

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
JACK G. SCHWARTZ	:	DECISION
	:	DTA NO. 815708
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 December 1, 1994 through May 31, 1995.	:	

Petitioner Jack G. Schwartz, 425 East 58th Street, New York, New York 10022-2300, filed an exception to the determination of the Administrative Law Judge issued on December 31, 1998. Petitioner appeared by Alvin Grubman, C.P.A. The Division of Taxation appeared by Terrence M. Boyle, Esq. (John E. Matthews, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a letter stating it would rely on its brief filed with the Administrative Law Judge. Oral argument was not requested.

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

ISSUES

I. Whether, during the assessment period, petitioner was a person responsible for collection and payment of sales taxes on behalf of Gaines Service Leasing Corporation.

II. Whether the absence of a final determination of tax due from Gaines Service Leasing Corporation prevents the Division of Taxation from imposing a sales tax liability on petitioner.

III. Whether petitioner fulfilled his fiduciary responsibility to both New York State and Gaines Service Leasing Corporation by establishing a separate account for sales and use taxes collected by the corporation and turning that account over to the bankruptcy trustee when the corporation filed a Chapter 7 petition in bankruptcy court.

IV. Whether the Division of Taxation should be equitably estopped from collecting sales tax from petitioner.

FINDINGS OF FACT

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

During the assessment period, petitioner, Jack G. Schwartz, was the sole shareholder and chairman of the board of Gaines Service leasing corporation (“Gaines”). Gaines leased and sold limousines in New York and elsewhere. It was incorporated in 1964 and did business for over 30 years.

On February 10, 1995, Gaines filed for reorganization under Chapter 11 of the Bankruptcy Code. Its attempts to reorganize were unsuccessful, and on April 27, 1995, the Chapter 11 petition was converted to a Chapter 7 filing. Alan Nisselson was appointed Chapter 7 trustee shortly after the conversion, and the corporation’s books and records were turned over to him. Gaines transferred funds from its own corporate accounts to the accounts of Nisselson.

Around April 1995 the Division of Taxation (“Division”) began an audit of Gaines’s sales tax returns for the period March 1, 1992 through May 31, 1995. The assigned auditor, Frank Jaquez, was not aware of Gaines’s status as a bankrupt when he commenced the audit.

According to a contemporaneous log maintained by Mr. Jaquez throughout the audit, he initially

contacted Gaines to request the completion of certain electronic processing questionnaires which had been sent to Gaines earlier.

On May 3, 1995, Mr. Jaquez visited Gaines's place of business. Among other things, he wanted to have a consent to extend the period of limitations for assessment of taxes executed on behalf of Gaines. He learned that Gaines had filed for bankruptcy, and he was given the name of the bankruptcy trustee. The auditor then telephoned Nisselson and mailed him a consent form.

Mr. Jaquez telephoned Nisselson on May 5, 1995 and May 16, 1995 to request the return of the consent form. In a telephone conversation that took place on May 16, 1995, Mr. Jaquez "asked for the trustee's authority to commence the audit of and the release of records of Gaines Service Leasing Corp." (Auditor's Log, May 16, 1995, original all in capital letters.) He was told to make contact with the accountant appointed by the court, Mr. Miglino, which he did.

On May 19, 1995, the auditor received a consent form signed by Nisselson. On May 24, 1995, the Division mailed a letter to Joseph A. Wagner, then Gaines's president, scheduling an audit appointment on May 30, 1995. The letter requests that Gaines have all books and records pertaining to its sales tax liability available on the appointment date. Mr. Jaquez also telephoned Mr. Miglino to notify him of the audit appointment.

A limited number of records were made available to the auditor at this appointment, including a general ledger for the fiscal year ending September 30, 1994 and trial balances for the periods ending September 1994, May 1995 and June 1995. There were no invoices for fixed asset acquisitions, sales invoices or files of paid bills. The auditor was able to trace reported sales for the quarterly period ending August 31, 1994 to Gaines's general ledger and he found no tax due for that period. His log for May 30, 1995 states: "Vendor prepared sales tax returns

based on preliminary data. Tax adjustments after cut-off are properly reported on the following sales tax return” (original entirely in capital letters).

The auditor discussed the audit with Mr. Wagner who was knowledgeable about the business affairs of Gaines. He never spoke directly to petitioner. Mr. Jaquez completed a Responsible Person Questionnaire based upon information provided to him by Mr. Wagner and Federal income tax returns filed by Gaines for the fiscal years ended September 30, 1992 and September 30, 1993. The questionnaire states that petitioner was not responsible for preparing sales tax returns or ensuring the remittance of tax during the audit period but otherwise had complete authority over the business and financial affairs of Gaines, including the authority: to manage the financial affairs of Gaines; to direct payment to creditors; to sign checks; to negotiate with the Tax Department; to sign legal documents on behalf of Gaines; to hire and fire employees; and to negotiate business loans. According to that questionnaire, petitioner devoted 90 percent of his time to Gaines. The Federal income tax returns show that petitioner was an officer of Gaines and devoted 90 percent of his time to the business in 1992 and 1993.

Gaines maintained a sales tax accrual account which the auditor relied on to determine sales tax due from Gaines for the assessment period. In his log entry of July 5, 1995, the auditor refers to this account as the sales tax payable account. He states that as of June 30, 1995, the trial balances posted to this account showed a net sales tax due of \$92,646.09. The documents to which he was referring were computer generated work papers prepared by the Gaines bankruptcy trustee. Those work papers show sales tax collected during the assessment period as follows:

Month	Tax Collected
December 1994	\$ 66,501.75
January 1995	49,949.47
February 1995	26,895.08
March 1995	9,650.68
April 1995	13.50
May 1995	108.00

Apparently, the tax was paid to the State for the month of December 1994. The taxes collected for that month were not included in the auditor's calculation of taxes owed by Gaines. Tax was determined to be due for the remaining five months. In addition, the auditor discovered tax due in the amount of \$338.90 under section 1160 of the Tax Law, known as the special tax on passenger car rentals.

During the months of July and August 1995, the auditor continued in his attempts to obtain books and records from the bankruptcy trustee and the appointed accountant. However, those books and records were not made available. The auditor then determined to issue an assessment on the basis of the books and records made available to him.

On August 24, 1995, the Division issued to Gaines Service Leasing Corporation a Statement of Proposed Audit Adjustment for the period March 1, 1992 through May 31, 1995. The statement proposed sales tax due of \$82,752.41 for the period December 1, 1994 through February 28, 1995 and sales tax due of \$9,554.78 for the period March 1, 1995 through May 31, 1995. Penalties and interest were also proposed upon the taxes due. On the same date, the Division issued a statement of proposed audit adjustment proposing a special tax due of \$338.90. No taxes were found to be due for the period March 1, 1992 through November 30, 1994. The statements of audit adjustment were mailed to Gaines at its business address.

On August 25, 1995, the auditor finalized his audit report, prepared assessment documents and sent information regarding the audit to the Division's Bankruptcy Unit.

On or about September 7, 1995, the auditor mailed a copy of the statements of audit adjustment, with worksheets, to Nisselson.

On January 26, 1996, the Division issued to petitioner a Notice of Determination of sales and use taxes due for the period December 1, 1994 through May 31, 1995, assessing tax due of \$92,307.19, plus interest of \$9,721.07 and penalty of \$18,174.73 for a total amount due of \$120,202.99. On the same date, it issued a Notice of Determination to petitioner, assessing special tax due of \$338.90 plus interest of 29.67 and penalty of \$200.00. The notices state that they were issued because petitioner had been found to be liable for sales and use taxes as an officer, or a responsible person, of Gaines Service Leasing Corporation.

On January 3, 1997, the Division issued a Conciliation Order to petitioner sustaining both notices in full. Petitioner then filed a petition with the Division of Tax Appeals where he contested the full balance of tax, penalty and interest due as shown on the two notices of determination.

A bank statement analysis provided to the Division by Nisselson shows that Gaines maintained a separate account for sales tax with a balance of \$85,750.00 at the time the document was prepared. The date of preparation is not known.

A Bank America transfer application was annexed to the petition which was entered into evidence. It shows a transfer of \$133,596.50 from a Gaines account denominated "Special Fund - Tax," account number 0790656167-72, to Alan Nisselson, trustee for Gaines, account number 15816-26550.

Although the Division's bankruptcy unit was advised of the audit results, there is no evidence that the Division filed a proof of claim or issued an assessment to Gaines before the bar date established by the bankruptcy court.

According to a docket for the Gaines bankruptcy estate, Nisselson applied for and received approval from the bankruptcy court to settle claims made by various Gaines creditors. The Gaines bankruptcy proceeding remained active until at least September 1997. Petitioner claims that over \$300,000.00 remains in trust accounts, but he presented no evidence of that fact.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge rejected petitioner's argument that his personal liability for sales taxes was derivative of and dependent on the establishment of Gaines's liability for the same tax. The Administrative Law Judge concluded that every person who is required to collect the tax imposed by Article 28 of the Tax Law is personally liable for that tax. Based on relevant case law and prior decisions of this Tribunal, the Administrative Law Judge noted that such personal liability is separate and independent from the corporation's liability, and even if the corporation were discharged of its tax liability by a bankruptcy court, the liability of the person responsible for the collection of such tax would survive.

The Administrative Law Judge also concluded that petitioner had failed to meet his burden of proof to show that the determination by the Division that petitioner was a person responsible for the collection of the sales tax was erroneous or that the amount of tax assessed was incorrect. Therefore, petitioner had submitted to the presumed correctness of the notice of determination.

The Administrative Law Judge did conclude, however, that petitioner was not responsible for collection and payment of tax due through the end of May 1995. When Gaines filed for

Chapter 7 on April 27, 1995, Gaines came under the control of the bankruptcy trustee. The Administrative Law Judge concluded that at that point, petitioner could no longer be held to be responsible for collecting and paying over sales tax. Therefore, the Administrative Law Judge canceled the tax assessed for the period March 1, 1995 through May 31, 1995 in the amount of \$9,554.19 (*see*, L-011666654-1) and the special tax on passenger car rentals assessed for the same period in the amount of \$217.40 (*see*, L-011666655-9).

The Administrative Law Judge sustained petitioner's liability for the period December 1, 1994 through February 28, 1995 as she concluded that petitioner presented no evidence to show that he was prevented from filing a sales tax return for this period, paying over the taxes due to the State or that he was legally precluded from doing so while Gaines was the debtor-in-possession after the Chapter 11 filing in February 1995. The Administrative Law Judge also noted that while it was difficult to understand why a bankruptcy claim was not timely filed by the Division, there are no provisions of the Tax Law or principles of equitable estoppel which prevented the Division from imposing personal liability on petitioner for the taxes due.

ARGUMENTS ON EXCEPTION

On exception, petitioner presents the same arguments which he made to the Administrative Law Judge. Petitioner claims that he cannot be held liable for sales tax due from Gaines where there has never been a valid determination of corporate liability for such tax. Petitioner argues that his liability, if it exists, is derivative and not personal. Therefore, since the amount of sales tax at issue was never determined due from Gaines by the bankruptcy court, there can be no determination of petitioner's liability.

Petitioner claims that during the assessment period he was not a person required to collect tax on behalf of Gaines, in that he did not sign sales tax returns after 1991 and there is no evidence that he actually performed any of the acts or duties associated with responsible person status. Petitioner claims that he was relieved of his status as a responsible person by the filing of the Chapter 11 petition in bankruptcy by Gaines, the conversion of the case to a Chapter 7 proceeding and the appointment of a trustee.

Petitioner claims that he was not able to remit the taxes which represented pre-petition debt in the Chapter 11 proceeding. Petitioner argues that he fulfilled his fiduciary duty to the State of New York by tendering the corporate sales tax account to the Bankruptcy Trustee when the bankruptcy proceeding was converted from Chapter 11 to Chapter 7.

Finally, petitioner argues that the Division is equitably estopped from collecting sales tax from petitioner. Petitioner asserts that it would be improper to hold him liable where the Division has made no effort to collect sales tax from Gaines. Petitioner argues that he did not have any authority to pay pre-petition sales tax obligations from the tax account without bankruptcy court approval. Petitioner claims that the short duration of the Chapter 11 proceeding until it was converted to a Chapter 7 proceeding did not allow petitioner time to seek such approval.

The Division argues, in opposition, that the Administrative Law Judge correctly decided the relevant issues presented to her and her determination should be affirmed.

OPINION

Tax Law § 1133(a) provides, in pertinent part, that every person who is required to collect the tax imposed by Article 28 of the Tax Law is personally liable for that tax. A person required to collect such tax is defined by Tax Law § 1131(1), in pertinent part, as:

any officer, director or employee of a corporation . . . who as such officer, director, employee or manager is under a duty to act for such corporation . . . in complying with any requirement of [Article 28].

Whether an individual is under a duty to act for a corporation with regard to its tax collection responsibilities so that the individual would have personal liability for the taxes not collected or paid depends on the particular facts of the case (*Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022, 513 NYS2d 564).

The question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and the decisions of the Tax Appeals Tribunal have identified a variety of factors as indicia of responsibility: the individual's status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual's knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; and the individual's economic interests in the corporation (*see, Matter of Martin v. Commr. of Taxation & Fin.*, 162 AD2d 890, 558 NYS2d 239; *Matter of Cohen v. State Tax Commn.*, *supra*; *Matter of Blodnick v. New York State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536; *Matter of Vogel v. New York State Dept. of Taxation & Fin.*, 98 Misc 2d

222, 413 NYS2d 862; *Chevlowe v. Koerner*, 95 Misc 2d 388, 407 NYS2d 427; *Matter of Constantino*, Tax Appeals Tribunal, September 27, 1990).

In this case, the determination of petitioner as a person responsible to collect tax was based on information concerning his role in the operation of the corporation which was obtained by the auditor from another corporate officer. As the Administrative Law Judge noted, once a Notice of Determination was issued to petitioner, petitioner bore the burden of proof to demonstrate that the basis for assessment is unreasonable or that the amount of tax assessed is incorrect (*Matter of Micheli Contracting Corp. v. New York State Tax Commn.*, 109 AD2d 957, 486 NYS2d 448). Petitioner introduced no evidence to rebut the Division's conclusion that he was a responsible person. Therefore, petitioner was deemed to have submitted to the presumption of correctness which attaches to a properly issued statutory notice (*see, Matter of Atlantic & Hudson Ltd. Partnership*, Tax Appeals Tribunal, January 30, 1992).

The Administrative Law Judge, in her determination, also concluded that a responsible person's liability does not depend on a prior determination of corporate liability for the same tax. Nor, she determined, would the cancellation of an indebtedness of the corporation as the result of a bankruptcy proceeding affect a responsible person's liability for tax. We affirm these conclusions for the reasons set forth in her determination.

Although the audit period extended from March 1, 1992 through May 31, 1995, the Division only asserted liability for the period January 1, 1995 through May 31, 1995 (with the March 1, 1995 through May 31, 1995 liability having been canceled by the Administrative Law Judge). Thus, it is only for January 1995 and February 1995 that petitioner's

responsibility for collection and payment of the tax on behalf of the corporation is at issue. Significantly, on February 10, 1995, the corporation filed for protection in Chapter 11. At that time, the corporation became a debtor in possession of the property of the estate.

We have held that, generally, liability for taxes is fixed from the time the taxes are to be collected, and not from the time that the return was due to be filed and payment remitted (*Matter of Kadish*, Tax Appeals Tribunal, November 15, 1990). However, we have also held that where the responsible officer is prevented from carrying out his responsibilities to see to it that the taxes so collected are properly remitted to the State, such liability does not lie (*Matter of Kadish, supra*).

The record does not indicate whether Gaines filed its sales and use tax returns on a quarterly basis or a monthly basis pursuant to Tax Law § 1136. The record does indicate that Gaines remitted the sales tax collected during December 1994, which is the first month of the quarter ending February 28, 1995. Pursuant to Tax Law § 1136(b), whether returns were required to be filed quarterly or monthly, sales tax returns are due to be filed within 20 days after the end of the applicable period. Relevant to the instant case, petitioner has provided no explanation why the tax collected during December 1994, the first month of the quarter, was remitted but as to the tax collected during January 1995, no return was filed nor tax remitted to the Division prior to the filing of Gaines' petition in bankruptcy on February 10, 1995. The record does not indicate how much of the \$26,895.08 of sales tax collected in February 1995 was collected prior to the filing of the bankruptcy petition. As with January 1995, however, there is no indication that any attempt was made to file a return or remit the tax collected prior to the February 10, 1995 filing date.

Pursuant to section 541 of the Bankruptcy Code, on the filing of a petition in bankruptcy, all property of the debtor becomes property of the estate (11 USC § 541). Sales tax collected by Gaines and not remitted to the Division prior to February 10, 1995 constituted a pre-petition debt owed to the Division. To collect these taxes, the Division was entitled to proceed as a priority creditor pursuant to section 507(a)(8) of the Bankruptcy Code. However, any tax liability arising subsequent to February 10, 1995 constituted post-petition tax liability.

A debtor in possession has the same responsibilities as a trustee pursuant to section 1107 of the Bankruptcy Code. The duties of a trustee include filing returns for pre-petition periods (11 USC § 1106[a][6]) and filing returns and paying state and local tax liabilities for post-petition periods on behalf of the debtor (11 USC §§ 346[c][2], 346[f]). Thus, Gaines, as a debtor in possession, had a responsibility to file sales tax returns and pay sales tax collected for all periods subsequent to the filing of its bankruptcy petition. Petitioner, as chairman of the board and sole stockholder of Gaines, was a person responsible for the collection of sales tax both before Gaines filed its petition in bankruptcy and after the filing of the petition, while Gaines was a debtor in possession. It was petitioner's burden to demonstrate that, as a person responsible for the collection of such taxes, he was unable to file returns and remit such taxes on behalf of the corporation. This burden was not met by petitioner.

The Administrative Law Judge concluded that, on conversion of the case to Chapter 7, only the trustee and not Gaines or petitioner had authority to make payment of the taxes due on behalf of the corporation. Thus, the Administrative Law Judge concluded that petitioner was not a person responsible for the collection of sales tax on behalf of Gaines for the entire

quarterly period March 1, 1995 through May 31, 1995. As neither party took exception to this conclusion, it is not before us for consideration herein.

As to petitioner's remaining issues, we find that the Administrative Law Judge has fully and correctly addressed each of these issues in her determination. Petitioner has presented no basis for modifying the Administrative Law Judge's determination in any respect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Jack G. Schwartz is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Jack G. Schwartz is granted to the extent that he is not liable for taxes due for the period March 1 through May 31, 1995, but is otherwise denied; and
4. The notices of determination, No. L-011666654-1 and No. L-011666655-9, dated January 26, 1996 are modified in accordance with paragraph "3" above.

DATED: Troy, New York
August 19, 1999

/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