

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

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|-------------------------------------------------|---|----------------|
| In the Matter of the Petition | : | |
| of | : | |
| PAUL J. LEDMAN, | : | DECISION |
| OFFICER OF BLAZING EAGLES CORP. | : | DTA No. 811791 |
| | : | |
| 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, 1989 | : | |
| through February 28, 1990. | : | |

Petitioner Paul J. Ledman, officer of Blazing Eagles Corp., 19 Ivy Road, Cape Elizabeth, Maine 04107, filed an exception to the determination of the Administrative Law Judge issued on March 16, 1995. Petitioner appeared by Maloney & Porcelli, Esqs. (William P. Maloney, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Kathleen D. Church, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation filed a letter stating it would not file a brief in opposition which was received on April 27, 1995 and began the six-month period for the issuance of this decision. Oral argument was not requested.

Commissioner DeWitt delivered the decision of the Tax Appeals Tribunal. Commissioner Dugan concurs. Commissioner Francis R. Koenig took no part in the consideration of this decision.

ISSUE

Whether petitioner is personally liable for sales tax on behalf of Blazing Eagles Corp. as a person required to collect and pay tax under Tax Law §§ 1131 and 1133.

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, Paul J. Ledman, four notices of determination, dated May 26, 1992, asserting sales tax due from petitioner as an officer of a restaurant, Blazing Eagles Corp., which was located in Manhattan, New York. The four notices were for the following amounts:

| <u>Notice No.</u> | <u>Sales Tax Quarter Ending</u> | <u>Amount</u> | <u>Interest Plus Penalty</u> | <u>Total</u> |
|-------------------|-------------------------------------|---------------|----------------------------------|--------------|
| L-005693839-6 | 5/31/89 | \$4,061.34 | \$2,930.24 | \$6,991.58 |
| L-005693837-8 | 8/31/89 | 3,949.28 | 2,682.16 | 6,631.44 |
| L-005693836-9 | 11/30/89 | 295.76 | 188.70 | 484.46 |
| L-005693838-7 | 2/28/90 | 5,076.67 | 3,043.35 | 8,120.02 |

The amounts of the sales tax deficiencies for the first three quarters ending May 31, 1989, August 31, 1989 and November 30, 1989 were based on sales tax returns filed by Blazing Eagles Corp. without remittance. The sales tax determined for the last quarter ending February 28, 1990 was estimated and subsequently cancelled by the Division inasmuch as the business closed sometime in September of 1989.

Petitioner was a 50% shareholder and vice-president of Blazing Eagles Corp. The president and other 50% shareholder of the corporation was David Feldman, a friend of petitioner since childhood.

At hearing, petitioner testified that, based on his long-term friendship with Mr. Feldman, he entered into an oral agreement with Mr. Feldman concerning their respective interests in the restaurant, Blazing Eagles Corp. In exchange for his 50% interest, petitioner, who was an experienced contractor, was to invest \$100,000.00 worth of building supplies and physical labor to build a restaurant which Mr. Feldman, who had 20 years of restaurant experience, would then operate. Petitioner testified that once the construction of the restaurant was completed in

October or November of 1987, Mr. Feldman thereafter took charge and managed the restaurant without petitioner's involvement.

Petitioner was not employed by the restaurant, did not receive any salary, dividend or profits, did not design the menu, set prices, hire or fire employees, order food or liquor, prepare tax returns, or in any other way manage or operate the restaurant. Although petitioner visited the restaurant on the average of once a week or every 10 days "to see how things were going" (tr., p. 14), he never asked to look at the restaurant's financial records or meet with the restaurant's accountant because he trusted Mr. Feldman based on Mr. Feldman's restaurant experience and the length of his friendship with Mr. Feldman. Petitioner testified that he viewed himself as a passive investor and was not familiar with the corporation's by-laws or any duties of a vice-president other than the construction work performed in accordance with their oral agreement. Petitioner signed one sales tax return on behalf of the restaurant for the quarter ending May 31, 1988 at the accountant's request when Mr. Feldman was not available. He also signed a New York subchapter S corporation franchise tax return for the year 1990.

In support of his position that he was not involved in the management of the restaurant, petitioner submitted an affidavit of John Chute stating that, from December 1987 through October 1990, petitioner was a full-time salaried employee of Filequest, a business engaged in the development and marketing of computer software. Petitioner also submitted (1) a 1989 W-2 form indicating that he was employed by Filequest for that year, and (2) an affidavit by Denise Zurlo, the restaurant's accountant. In the affidavit, Ms. Zurlo stated that she dealt exclusively with Mr. Feldman on all financial matters and that her only contact with petitioner occurred when Mr. Feldman was unavailable and Mr. Feldman was "called upon . . . on an emergency basis, in order that the Corporation could meet a filing deadline."

In August of 1989, the restaurant's accountant called petitioner to inform him that the business had problems with the nonpayment of taxes. Petitioner thereafter contacted the Division to inquire about the tax delinquency. Petitioner sent to the Division the following letter, dated August 23, 1989:

"Thank you for your assistance in our conversation on August 17, 1989. We had just recently become aware that the restaurant management was not paying Sales Tax and would like to resolve the matter as quickly as possible. The business has not been doing well, and we will need to cover the back due amounts by borrowing personally. The owners of the Corporation are Paul J. Ledman, and David S. Feldman.

"We have enclosed \$9,000. which is about half of the amount due, and request that the terms of a Deferred Payment Agreement we [sic] agreed to."

Petitioner paid \$9,000.00, as indicated in the letter, from his personal funds.

By letter dated October 23, 1989, Mr. Ledman made the following request to the Division:

"I still do not have complete information on what was paid by the restaurant management and what was not. As we discussed, I would appreciate your sending a print-out so that I can put together a complete picture. My accountant has also requested this. Thank you."

After the Division issued the four notices of determination, dated May 26, 1992, to petitioner, a conciliation conference was held. By Conciliation Order dated March 26, 1993, the conferee sustained the statutory notices.

Petitioner thereafter filed a petition, dated April 6, 1993, challenging the assessment against him on the ground that he was not a "person responsible" for the payment of sales taxes within the meaning of the Tax Law.

The Division filed an answer, dated November 17, 1993, noting that notice number L-005693838-7 for the quarter ending February 28, 1990 was cancelled. In the answer, the Division affirmatively stated that petitioner was authorized to sign sales tax and corporation franchise tax returns on behalf of the corporation during the sales tax quarters in question; that petitioner was vice-president and one of the two shareholders of the corporation; that petitioner used personal funds to pay taxes to the Division on behalf of the corporation; and that petitioner was authorized to, and did negotiate with, the Division on behalf of the corporation with regard to the outstanding sales tax obligation.

Petitioner brought a court action against David Feldman to recoup his financial losses with respect to the restaurant. This action was terminated by Stipulation of Settlement, dated February 4, 1993. The stipulation also set forth the duties and obligations that Mr. Ledman and

Mr. Feldman had assigned to each other as part of their business agreement. The stipulation contained the following statements:

"WHEREAS, on or about December, 1986, the parties entered into an agreement whereby the parties would construct and operate a restaurant in the premises located at 1135 1st Avenue, New York, New York (the 'subject restaurant'); and

"WHEREAS, pursuant to and as part of the agreement between the parties, plaintiff, who is experienced in construction and property management, was to supervise construction and set-up of the restaurant, and bear costs and expenses associated with the construction and set-up of the restaurant; and

"WHEREAS, pursuant to and as part of the agreement between the parties, upon completion of construction and set-up of the restaurant, plaintiff's duties and obligations with respect to the restaurant venture were fulfilled and at an end; and

"WHEREAS, pursuant to and as part of the agreement between the parties, upon completion of construction and set-up of the restaurant, defendant, who was an experienced restaurateur, was to oversee the day-to-day management and take charge of all aspects of operation of the restaurant; and

"WHEREAS, on or about December 1987, the subject restaurant was fully constructed, operational and open for business, whereupon plaintiff's duties and obligations with respect to the joint venture were at an end, and defendant commenced performance of his duties with respect to the restaurant venture, including the day-to-day management and operation of the restaurant; and

"WHEREAS, on or about September 1989, after approximately twenty one months of operation, the restaurant closed and ceased operation; and

"WHEREAS, plaintiff fully constructed and completed the set-up of the subject restaurant, and expended substantial monies in the construction and set-up of the subject restaurant; and

"WHEREAS, defendant fulfilled all his obligations in connection with the day-to-day management of the restaurant, including hiring, firing and training of staff, inventory control, purchasing, bookkeeping, as well as all other aspects of operation of the subject restaurant, it is therefore

"STIPULATED AND AGREED that the parties hereto have completely fulfilled their respective obligations under their agreement concerning the restaurant venture, and it is further

"STIPULATED AND AGREED that the within action is settled and hereby discontinued with prejudice."

OPINION

In her determination, the Administrative Law Judge reviewed the definition of "persons required to collect tax" provided by section 1131(1) of the Tax Law and the imposition of personal liability on such persons by Tax Law § 1133(a).

The Administrative Law Judge correctly concluded that the particular facts in each case must be considered when determining whether an individual is personally liable under then section 1133(a) of the Tax Law and, further, a person is not personally liable merely because of his status as an officer of a corporation. The issue of personal liability "concerns not only actual control over the affairs of a corporation, but also whether the officeholder had a 'duty to act' for the corporation or had, or could have had, sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee" (Determination, conclusion of law "A").

The Administrative Law Judge, after reviewing the factors to be considered in making a determination whether or not petitioner was a person required to collect tax, noted that "[w]hile no one factor is controlling, all must be considered [citation omitted]. However, the taxpayer has the burden of overcoming the tax assessment [citation omitted]" (Determination, conclusion of law "A").

The Administrative Law Judge found that petitioner could not avoid tax liability by relying on his status as a passive investor. The Administrative Law Judge rejected petitioner's reliance on Vogel v. New York State Dept. of Taxation & Fin. (98 Misc2d 222, 413 NYS2d 862) and Chevlowe v. Koerner (95 Misc2d 388, 407 NYS2d 427), holding that although petitioner and Mr. Feldman:

"mutually agreed to divide their responsibilities and duties such that petitioner was not involved in the management of the restaurant, there is no evidence in the record that petitioner lacked the authority to intervene in the management or was otherwise misled or prevented from exercising any authority, or taking any action, with respect to the sales tax due [citations omitted]. Consequently, petitioner cannot avoid tax liability due to his reliance on Mr. Feldman to satisfy all tax obligations of a business where petitioner was both a 50% shareholder and vice president" (Determination, conclusion of law "A").

On exception, petitioner argues that, based on all the facts presented in this case, he is not a person responsible for the collection of sales tax during the periods in issue, relying on Vogel v. New York State Dept. of Taxation & Fin. (*supra*) and Chevlowe v. Koerner (*supra*). He argues that the Administrative Law Judge misconstrued and misapplied case law in determining

that petitioner was a person liable for payment of sales tax. He argues that the Administrative Law Judge's reliance on case law subsequent to Vogel does not vitiate the effect of Vogel, which is that each situation must be examined "with regard to the particular facts of the case, and that no one factor should control a particular decision" (Petitioner's exception, p. 3). He also argues that because the signing of the sales tax return in May 1988 and the Subchapter S Corporate Franchise Tax return in 1990 were not performed within the sales tax periods under consideration, this demonstrates that petitioner was not involved in the operation of the restaurant during the periods at issue.

The Division relies on the determination of the Administrative Law Judge as support for its position that petitioner is a person required to collect tax and, therefore, personally liable for the sales tax due from the corporation.

We affirm the determination of the Administrative Law Judge. Petitioner argues for the first time on exception that the signing of the sales tax return in May 1988 and the Subchapter S Corporate Franchise Tax return in 1990, not performed within the sales tax periods under consideration, are proof that petitioner was not involved in the restaurant operations during the sales tax periods for which he was assessed. We have consistently held that legal issues may be raised for the first time on exception (Matter of Howard Enterprises, Tax Appeals Tribunal, August 4, 1994). However, neither the signing of the sales tax return in May 1988 nor the Subchapter S Corporate Franchise Tax return in 1990, in and of themselves, formed the basis of the Administrative Law Judge's determination that petitioner was a person liable for the collection of sales tax on behalf of the corporation. Further, since these actions by petitioner on behalf of the corporation bracketed the periods at issue and there is no evidence that the authority of petitioner to act on behalf of the corporation changed in any way from May 1988 until 1990, petitioner's argument is unsupported by the record and must fail.

Each of the remaining issues raised by petitioner on exception were raised before the Administrative Law Judge. In her determination, the Administrative Law Judge considered all of the facts relevant to the relationship of petitioner to the corporation and correctly concluded,

based on the statutes and applicable case law, that petitioner was a person liable to collect sales and use tax on behalf of the corporation and, therefore, is personally liable for such indebtedness. Therefore, we sustain the position of the Division and deny the exception of petitioner for the reasons set forth in the Administrative Law Judge's determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Paul J. Ledman, Officer of Blazing Eagles Corp. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Paul J. Ledman, Officer of Blazing Eagles Corp. is denied;
4. The notices of determination dated May 26, 1992, for the quarters ending May 31, 1989, August 31, 1989 and November 30, 1989 are sustained; and
5. The Notice of Determination dated May 26, 1992 for the quarter ending February 28, 1990 is cancelled as stated by the Division of Taxation in its answer.

DATED: Troy, New York
October 5, 1995

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

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner