

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
JERRY FISHER, :
OFFICER OF BOSS HOLDING CORP. :
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, 1988. :

DECISION
DTA Nos. 808579
and 808708

In the Matter of the Petition :
of :
EVERETT YAGUD, :
OFFICER OF BOSS HOLDING CORP. :
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, 1988. :

Petitioners Jerry Fisher, Officer of Boss Holding Corp., 10320 Camelback Avenue, Boca Raton, Florida 33498 and Everett Yagud,¹ Officer of Boss Holding Corp., 3812 Laurel Lane, Bedford, Texas 76021, each filed an exception to the determination of the Administrative Law Judge issued on July 23, 1992. Petitioner Jerry Fisher appeared by Ronald S. Miller, C.P.A. Petitioner Everett Yagud appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (John O. Michaelson, Esq., of counsel).

Petitioners each filed a brief on exception. The Division of Taxation filed a brief in opposition. Petitioner Jerry Fisher filed a reply brief which was received on March 10, 1993 and began the six-month period for the issuance of this decision.

¹Petitioners Jerry Fisher and Everett Yagud filed exceptions to the Administrative Law Judge's determination; petitioner Bernard Myers did not file an exception. Therefore, this opinion addresses only the petitions of Jerry Fisher and Everett Yagud.

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

ISSUES

I. Whether the Division of Taxation properly found that petitioners, in their capacities as officers of Boss Holding Corp., were persons required to collect tax pursuant to Tax Law § 1131(1) and personally liable for the tax imposed, collected or required to be collected under Article 28 of the Tax Law pursuant to Tax Law § 1133(a) for the period March 1, 1985 through February 28, 1988.

II. If petitioners are found to be liable for the tax assessed, whether certain payments have been paid and applied toward the assessments of tax against Boss Holding Corp.

FINDINGS OF FACT

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

The Division of Taxation (hereinafter the "Division") issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated February 28, 1989, to Jerry Fisher, as an officer of Boss Holding Corp. for the period March 1, 1985 through February 28, 1988 which set forth total tax due of \$393,339.52, plus penalty and interest. The Division also issued a second Notice of Determination and Demand for Payment of Sales and Use Taxes Due on the same date to Mr. Fisher for omnibus penalty pursuant to Tax Law § 1145 in the sum of \$38,174.46. On February 28, 1989, the Division issued a Notice of Assessment Review with regard to the above assessments modifying the tax due and reducing the sum to \$103,149.93, plus penalty and interest. Following a conciliation conference on February 5, 1990, a second Notice of Assessment Review, dated June 27, 1990, cancelled the omnibus penalty in the sum of \$38,174.46. Therefore, the amount remaining in issue is the adjusted tax due of \$103,149.93, plus penalty and interest.

The Division also issued notices of determination and demands for payment of sales and

use taxes due to Bernard Myers and Everett Yagud, as officers of Boss Holding Corp., all notices dated February 28, 1989. The amounts stated on said notices were identical to those set forth on the notices sent to Jerry Fisher, as set forth above.

Notices of assessment review, dated February 28, 1989, were issued to both Mr. Myers and Mr. Yagud reducing the amount of tax due to \$103,149.93, plus penalty and interest. Following a conciliation conference on February 5, 1990, omnibus penalty assessed against both Mr. Myers and Mr. Yagud was cancelled by a second set of notices of assessment review dated June 27, 1990. Therefore, as in the case of Mr. Fisher, the amount in issue with regard to both Mr. Myers and Mr. Yagud is \$103,149.93, plus penalty and interest.

The underlying audit in this matter, which yielded the assessments against the corporation and its alleged officers, was not challenged herein. Briefly, the tax due was based upon disallowed nontaxable sales for which no exemption certificates were made available. Additional taxes were found due on assets acquired and expense purchases made.

Boss Glass Industries, Inc./Boss Holding Corp. made flat glass products, mirrors, curved auto glass and colored glass products.

MATTER OF JERRY FISHER

Mr. Fisher was one of the principals in a predecessor corporation called Boss Auto Glass Distributors. That entity was sold in June 1984 to another corporation, purportedly Page Mill Intercapital Corporation, which continued operations of the business as Boss Holding Corp., Federal employer identification number 22-2536737, with an address at 321 Change Bridge Road, Pine Brook, New Jersey, and doing business as Boss Glass Industries. The chief investor in the corporation was one Michael Gibbs.

Mr. Fisher denied that he had ever been an officer with Boss Holding Corp. and that his position was as a salesman, calling customers, checking on sales, collections and receivables. He was also called upon to determine the credit of various customers. Although he claimed he did not have check-signing authority, Mr. Myers testified that he did.

Mr. Fisher conceded that he had been an officer in Boss Auto Glass Distributors, the

predecessor corporation, acting as secretary and treasurer, and received approximately \$2,000.00 per week in salary.

Following the sale of Boss Auto Glass Distributors to the new corporation, Mr. Fisher received approximately the same salary and entered into a three-year employment contract with Boss Holding Corp. There were essentially the same personnel in the predecessor corporation as in Boss Holding Corp., including the same branch managers and number of employees, i.e., 65.

Mr. Fisher testified that there was one bookkeeping department for all divisions of Boss Holding Corp.

Mr. Fisher had some managerial duties with regard to his sales staff and had authority to hire and fire said staff. However, he never prepared or filed sales or income tax returns on behalf of the corporation. He did, however, concede that he had access to the financial records of the corporation.

Mr. Fisher was in the office on a day-to-day basis during the years in issue, retiring in January of 1989.

In a letter addressed "Dear Friends", dated February 24, 1989, on Boss Glass Industries, Inc. stationery, noting an address of 321 Change Bridge Road, Pine Brook, New Jersey 07058, the same address as Boss Holding Corp., Mr. Fisher announced his retirement. In the fifth paragraph of said letter, Mr. Fisher noted that:

"I take comfort in knowing that I have helped build Boss Glass as a leader in the glass industry and I feel secure in the knowledge that I am leaving behind a competent management team to guide its future and serve your needs."

Additionally, in the first paragraph of said letter, Mr. Fisher notes that he had spent "30 [years] with Boss Glass".

Jerry Fisher was listed on the Federal income tax return for Boss Holding Corp., Form 1120, as an officer of the corporation in either fiscal year ended January 31, 1986 or January 30, 1987. His title was listed as executive vice-president, receiving compensation in the sum of \$117,216.00.

Additionally, in a sales tax examination questionnaire sent to Boss Glass Distributors of Long Island, Inc., which listed its business address as 321 Change Bridge Road, Pine Brook, New Jersey 07045, filed by its bookkeeper, Young Ahn, Mr. Fisher was listed by the corporation as its vice-president during the period March 1, 1985 through November 30, 1987.

MATTER OF BERNARD MYERS

Mr. Myers was also a principal in the predecessor corporation, Boss Auto Glass Distributors, and its branch offices in both New York and New Jersey. He held the office of president and agreed to hold over with the new corporation, Boss Glass Industries, until a new president could be groomed for the job. Mr. Myers testified that this position only lasted three months, between June of 1984 and September of 1984. In an affidavit filed by Michael Gibbs, Mr. Gibbs states that Mr. Myers agreed to serve as president of the corporation from June of 1984 through the early part of 1985 and that Mr. Myers resigned as president not later than May of 1985. Mr. Gibbs also stated, as was corroborated by the testimony of Mr. Myers, that Mr. Stephen Smith, now deceased, succeeded him as president of the corporation.

Mr. Myers testified that the predecessor corporation, Boss Auto Glass Distributors, Inc., sold its assets to a new corporation called Boss Glass Industries, Inc., a Delaware corporation whose majority stockholder was Page Mill Intercapital Corporation, another Delaware corporation of which Mr. Michael Gibbs was president.

Mr. Myers conceded that he was authorized to sign checks on behalf of the corporation and that he was essentially in charge of the manufacturing operations, including deliveries, cutting of glass and assembly. He also was in charge of ordering supplies from various vendors which included routinely signing invoices and making orders, and testified that other signatories authorized to sign checks on behalf of the corporation were Mr. Fisher, Mr. Yagud, Mr. Gibbs and Mr. Smith.

Mr. Myers stated that he always took orders from either Mr. Gibbs or the other chief executive officers, whom he believed to be Mr. Stephen Smith or Mr. Don Rosencotter.

Although not directly involved in the finances of the corporation, Mr. Myers admitted

that he did have access to the books and records of the corporation. He testified that he never prepared tax returns or had occasion to review them.

Mr. Myers indicated that he began the predecessor corporation, Boss Auto Glass Distributors, Inc., in 1949 or 1950 with his background as a glazier. He continues to work for Boss Glass Industries, Inc. to the present day and is a member of its board of directors.

Mr. Myers' name appears as an officer of Boss Holding Corp. on its Federal income tax return, Form 1120, for either the year 1985 or 1986 (fiscal year ending January 31, 1986 or January 30, 1987) with a salary of \$120,016.00. He was also listed as a vice-president in the questionnaire provided by bookkeeper, Young Ahn, of Boss Glass Distributors of Long Island, Inc. for the period March 1, 1985 through November 30, 1987.

MATTER OF EVERETT YAGUD

Mr. Yagud was the last of the principals in the predecessor corporation, Boss Auto Glass Distributors, which sold its assets to Boss Glass Industries, Inc., purportedly a Delaware corporation in which Page Mill Intercapital Corporation, Mr. Gibbs' corporation, held a majority stock interest. Mr. Yagud, as part of the sale, accepted a three-year employment contract with Boss Glass Industries, Inc. which terminated on June 30, 1987.

Mr. Yagud had responsibility for the operations of the main branch of Boss Glass Industries, Inc. in Pine Brook, New Jersey, as well as other branches in Pleasantville, New York, Babylon, New York and Wall, New Jersey. His responsibilities grew to include the installation, maintenance and running of an insulated line of glass products. With more of his time taken up by the insulated glass product line, Mr. Yagud assigned or delegated his responsibilities for the branches and the purchasing of materials to others while he concentrated on the start-up of the insulated product line.

Mr. Yagud periodically sent letters to the trade indicating that tax resale certificates were required in dealing with Boss Glass Industries for both the State of New York and the State of New Jersey.

Mr. Yagud denied any responsibility in the area of sales and marketing after the sale of

Boss Auto Glass Distributors in June of 1984. He claims that he had no contact with customers or with obtaining any tax resale certificates.

Mr. Yagud submitted various W-2 forms which were submitted with his tax returns for the years 1984, 1985, 1986 and 1987, noting that he received them from a company called Boss Glass Industries, not Boss Holding Corp. For the year 1987, Mr. Yagud's W-2 (Wage and Tax Statement) from Boss Glass Industries indicated taxable wages and tips of \$39,150.00. It is noted that the employer's identification number on said W-2 was 22-2536737, the same employer identification number used by Boss Holding Corp. The W-2s for 1986, listing aggregate wages of \$75,089.00, also indicate the same employer identification number on two separate W-2s. For the year 1985, the W-2 issued by Boss Glass Industries, again using the same employer identification number as Boss Holding Corp., indicated wages of \$85,000.00.

Mr. Yagud was also a signatory on the corporate checking account and was listed on Boss Holding Corp.'s income tax return for either the fiscal year ended January 31, 1985 or January 31, 1986 as a vice-president with compensation of \$74,400.00.

Between October 20, 1989 and September 28, 1990, Boss Glass Industries, Inc. of Change Bridge Road, Pine Brook, New Jersey 07058 made nine equal payments of \$47,000.00 to the New York State Department of Taxation and Finance. With regard to these payments, in the record is a September 20, 1989 letter from Mr. William Horn, director of finance of Boss Glass Industries, Inc., indicating that an enclosed check for \$47,000.00 represented 1/12th of the total combined estimated tax assessment and penalty for Boss Glass Industries (ID #22-2536737 [same as Boss Holding Corp.]) and WSS Glass Corp. (formerly Insulpane Industries, Inc. [ID #14-1560266]). Additionally, a Deferred Payment Agreement/Income Execution, dated November 3, 1989, indicates that an agreement had been reached between the Division and WSS Glass (formerly Insulpane Industries, Inc.) whereby Mr. Horn agreed, on behalf of WSS Glass, to pay to the Division \$410,749.08 representing estimated total liability on assessments issued to Insulpane Industries (ID #14-1560266).

OPINION

In the determination below, the Administrative Law Judge, based on his reading of Tax Law § 1133(a), which imposes personal liability for taxes required to be collected under Article 28 of the Tax Law upon a person required to collect such tax, and Tax Law § 1131(1), which defines a person required to collect such tax under Article 28 of the Tax Law, and after weighing a variety of factors used in determining the responsibility of a particular individual, held that petitioners were responsible officers or employees of Boss Holding Corp. or its alter ego Boss Glass Industries, Inc.

The Administrative Law Judge held that with regard to the corporate entities:

"[g]iven the entire record herein, it is most likely that Boss Auto Glass sold its assets to Boss Glass Distributors, Inc., whose majority shareholder was a company called Page Mill Intercapital Corp., of which Michael Gibbs was president. However, the business, including employees, of Boss Auto Glass as transacted prior to the sale of the business assets in June of 1984 remained almost identical before and after the sale" (Determination, conclusion of law "A").

The Administrative Law Judge further held that since:

"[n]one of the petitioners challenged the fact that he was an employee of Boss Glass Distributors, which had the same employer identification number as Boss Holding Corp. [and since] the corporations involved did not keep accurate records with regard to which name and identification numbers were used for governmental filings, the Division's use of Boss Holding Corp. rather than Boss Glass Distributors, Inc. is a negligible error, if an error on its part at all" (Determination, conclusion of law "A").

With respect to his conclusion that petitioners were responsible officers, the Administrative Law Judge stated that:

"[t]he critical factor in determining that these [two] petitioners were responsible employees or officers of Boss Holding Corp. is that they were key employees with management roles in each of the major divisions of the corporation before and after the sale of assets from Boss Auto Glass Distributors, of which they were the principals, to Boss Glass Industries [and] those essential characteristics of responsible officers or employees which attached to petitioners herein prior to 1984 did not dissipate after the sale of the assets" (Determination, conclusion of law "A").

As further support for his conclusion, the Administrative Law Judge noted that: 1) each of the petitioners could have been informed with regard to the financial matters of the

corporation, but chose not to be; 2) each petitioner denied responsibility for the finances of the corporation, but none denied access to the records or that they simply delegated this duty to another department or individual; and 3) petitioners' role in the corporation was not "minimal" and petitioners could have taken actions to ensure that the taxes were paid.

With regard to the payments claimed to have been made by petitioners, the Administrative Law Judge stated "it appears that [the nine equal installment payments] made by Boss Glass Industries, Inc. were made pursuant to a deferred payment agreement with WSS Glass, formerly Insulpane Industries, Inc., and applied to assessment numbers which are unrelated to those at issue herein" (Determination, conclusion of law "B").

Finally, the Administrative Law Judge held that petitioner Everett Yagud presented evidence uncontradicted by the Division that his involvement with all of the Boss companies ended as of June 29, 1987. Therefore, the Administrative Law Judge cancelled Everett Yagud's liability for any taxes after that point.

On filing his exception (Form TA-14, dated August 24, 1992), petitioner Jerry Fisher maintains that while he may be deemed a responsible officer for a certain period of time, he was not a responsible officer for the entire period of the assessment. Petitioner Fisher:

"maintains that he should not be deemed a responsible officer after January 31, 1986; January 30, 1987; or November 30, 1987; as the case may be. It would appear that what is stated on a corporate tax return that is signed by a responsible corporate officer would have much more weight than a document not signed by a responsible officer (it is assumed that the bookkeeper that signed the sales tax examination questionnaire was not deemed to be a responsible corporate officer). Therefore . . . Form 1120 should be the applicable document to determine what period [he] is to be deemed a responsible officer" (Petitioner Fisher's Exception, p. 2).

However, in filing his brief on January 6, 1993, it appears petitioner Fisher retracted his responsible corporate officer argument made on exception, as he now acknowledges that he was listed as an officer on the corporate tax returns filed for FYE 1/31/86 and FYE 1/30/87.

In his exception filed August 24, 1992, petitioner Fisher also maintains that payments made should have been applied in a manner similar to that prescribed in the Internal Revenue Service's (hereinafter the "IRS") Revenue Ruling 73-305, 1973-2 C.B. 43 that sets forth the

IRS's position for the application of a partial payment of assessed tax, penalty, and interest. Further, petitioner Fisher maintains that the six checks of \$47,000.00 (for a total of \$282,000.00) that were not designated to apply to a particular company or assessment number, should be applied first to the liabilities of the issuer of the checks (Boss Glass Industries, Inc.) and after such liabilities are satisfied, only then should payments be applied to another entity's liabilities.

However, in a subsequent letter brief filed on January 6, 1993, petitioner Fisher argues that based on the September 20, 1989 letter from William Horne, Director of Finance for Boss Glass Industries, Inc. to Mr. Guida of the New York State Department of Taxation and Finance in Rye Brook, New York, the assessment amounts for Boss Glass Industries (I.D.#222536737) and WSS Glass Corp. (formerly Insulpane Industries, Inc., I.D.#141560266) should have been combined into one tax file under the name of Boss Glass Industries, Inc. Petitioner Fisher now argues, which argument incidentally is inconsistent with his argument on exception, that because the word "combine" was specifically used, New York State should have applied payments to both entities, not just WSS Glass Corp.

Petitioner Fisher requests that after an analysis of the payments has been made pursuant to Mr. Horne's September 20, 1989 letter, if there is any remaining balance due, penalties assessed should be abated since he did not knowingly fail to pay any tax due and did not knowingly fail to comply with the Tax Law since his actions were due to reasonable cause and not due to willful neglect.

On exception, petitioner Everett Yagud argues that: 1) he was not an employee or officer of Boss Holding Co.; 2) he had no responsibilities with regard to financial activities of Boss Glass Industries, Inc. other than to sign payroll checks and minor bills on occasion; 3) the payment for taxes due was paid to the State but was mistakenly applied by Mr. Horne's erroneous letter; and 4) he left the employ of Boss Glass Industries, Inc. on June 30, 1987.

Petitioner Everett Yagud also suggests that: 1) "Mr. Gibbs was owner of the corporation and directed all financial activities in conjunction with Mr. Myers advice"; 2) "[Mr. Gibbs] is

the one responsible for any taxes due"; and 3) "Mr. Gibbs knowingly and without my knowledge created a corporation called Boss Holding Co., and made me an officer, thereby protecting himself from any liability" (Petitioner Yagud's Exception, p. 1).

The Division argues that it has properly imposed responsible party liability upon petitioners. In support of this conclusion, the Division states "[i]t is abundantly clear that Mr. Fisher had the duty to act. His actions clearly implied his responsibility. He had control over the cash accounts, managed employees and had the ability to review the books and records of the business" (Division's Brief, p. 9). The Division also contends that the evidence shows Mr. Yagud is also a responsible officer since he managed the operations of several facilities including the home office, had control over the cash accounts, signed checks on the company's behalf, and had the authority to review the financial status of the company whenever he chose. The Division asserts that petitioners cannot escape liability by stating that someone else is the responsible party.

The Division also argues that: 1) it can allocate partial payments it receives in whatever manner it wishes, absent guidance from the taxpayer; 2) the guidance of the taxpayers herein was vague at best; and 3) while the guidance given was to consolidate the tax liabilities of Boss Glass and WSS Glass Corp. by combining these amounts into one tax file under the name of Boss Glass Industries, Inc. no other direction was given as to the application of the payments made by Boss. The Division states that even if petitioners are correct as to the allocation of payments received from a particular taxpayer, this argument fails when a payment is allocated between multiple taxpayers without specific guidance and, given the lack of guidance by the taxpayers in question, the Division acted properly in the allocation of payments.

Petitioner Fisher, in reply, takes exception to the Division's argument that specific instructions were not given or that such instructions were vague as to how the payments should have been applied, alleging the Division ignored the directions given by Mr. Horne to "combine" so that the liabilities of both Boss Glass Industries and WSS Glass Corp. would be paid.

We affirm the determination of the Administrative Law Judge.

In addition, because we find that the Administrative Law Judge completely and adequately addressed the issues before him we see no reason to analyze these issues further; therefore, we affirm the Administrative Law Judge based on his determination.

We do, however, find it necessary to address petitioner Fisher's argument relating to the \$47,000.00 payments made by Boss Glass Industries, Inc., as it appears that petitioner Fisher in his reply brief requests this Tribunal to do an analysis of the payments made pursuant to Mr. Horne's September 20, 1989 letter. This Tribunal can only review the evidence made a part of the record before the Administrative Law Judge, and there is no evidence that any of the payments (nine checks were made a part of the record) pertained to the assessments in question. While petitioners could have requested that the Division supply the information as to exactly what assessments the nine payments were applied to, such evidence has not been made a part of the record.

While the Division was requested to combine some unspecified liabilities of Boss Glass Industries and WSS Glass Corp. so that the liabilities of both corporations would be paid, petitioners have not established that this instruction related to the assessments at issue. Instead, as the Administrative Law Judge concluded, the \$47,000.00 payments appear to relate to a deferred payment agreement with respect to assessments other than those at issue.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exceptions of petitioners Jerry Fisher, Officer of Boss Holding Corp., and Everett Yagud, Officer of Boss Holding Corp., are denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Everett Yagud, Officer of Boss Holding Corp., is granted to the extent indicated in conclusions of law "C" and "D" of the Administrative Law Judge's determination but is otherwise denied and the two notices of determination and demand for payment of sales and use taxes due dated February 28, 1989, as modified by the two notices of assessment review, are sustained; and

4. The petition of Jerry Fisher, Officer of Boss Holding Corp., is denied and the two notices of determination and demand for payment of sales and use taxes due dated February 28, 1989, as modified by the two notices of assessment review, are sustained.

DATED: Troy, New York
September 9, 1993

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

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