

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
WILLIAM L. SWANSON, OFFICER OF	:	DECISION
POPPIN'S OF GLENS FALLS, INC.	:	DTA No. 807565
	:	
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, 1984 through February 28, 1987.	:	

Petitioner William L. Swanson, officer of Poppin's of Glens Falls, Inc., c/o John C. Mannix, Jr., Miller, Mannix & Pratt, P.C., One Broad Street Plaza, P.O. Box 765, Glens Falls, New York 12801, filed an exception to the determination of the Administrative Law Judge issued on January 21, 1993. Petitioner appeared by Miller, Mannix & Pratt, P.C. (John C. Mannix, Jr., Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Vera R. Johnson, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a letter brief in response. The six-month period to issue this decision began on May 11, 1993, the date by which petitioner could submit a reply brief. Oral argument, requested by petitioner, was denied.

Commissioner Koenig delivered the decision of the Tax Appeals Tribunal. Commissioner Dugan concurs.

ISSUES

I. Whether petitioner's motion to dismiss for failure to file a timely answer should be granted.

II. Whether the Division of Taxation's failure to proceed against the corporation in its bankruptcy proceeding has prejudiced petitioner.

III. Whether William L. Swanson was a person required to collect tax on behalf of Poppin's of Glens Falls, Inc. within the meaning of Tax Law §§ 1131 and 1133.

IV. Whether petitioner has shown that the failure to timely file and pay over sales tax was due to reasonable cause and the absence of willful neglect.

V. Whether it has been established that a portion of one of the assessments is time barred by the statute of limitations.

FINDINGS OF FACT

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

The Division of Taxation ("Division") issued to petitioner, William L. Swanson, two notices of determination and demands for payment of sales and use taxes due dated February 8, 1988. The first (No. S880208723A) was for the period March 1, 1984 through November 30, 1985 and assessed total tax due of \$7,522.80, plus penalty and interest. The second (No. S880208722A) covered the period December 1, 1985 through February 28, 1987 and assessed total tax due of \$18,499.42, plus penalty and interest. Both of the notices issued contained the following explanation:

"[t]he tax assessed above has been estimated in accordance with the provisions of Section 1138(a)(1) of the Tax Law You are liable individually and as officer of (Poppin's of Glens Falls, 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."

A conciliation conference was subsequently held and the statutory notices were adjusted as follows: Notice No. S880208722A was reduced to \$6,700.56 reflecting the tax as due according to the sales tax returns filed at the conciliation conference for the corporation. Such tax had previously been estimated by the Division. Total tax assessed by Notice No. S880208723A of \$7,522.80 was sustained. However, interest for the quarter ending May 31, 1984 was cancelled since the time to assess tax, penalty and interest on the corporation for that period had expired at the time of the issuance of the notice to the corporation. Thus, the total tax due after adjustments

as asserted by the Division is \$14,223.36, plus penalty and interest. This amount is reflected in the amended Conciliation Order dated August 18, 1989.

Thereafter petitioner filed a timely petition with the Division of Tax Appeals which was received on November 14, 1989 asserting that petitioner was incapacitated for much of the period covering the quarters in issue and thus was not a person responsible for the collection and payment of tax; that the statute of limitation had run with respect to some of the periods; and that the failure to file and pay taxes as due was attributable to reasonable cause and not due to willful neglect. The Division submitted its answer with correspondence dated February 1, 1990, 79 days after the filing of the petition.

Poppin's of Glens Falls, Inc. ("Poppin's") was a restaurant operating in the Northway Plaza in Glens Falls, New York. It was incorporated in the State of New York on December 5, 1983 and commenced doing business, according to petitioner's son, during the early part of February 1984. Christopher Swanson (petitioner's son) has been associated with the business since its inception and provided testimony as to some of the details of what took place during its few years of business operation.

At the time the business was opened William Swanson, Christopher Swanson and an unrelated party referred to as Dr. Jenkins managed the restaurant. Shortly thereafter, on February 16, 1984, petitioner suffered a heart attack for which he was admitted to the hospital. The hospital discharge summary provided by petitioner's representative indicates that petitioner was admitted to the hospital with an acute inferior wall M.I. (myocardial infarction). Petitioner remained hospitalized until his discharge on March 1, 1984. The discharge summary indicates that upon his release he was to be followed carefully as an outpatient, that he would be seen in the office in about 10 days and was instructed to restrict his activities to those around his home until he had received a follow-up examination. Christopher Swanson provided testimony which confirmed the fact that his father suffered a heart attack and was hospitalized shortly after the opening of Poppin's. According to Christopher Swanson's further testimony, after his father's

discharge from the hospital, he did not return to Poppin's on a regular basis. He did not review daily cash totals or participate in the general supervision or the day-to-day management of the restaurant. He stated that his father did not return to the business to perform duties as a manager until the latter part of 1986. Petitioner's son indicates that the reason his father did not return to the business in a managerial capacity was pursuant to the instructions petitioner received from his doctor.

Dr. Jenkins was identified as a consultant who also held a teaching position in the culinary curriculum at Adirondack Community College (a local community college). According to the testimony of Christopher Swanson, he and Dr. Jenkins were in charge of the business of the restaurant on a day-to-day basis after petitioner's heart attack. Dr. Jenkins would take care of the normal operation of the restaurant, including the kitchen, the waiters and waitresses, bar supplies, and other general aspects of the entire operation. He maintained the authority to hire and fire employees and was paid a salary from the business. Christopher Swanson handled cashing out registers, inventory, employee matters and general expenditures. Christopher Swanson also had the authority to hire and fire employees, but did not receive a salary from Poppin's. Both Christopher Swanson and petitioner had the authority to sign checks and both signatures appear on a bank record submitted into evidence as authorized signatories. However, it is clear from the document that only one signature was required to effectuate a transaction.

Christopher Swanson testified that he was an officer and shareholder of Poppin's. However, there is other conflicting information submitted into evidence by the Division which does not confirm Christopher Swanson's shareholder status. On or about February 15, 1984, petitioner executed an Election by Shareholders of a Small Business Corporation (Subchapter S Election) on which he listed himself as the only shareholder, owning 100 shares of stock. In addition, Federal corporate income tax returns (Form 1120S) for the years 1984, 1985 and 1986 all indicate that petitioner was the sole shareholder of the corporation, owning 100% of the stock.

Form 1120S for 1987 also shows petitioner as owning 100% of the stock with the number of shares owned by him as 100.

During his period of employment at Poppin's, Christopher Swanson also maintained a position with W. L. Christopher, Inc., a managing company of the Northway Plaza.

Petitioner's representative indicated that petitioner was unable to appear at the hearing and provide testimony due to a continuing medical problem which had been documented by a doctor's letter sent to the Division of Tax Appeals. Correspondence dated March 25, 1991 and June 7, 1991 from Dr. Fredric Fagelman indicates that petitioner suffers from a chronic back condition exacerbated by a fall resulting in a leg fracture. Dr. Fagelman stated that due to these medical problems, petitioner should refrain from driving to Troy (the location of the hearing). Prior to the time when the parties agreed upon arrangements for the taking of a deposition in lieu of petitioner's testimony, the Administrative Law Judge in this matter suggested to petitioner's representative "[t]hat within thirty days you submit to me the affidavit of Mr. Swanson as complete as he might have so testified if he were able to appear." The affidavit of Mr. Swanson, surprisingly brief, is reproduced below:

"WILLIAM L. SWANSON, being duly sworn, deposes and says:

"1. I am the petitioner in this matter and I am making this affidavit to supplement the record herein as provided for by the hearing tribunal at the hearing held October 16, 1991.

"2. The petitioner's contention throughout this proceeding has been that due to severe medical incapacity, he was not a person 'responsible' for collection of sales taxes for the periods at issue. Petitioner has never denied that he was an officer or shareholder of the defaulting corporation.

"3. On February 17, 1984 I suffered a debilitating heart attack and was taken to the Glens Falls Hospital. I was discharged from the hospital on March 1, 1984 and was instructed by my doctors to remain in bed, and in no case was I to leave my house. I did not resume any activities with respect to the above corporation until October of 1986. It was not that I avoided my responsibilities, rather I believed that trustworthy people had been employed to take care of the business. Furthermore, I believed that

were there any problems with this business, I would have been notified. I never received any information until my return to the business in October, 1986 that there were serious problems.

"4. When I returned to the business, I discovered serious problems of theft within the organization and what essentially amounted to total chaos. It was only then that I discovered that the sales taxes had not been paid over to the State.

"5. As a result of my medical incapacity, I did not have the duty of management and maintenance of the corporate books; nor was I responsible to review and file any of the corporate tax returns.

"6. My position with Poppins of Glens Falls, Inc., unfortunately, was that of a passive investor.

"7. So that the record is clear, I never received any distributions from this corporation in any capacity, as salary, dividends, or distributions of any kind. I have never been benefited financially from having owned this restaurant."

The Division submitted to petitioner written interrogatories for which petitioner provided responses. Some of the information revealed by the interrogatories was as follows:

(a) Petitioner conceded to having signed corporate checks between February 17, 1984 and October 31, 1986 as his health permitted. No further explanation was provided.

(b) Petitioner was asked whether he reported the income, profits or losses incurred by Poppin's in 1984, 1985, 1986 or 1987 on his personal income tax return for the respective years. Petitioner did not have any recollection of doing so.

(c) Petitioner indicated on the 1986 and 1987 schedule K-1 attached to Form 1120S that he "materially" participated in the business activities of the corporation in those years. He said he did so to the extent that his health permitted with no further explanation.

(d) Petitioner conceded that it was possible that he allowed other persons who were neither directors nor shareholders of the corporation to conduct certain business affairs of the corporation.

(e) Petitioner agreed that it was possible that he had communicated with employees of the corporation regarding corporate business affairs on numerous occasions after his release from Glens Falls Hospital.

(f) Petitioner conceded that it was possible that he communicated with employees regarding the day-to-day business affairs of the corporation even if not so on a daily basis. He said that he gave certain employees permission to transact the corporation's business affairs on his behalf.

(g) Petitioner did not recall the application of a \$60,000.00 loss in income reported on his personal income tax return as a pass-through from Poppin's as a subchapter S corporation.

(h) Petitioner indicated that he first contacted an attorney with respect to filing a petition in bankruptcy on behalf of Poppin's in April or May (presumably 1986).

(i) Petitioner did not recall when his doctor advised him that he no longer had to remain in bed recuperating.

(j) When petitioner was questioned as to whether his doctor advised him not to go to work during the period between March 1, 1984 and September 30, 1986, he indicated he was not prohibited from working but that his work habits were restricted. No further explanation was provided.

(k) When asked how often he visited the business premises of Poppin's during the period March 1, 1984 through September 30, 1986, he indicated he did so frequently for lunch or dinner.

The Division introduced a number of documents in an attempt to show petitioner's involvement with Poppin's during the period he was allegedly incapacitated. Mr. Swanson's signature appears on a document entitled "Election by Shareholders of a Small Business Corporation for New York State Personal Income Tax and Corporation Franchise Tax Purposes" which he dated February 15, 1984.

Additionally, the Division introduced two documents regarding bank accounts. The first was a resolution for bank accounts in the corporate name indicating that William L. Swanson and Christopher L. Swanson were authorized to effectuate transactions on behalf of Poppin's. They held the titles of owner and manager of the corporation, respectively. A copy of the bank signature card attached to the bank resolution shows the signatures of the two parties and indicates that petitioner was the president of the corporation and his son was the manager. The bank signature card also indicated that for purposes of checks only one signature was required. This account was the business checking account as indicated by the testimony of Christopher Swanson which was established at Chase Lincoln First Bank prior to the opening of the business in February 1984.

Mr. Swanson's signature appears at the bottom of Form CT-3S covering the period December 5, 1983 to December 31, 1983. The Form is entitled "New York State Small Business (Tax Option) Corporation Information Report" and it is dated May 21, 1984. The Division also introduced additional Forms CT-3S into evidence; however, for the years 1985, 1986, 1987, 1988 and 1989, such forms were signed by Mr. Swanson on October 2, 1990.

Attached to the written interrogatories and introduced into evidence were Forms 1120S (U.S. Income Tax Return for an S Corporation) pertaining to Poppin's for the years 1984, 1985, 1986 and 1987. A comparison of the end-of-year balance sheet for 1984 and the beginning of the tax year balance sheet for 1985 with specific reference to an attached schedule listing a breakdown of current liabilities reveals a note payable from William L. Swanson (WLS) in the amount of \$211,861.00. With that amount having appeared on the end-of-year balance sheet for 1984, the sum was loaned to the corporation sometime between the commencement of business in February 1984 and the end of that year. The note payable from the corporation to petitioner increased during 1985 by nearly \$16,000.00. The Division, in its interrogatories, requested information from petitioner regarding the notes payable from the corporation and referred specifically to the sums indicated in the balance sheet and described above. The only comments

petitioner made with respect to the questions about such loans were that "the written documents speak for itself [sic]." He provided no additional information about the nature, purpose or the timing of such loans.

In addition, the 1984 Form 1120S reflects the purchase of capital stock by petitioner for \$60,000.00. A schedule attached to the 1986 Form 1120S indicates that petitioner acquired common stock on December 5, 1983 (the date of incorporation) for \$60,000.00 and such sum was the amount that petitioner had "at risk" for purposes of the pass-through of corporate losses on petitioner's personal income tax return. The schedule also indicates that a \$60,000.00 loss was distributed to petitioner at the end of the corporation's calendar year 1984.

Christopher Swanson provided testimony that petitioner had no involvement with Poppin's between the time he was admitted into the hospital until sometime in late 1986. He did, however, indicate that petitioner had contact with him and secretaries of the corporation with respect to certain problems facing the corporation. In addition, petitioner had contact with Loretta Swanson, his sister, who assisted in the daily business operations of the restaurant after petitioner's heart attack.

Petitioner first contacted an attorney with respect to filing a petition in bankruptcy on behalf of Poppin's during April or May 1986. Petitioner's representative indicated at the time of the hearing that there was currently a Chapter 7 bankruptcy proceeding in process. It was also indicated that the bankruptcy trustee has maintained a fund available to pay the taxes. By correspondence dated July 16, 1991, petitioner's representative, John Mannix, Jr., indicated that the bankruptcy proceedings of Poppin's had been converted from a Chapter 11 action to Chapter 7 liquidation proceedings. He acknowledges in this correspondence that there were outstanding claims by New York State Department of Taxation and Finance for unpaid sales tax for quarters commencing in 1984 through 1987 and urged the State to assert its claims in bankruptcy for payment of such taxes. Petitioner's representative received correspondence from Anthony DeStefano, a manager of bankruptcy/special procedures section, Tax Compliance

Division, indicating what he believed the State's position to be with respect to the distribution of funds under the Chapter 7 proceeding.

Christopher Swanson's testimony indicated that the corporation attempted to staff its business office with experienced bookkeepers. During the nearly three-year period of time covered by the sales tax quarters in issue there were two or three different bookkeepers and Poppin's books and records were reviewed by accountants. It is petitioner's contention that the persons to whom such responsibility was delegated began a practice of failing to file and pay appropriate sales taxes due.

OPINION

In the determination below, the Administrative Law Judge held that: petitioner did not establish that he had been prejudiced by the three-week delay in receipt of the Division's answer; the corporation's filing for bankruptcy has no relevance to the liability at issue herein and did not relieve petitioner of his personal liability for the taxes, penalty and interest which have been assessed; and petitioner has properly been held liable for the penalty and interest assessed in this matter.

The Administrative Law Judge also held that "the evidence in this case supports the conclusion 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 (see, Matter of Pais, Tax Appeals Tribunal, July 18, 1991)" (Determination, conclusion of law "D"), further holding that no portion of the assessments in issue were deemed time-barred by the statute of limitations.

The Administrative Law Judge denied the petition and sustained the notices of determination and demand for payment of sales and use taxes due dated February 8, 1988, except as modified by the Amended Conciliation Order dated August 18, 1989.

On exception, petitioner argues that: he was not a responsible officer; penalties and interest should be remitted as reasonable cause has been established for his failure to pay the sales tax; and, further, there is no proof that he acted with willful neglect.

Petitioner also argues that he "sought to assist the Department of Taxation and Finance to satisfy the tax liability from the corporate bankruptcy estate" and "had more prompt attention been devoted to this matter, the tax liability, including interest and penalties, would have been satisfied in full" (Petitioner's brief, p. 8).

Petitioner objects to all of the findings of fact and conclusions of law of the Administrative Law Judge and argues that "the Administrative Law Judge's decision was due within 6 months after completion of the hearing or submission of briefs, whichever was later" (Petitioner's brief, p. 7) and since the decision was issued after the time period had expired, the Administrative Law Judge had no authority to issue a determination and, consequently, the determination is void in full.

The Division argues that the Administrative Law Judge's determination should be affirmed in its entirety. The Division also takes the position that the Tax Law does not deprive the Administrative Law Judge of the right to issue a determination beyond the six-month period or extended period of time and petitioner's remedy for a determination not issued within the required time frame was to institute a proceeding under Article 78 of the Civil Practice Law and Rules to compel a determination and, having failed to do so, petitioner is without recourse.

The Division also argues that: 1) petitioner has failed to establish facts sufficient to show his entitlement to relief based on his allegation of prejudice due to a late-filed answer by the Division and a late-filed Administrative Law Judge determination; 2) the substantial loans made by petitioner, the sole shareholder of a closely-held corporation, is proof of knowledge and control over the financial affairs of the corporation; 3) petitioner's representative incorrectly states that petitioner needs to be involved in the day-to-day activities of the business in order to

be considered a responsible officer as a matter of law; and 4) petitioner has failed to prove that his argument for the abatement of penalties has merit.

We affirm the determination of the Administrative Law Judge. Petitioner raises on exception the same arguments raised at hearing.

The Administrative Law Judge completely and correctly addressed the issues before her, and we affirm her determination for the reasons stated therein.

We do, however, find it necessary to address petitioner's claim that the Administrative Law Judge, due to the late issuance of her determination, had no authority to issue same and consequently the determination is void in full.

Tax Law § 2010(3) provides that:

"[a]n administrative law judge shall render a determination after a hearing, within six months after submission of briefs subsequent to completion of such a hearing or, if such briefs are not submitted, then within six months after completion of such a hearing. Such six month period may be extended by the administrative law judge, for good cause shown, to no more than three additional months. If the administrative law judge fails to render a determination within such . . . period . . . the petitioner for such hearing may institute a proceeding under article seventy-eight of the civil practice law and rules to compel the issuance of such determination."

In the instant case, the hearing was held on October 16, 1991. The Administrative Law Judge provided petitioner's representative thirty (30) days to submit to her an affidavit of Mr. Swanson, "as complete as he might have so testified if he were able to appear" (Determination, finding of fact "7"). The affidavit was received by the Division of Tax Appeals on November 18, 1991, and the Division of Taxation, after reviewing the affidavit, advised the Administrative Law Judge that written depositions would be taken. On January 16, 1992, the Division representative forwarded Written Interrogatories to petitioner's representative, as well a revised time schedule agreed to by petitioner. A copy was forwarded to the Administrative Law Judge. The revised time schedule called for petitioner's answers to Interrogatories by January 31, 1992, petitioner's

brief by March 16, 1992, Division's brief by April 16, 1992, and petitioner's reply by April 30, 1992. The six-month period in section 2010(3) commenced on this date.

The determination was issued January 21, 1993 and was clearly beyond the six-month period allowed by section 2010(3) of the Tax Law. We find this failure to comply with the statutory time period unacceptable.

This Tribunal regards the time limitations of sections 2010(3) and 2006(7) (the latter imposing a six-month limitation on the issuance of Tribunal decisions) as requirements to be satisfied in every case. We conduct our operation in a manner to ensure that Tribunal decisions are issued within the six-month period. We expect each of the Administrative Law Judges in the Division of Tax Appeals to do the same. However, this Administrative Law Judge's failure to discharge her statutory responsibility and our dissatisfaction with this failure does not allow us to grant the remedy requested by petitioner, i.e., that the Administrative Law Judge had no authority to issue a determination and, consequently, the determination is void in full. To do so would penalize one party to this proceeding, the Division of Taxation, for the Administrative Law Judge's failure and would be inconsistent with our responsibility to administer a just system for resolving tax controversies (Tax Law § 2000). In the absence of a statute or court decision that explicitly requires such a result (see, Matter of Janus Petroleum v. New York State Tax Appeals Tribunal, 180 AD2d 53, 583 NYS2d 983), we cannot impose such a remedy. We will, however, pursue administrative action within the Division of Tax Appeals, consistent with our administrative responsibility under sections 2002 and 2004 of the Tax Law, to attempt to prevent such failures in the future.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner William L. Swanson, officer of Poppin's of Glens Falls, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;

3. The petition of William L. Swanson, officer of Poppin's of Glens Falls, Inc. is denied;
and

4. The notices of determination and demand for payment of sales and use taxes dated
February 8, 1988, as amended by the Conciliation Order dated August 18, 1989, are sustained.

DATED: Troy, New York
November 4, 1993

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

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