

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

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| In the Matter of the Petition | : | |
| of | : | |
| J. LINCOLN BARR | : | DECISION |
| OFFICER OF AVTRONICS, LTD. | : | DTA No. 813526 |
| | : | |
| 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, 1992 | : | |
| through May 31, 1992. | : | |

Petitioner J. Lincoln Barr, Officer of Avtronics, Ltd., P.O. Box 363, Huntington, New York 11743-0363, filed an exception to the order of the Administrative Law Judge issued on June 15, 1995. Petitioner appeared pro se. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Andrew S. Haber, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation filed a letter in lieu of a brief in opposition. Any reply by petitioner was due on August 31, 1995, which date began the six-month period for the issuance of this decision. Oral argument was not requested.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether the Administrative Law Judge properly granted the Division of Taxation's motion to dismiss the petition for failure to state a cause of action.

FINDINGS OF FACT

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

On September 30, 1993, the Division of Taxation ("Division") issued a Notice of Determination in the amount of \$14,286.74 (additional sales tax due of \$10,090.10, interest of

\$1,674.13 and penalty of \$2,522.51) to J. Lincoln Barr, as an officer/responsible person of Avtronics, Ltd. ("petitioner") for the quarter ended May 31, 1992.

Petitioner timely filed a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). The conciliation conference was held on August 4, 1994. On October 28, 1994, a Conciliation Order (CMS No. 135568) was issued by BCMS which cancelled the penalty, but sustained the tax (\$10,090.10) and interest (computed at the applicable rate).

On January 26, 1995, the Division of Tax Appeals received a petition protesting the aforementioned Conciliation Order. At paragraph 6 (wherein petitioner is required to set forth the errors made by the Commissioner of Taxation and Finance together with the facts upon which petitioner relies to establish such errors), petitioner stated as follows:

"The attorney for Avtronics, Ltd. submitted to the NYS Department of Taxation & Finance, in 1993, a document from the court handling the bankruptcy of Avtronics that stated that the state's claim was receiving priority and it was likely that the state will be paid in full with interest.

"I contend that NYS should await discharge of the bankruptcy proceedings before determining and demanding payment from me."

The tax assessed against petitioner represents the amount due from Avtronics, Ltd. which was reported on a late-filed sales tax return (received August 4, 1992) for the quarter at issue. A copy of this return is attached, as Exhibit "C", to the Division's motion papers. The signature on the return, while illegible, appears to have been made by the same person who signed the petition.

Avtronics, Ltd. filed for protection under Chapter 7 of the United States Bankruptcy Code on or about May 29, 1992.

The Division filed a claim in the bankruptcy court on September 13, 1993 for the sales tax due for the period at issue. The affidavit of the Division's representative, Andrew S. Haber, Esq., sworn to on March 21, 1995, states that no payment has been received via the bankruptcy proceeding, but that there may be a distribution in the future.

OPINION

The Administrative Law Judge granted the Division's motion to dismiss the petition for failure to state a cause for relief. The Administrative Law Judge held that a corporation's bankruptcy does not relieve a responsible officer of his personal liability to collect tax. Noting that petitioner did not contest his status as a responsible officer of Avtronics, Ltd., nor the amount of the assessment, the Administrative Law Judge held that petitioner's contention that the Division should await the outcome of the corporation's bankruptcy proceeding does not state a cause for relief.

On exception, petitioner states:

"The implied cause for relief . . . is that Federal law counts more than State law. Avtronics, Ltd.'s bankruptcy was filed in Federal court. As such its life was suspended. Although, I as officer no longer control the assets of Avtronics, my responsibilities as officer seem to be suspended by Federal law also. The Federal court has not discarded those responsibilities" (Exception, p. 1).

In response, the Division asserts that petitioner's personal liability as a responsible officer is unaffected by the corporation's bankruptcy proceeding.

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

Pursuant to the Rules of Practice and Procedure of the Tax Appeals Tribunal, a motion may be brought to dismiss a petition on the ground that the pleading fails to state a cause for relief (20 NYCRR former 3000.5[b][vi]). Additionally, pursuant to our Rules of Practice and Procedure, we are to be guided by the Civil Practice Law and Rules (CPLR) (where not inconsistent with our own regulations) in entertaining motions (20 NYCRR former 3000.5[a][vi]). The standard under the comparable provision of the CPLR is:

"whether the pleading . . . states, in some recognizable form, a cause of action known to the law If in any aspect upon the facts stated the [petitioner] is entitled to recovery the pleading is good. It is deemed to allege whatever can be implied from its statements by fair intendment and the whole of it must be considered" (Howard Stores Corp. v. Pope, 1 NY2d 110, 150 NYS2d 792, 796, citations omitted).

Under modern pleading rules, the petition is to be liberally construed (Rovello v. Orofino Realty Co., 40 NY2d 633, 389 NYS2d 314, 315). The focus of the pleading is not on whether the

petitioner has properly stated a cause for relief, but whether petitioner has a cause of relief (Rovello v. Orofino Realty Co., supra, 389 NYS2d 314, 316). Under the CPLR, a motion to dismiss for failure to state a cause of relief is available where the facts are conceded or where there is no dispute as to the factual allegations contained in the petition (Abrams v. Richmond County S.P.C.C., 125 Misc 2d 530, 479 NYS2d 624, 627). Whether a responsible officer is discharged from his duty to report and pay sales tax because the corporation of which he is an officer is involved in a bankruptcy proceeding is a question of law which can be decided on a motion to dismiss for failure to state a cause of relief (see, Rosner v. Paley, 65 NY2d 736, 492 NYS2d 13, 14).

Since there are no facts in dispute and petitioner does not dispute that he was a responsible officer of Avtronics, Ltd. during the period in issue, the Administrative Law Judge properly granted the Division's motion to dismiss for failure to state a cause for relief because a corporation's bankruptcy does not act to discharge a responsible officer's personal liability to pay over sales and use tax, nor suspend it (Matter of Swanson, Tax Appeals Tribunal, November 4, 1993; Matter of Kadish, Tax Appeals Tribunal, November 15, 1990; Matter of Bressner, State Tax Commn., June 19, 1981).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of J. Lincoln Barr, Officer of Avtronics, Ltd. is denied;
2. The order of the Administrative Law Judge is affirmed;
3. The petition of J. Lincoln Barr, Officer of Avtronics, Ltd. is dismissed; and

4. The Notice of Determination for sales and use taxes dated
September 30, 1993 is sustained.

DATED: Troy, New York
February 15, 1996

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

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

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