4. The Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated November 23, 1987, is sustained.

DATED: Troy, New York
July 18, 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