

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JACK HURLEY	:	DECISION DTA NO. 815042
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 June 1, 1992 through August 31, 1992.	:	

Petitioner Jack Hurley, 25 22nd Avenue, Isle of Palms, South Carolina 29451, filed an exception to the determination of the Administrative Law Judge issued on December 4, 1997. Petitioner appeared *pro se*. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (John E. Matthews, Esq., of counsel).

Neither party filed a brief. Oral argument was not requested.

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

ISSUE

Whether petitioner was a person required to collect and pay over sales tax on behalf of Old Dock House, Inc. within the meaning and intent of Tax Law §§ 1131(1) and 1133(a) during the period at issue and, therefore, is liable for any such unpaid taxes owed by the corporation.

FINDINGS OF FACT

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

On March 16, 1995, the Division of Taxation ("Division") issued a Notice of Determination to Jack Hurley ("petitioner") which assessed sales tax in the amount of \$8,491.37, plus penalty and interest, for a total amount due of \$13,888.08 for the quarter ended August 31, 1992. The Notice of Determination explained that petitioner was an officer or responsible person of Old Dock House, Inc. and, therefore, was liable for sales taxes determined to be due from the corporation.

Petitioner submitted an affidavit, sworn to on April 22, 1997, in which he states that from approximately 1986 through the summer and early fall of 1989, he was a shareholder, a director, an officer and an employee of the Old Dock House, Inc. with an active role in all phases of its operation, including taxes and finances.

According to the corporate resolutions, petitioner, as vice president, Jack Halpin, as president, and Robin Hill, as vice president, were authorized to sign corporate checks and drafts which were drawn on Champlain National Bank.¹ A letter from the Champlain National Bank to the Division's Tax Compliance Division, dated February 16, 1995, indicates that the Old Dock House, Inc. had two accounts at this bank. One account (Account No. 15 02207) was opened on May 8, 1986 and was closed February 22, 1988. Signatories for this account were: Jack Halpin, President; Jack Hurley, Treasurer; and Robin Hill, Vice President. The other account (Account No. 15 02012) was opened on May 30, 1986 and closed on July 15, 1993. Authorized signatories

¹As part of its exhibits, the Division submitted various corporate bank account information relating to the Old Dock House, Inc. The documents consisted of corporate resolutions, signature cards and requests for money market deposit accounts, all of which were dated between May 1986 and May 1988. Some of the documents were signed by petitioner; others listed him as a signatory in his capacity as vice president. On some of the documents, the name Norma M. Thomas appears, as bookkeeper, and illegible signatures of a secretary/treasurer are contained on some of these documents as well.

were: Jack Halpin, President; Jack Hurley, Vice President; Robin Hill, Vice President; and Norma Thomas, Bookkeeper.

On April 18, 1986, Ruth P. Cahill, as secretary-treasurer, filed a sales tax registration form on behalf of Old Dock House, Inc. On the form, in addition to Ms. Cahill's title, petitioner was listed as vice president and Jack Halpin as president. Petitioner's address, as set forth on the sales tax registration form was 42 Elmwood Avenue, Burlington, Vermont. On September 13, 1988, petitioner signed, as owner and manager, a form DTF-95, Change of Business Information, which was filed with the Division. The stated reason for filing the form was a change in the business's post office box number.

On August 22, 1988, the Division issued a Notice and Demand for Payment of Sales and Use Taxes Due to Old Dock House, Inc. for the quarter ended May 31, 1988. A letter in response to this notice was sent to the Division by petitioner.

The Division submitted the following corporate tax forms which were signed by petitioner: 1986 and 1987 forms CT-3, Corporation Franchise Tax Report; 1988 and 1989 forms CT-5, Application for Automatic Six-month Extension for Filing Tax Report or Return; and 1989 form CT-3-S, S Corporation Information Return.

The Division also submitted the corporation franchise tax returns (forms CT-4) filed on behalf of Old Dock House, Inc. for the years 1990 and 1991. Attached to the 1990 return was a schedule K-1 (Shareholder's Share of Income, Credits, Deductions, Etc.) issued to John Hurley² which indicated that petitioner was a 33-percent shareholder and had incurred an ordinary loss

²On all of the bank signature cards, corporate resolutions and corporate returns signed by petitioner, his name appears as "Jack" Hurley; on the schedules K-1 and on his personal income tax returns, petitioner's name is listed as "John" Hurley.

from the corporation in the amount of \$12,297.00. For 1991, the schedule K-1 stated that petitioner owned 26.8 percent of the stock and had incurred an ordinary loss of \$13,406.00 from the corporation for the year. On both of the schedules K-1, petitioner's address was listed as 175 Lyman Drive, Burlington, Vermont 05401.

As part of its exhibits in the present matter, the Division submitted the Federal returns filed by petitioner for the years 1992 and 1993. On each of these returns, petitioner indicated that his address was 25 22nd Avenue, Isle of Palms, South Carolina 29451. On the schedule E (Income or Loss from Partnerships and S-Corporations), petitioner reported, under the category of passive activities, loss from "The Old Dock Partnership" of \$3,097.00 and gain from "The Old Dock, Inc." in the amount of \$1,302.00.³ On a note to schedule E attached to petitioner's 1993 Federal income tax return, it was stated that the Old Dock Partnership (ID# 14-1683867) had been sold, the K-1s had not yet been distributed and, as soon as the K-1s were received, the return would be amended.

Petitioner's affidavit states that in 1990, he had a "falling out" with the other owners and officers of the corporation (Robin Hill and Jack Halpin) concerning the operation of the business and thereupon "totally withdrew from every phase of the operation of the corporation, including the taxes and financial matters." He indicates that he then became a passive shareholder.

On July 10, 1991, petitioner states that he moved his wife and family to Isle of Palm, South Carolina and that he established a residence and business in that state. The affidavit does not indicate whether petitioner continued to own his home in Burlington, Vermont.

³The employer identification number of the corporation was listed on its franchise tax reports and on petitioner's schedules E as 14-1679260. The identification number of The Old Dock Partnership is listed on the schedules E as 14-1683867.

Petitioner's affidavit states that "upon information and belief, every phase of the business of the Old Dock House, Inc., was assumed entirely by Messrs Hill and Halpin during the summers of 1990 and 1991." It goes on to state that, again upon information and belief, Messrs. Hill and Halpin entered into a lease arrangement with a third party in 1992 and that it was this third party who generated the sales upon which the taxes at issue are allegedly due and owing. Petitioner maintains that since he was a passive shareholder, had no personal relationship with those operating the corporation and was located 875 miles from Essex, New York, he has no information as to precisely whom was involved in the operation of the business. He states, however, that he was not involved in or aware of the operation of the business.

During the period at issue (and after 1989), petitioner states that he was a minority shareholder who lacked any authority and control over the business, the disposition of its funds or the filing of its tax returns. After moving to South Carolina, he asserts that he had virtually no contact of any kind with the "active" shareholders. In 1993, he arranged to sell his shares in the corporation to the Halpins and his interest therein was actually conveyed to them in 1995.

Petitioner states that during the period at issue that he was not an employee, had no authority to hire and fire employees of the corporation, attended no shareholder or director meetings and "as far as I am aware, I had no authority to write corporate checks and I did not do so." His affidavit also alleges that he had nothing to do with the purchase of food or beverages for the restaurant and that he did not advance funds to the corporation or prepare, review or sign tax returns on its behalf. He contends that he had no responsibility for nor did he ever maintain the corporate books and, furthermore, as far as he knew, he was not even an officer.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge reasoned that in order to conclude whether a person is a responsible officer and, thus, personally liable for the taxes owed by the corporation, it must be determined whether that individual had or could have had sufficient authority and control over the corporation's affairs. The Administrative Law Judge noted that petitioner conceded that he was a shareholder, director, officer and employee of the Old Dock House, Inc. from 1986 through 1989. Moreover, the Administrative Law Judge found that there was no evidence that petitioner, at any time prior to the period in issue, resigned from his position as an officer or director. The Administrative Law Judge concluded that there was, however, evidence that petitioner signed tax returns on behalf of the corporation.

The Administrative Law Judge stated that the failure of petitioner to exercise his share of the responsibility by leaving such duties to someone else does not free petitioner from tax liability (*see, Matter of Ragonesi v. New York State Tax Commn.*, 88 AD2d 707, 451 NYS2d 301; *Matter of Baumvoll*, Tax Appeals Tribunal, November 22, 1989; *Matter of Roberto*, Tax Appeals Tribunal, December 1, 1988). Therefore, the Administrative Law Judge rejected petitioner's argument that since he moved 875 miles away and he chose to no longer play an active role in corporate management, that petitioner was prevented from exercising his authority. The Administrative Law Judge noted that petitioner's tax returns during the period in issue establish that he remained a corporate shareholder and petitioner failed to submit any evidence that he ever resigned from his position as officer or director. Accordingly, the Administrative Law Judge held that petitioner was properly assessed as a person responsible to collect and pay

over taxes on behalf of the Old Dock House, Inc. and, thus, he denied the petition and sustained the Notice of Determination issued to petitioner.

ARGUMENTS ON EXCEPTION

Petitioner contends that beginning in 1990 he and his wife, Priscilla Shumway, opted not to be active in the operation of the restaurant anymore. Petitioner states that the stock was adjusted from 33% to 26.8% to reflect that they would be passive investors. Petitioner argues that there was not a falling out among the shareholders as found by the Administrative Law Judge in his finding of fact. Petitioner states that, at this point, he did not play an active role in the restaurant, did not have authority to collect moneys, did not have check signing authority, did not have an office, was no longer an employee and no longer had any role as director, manager or participant in the corporation.⁴ Therefore, petitioner requests that the determination of the Administrative Law Judge be reversed.

OPINION

Primarily, petitioner alleges that, despite the finding of fact made by the Administrative Law Judge that a falling out between the shareholders resulted in petitioner becoming a passive investor, he chose to become a passive investor after reaching a mutual agreement among all the shareholders. We disagree.

In paragraph 5 of petitioner's affidavit, it states as follows:

⁴Petitioner also makes reference to the sale of his and his wife's shares in the corporation which took place in 1995 and petitioner attached to his exception a copy of a release signed between the parties to the stock sale. Since 1995 is well beyond the period in issue in this case, we will not consider this information in rendering our decision herein. Furthermore, since the record was closed by the Administrative Law Judge, we refuse to accept into evidence, at this stage of the proceedings, the attachment to petitioner's exception (*see, Matter of Pavlak*, Tax Appeals Tribunal, February 12, 1998; *see also, Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991).

That in 1990, your deponent had a “falling out” with the other owners and officers of the corporation (Robin Hill and Jack Halpin) concerning the operation of the corporation’s business (a lakeside, seasonal restaurant) and thereupon totally withdrew from every phase of the operation of the corporation, including the taxes and financial matters. Your deponent became a “passive” shareholder.

Clearly, petitioner’s affidavit supports the finding of fact as determined by the Administrative Law Judge and we refuse to modify this fact in any respect.

Petitioner asserts that, by 1990, he was a passive investor and was no longer involved in the operation of the corporation. Petitioner states that it was the members of the Halpin family who were in actuality operating the corporation. We agree with the Administrative Law Judge that petitioner has failed to submit any evidence that he resigned his position as an officer or director or that he was prevented from exercising any authority in operating the business. The fact that petitioner did not exercise his responsibilities is irrelevant (*see, Matter of Blodnick v. New York State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536). Moreover, it is important to note that more than one person can be held liable as a responsible officer. Therefore, merely pointing to others and alleging that such individuals are the true responsible officers does not necessarily establish that petitioner is not a responsible officer as well (*see, Matter of LaPenna*, Tax Appeals Tribunal, March 14, 1991).

After reviewing the record in this matter, we find that the Administrative Law Judge completely and adequately addressed the issue presented to him. Therefore, we affirm his determination for the reasons set forth therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Jack Hurley is denied;

2. The determination of the Administrative Law Judge is sustained;
3. The petition of Jack Hurley is denied; and
4. The Notice of Determination dated March 16, 1995 is sustained.

DATED: Troy, New York
July 16, 1998

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.

Joseph W. Pinto, Jr.
Commissioner