

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
JENNIFER VALLONE : DECISION
 : DTA NO. 818357
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, 1998 through August 31, 1998. :

Petitioner Jennifer Vallone, 21467 Chipmunk Lane, Boca Raton, Florida 33427, filed an exception to the determination of the Administrative Law Judge issued on September 5, 2002. Petitioner appeared by Leon C. Baker, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Michael B. Infantino, Esq., of counsel).

Petitioner did not file a brief in support of her exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on March 20, 2003 in New York, New York.

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

ISSUES

- I. Whether petitioner was personally liable for sales tax due on behalf of 1880 House, Inc. as a person required to collect and pay tax under Tax Law §§ 1131 and 1133.
- II. Whether the assessment of sales and use taxes lacks a rational basis.
- III. Whether petitioner has shown reasonable cause for abatement of penalties assessed.

FINDINGS OF FACT

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

On September 28, 2000, the Division of Taxation (“Division”) issued a Notice of Determination (Notice No. L-018573246) to petitioner, Jennifer Vallone, for sales and use taxes due for the period June 1, 1998 through August 31, 1998 in the amount of \$6,118.80, interest due of \$1,679.89 and penalty due of \$1,835.48, for a total amount due of \$9,634.17. The notice stated that petitioner was personally liable as an officer or responsible person of 1880 House, Inc. (“1880 House” or “the corporation”) under Tax Law §§ 1131(1) and 1133 for taxes determined to be due in accordance with Tax Law § 1138(a).

The amount of tax due was based upon the sales tax return for the period June 1, 1998 through August 31, 1998 as filed by the corporation on September 20, 1998 without full payment of the tax reported to be due thereon.

The corporation operated a restaurant called Jenny’s Restaurant located at 755 Montauk Highway, in Water Mill, New York. 1880 House was incorporated on August 26, 1996 to operate Jenny’s Restaurant.

Petitioner, as owner/manager of the corporation, prepared and signed sales tax returns reporting zero sales for the periods June 1, 1997 through August 31, 1997 and December 1, 1997 through February 28, 1998.

On behalf of 1880 House, petitioner, as manager, signed an Election by a Federal S Corporation to be Treated as a New York State S Corporation (Form CT-6) dated March 10,

1998. This Form CT-6 indicates that Jennifer Vallone and Diego Vallone each own 50 shares of 1880 House stock acquired on August 26, 1996.

On May 28, 1998, petitioner, as president of 1880 House, signed the corporation's 1997 Form CT-3, General Business Corporation Franchise Tax Return, the corporation's 1997 Form CT-3M/4M, General Business Corporation MTA Surcharge Return, and a Request for Six-Month Extension to File (For Franchise/Business Taxes, MTA Surcharge, or Both) (Form CT-5). Those corporation franchise tax returns were prepared by a paid professional tax preparer.

Petitioner acted as general manager of the restaurant which opened sometime in April 1998.¹ The restaurant generated gross and taxable sales of \$66,883.00 during the months of April and May 1998. For the period March 1, 1998 through May 31, 1998, sales tax in the amount of \$5,477.72 was reported on the sales tax return prepared by an outside preparer. Petitioner, as owner/manager, signed the sales tax return for that period. She also prepared and signed the check sent in payment of sales tax due for that period. The check, dated June 20, 1998, payable to the "N. Y. S. Sales Tax Bureau" in the amount of \$5,477.72, was drawn on the corporation's checking account with the North Fork Bank.

On August 17, 1998, the restaurant closed and its employees were discharged without notice.

As noted above, on September 20, 1998, the corporation filed a sales and use tax return, for the period June 1, 1998 through August 31, 1998, reporting tax due of \$14,118.80, with

¹ The exact date on which the restaurant opened is not part of the record.

remittance of \$8,000.00. The \$8,000.00 payment was made using a Washington Mutual Bank, FA bank check, dated September 17, 1998, on which petitioner was listed as the remitter.²

On April 10, 2000, a final amended sales and use tax return for the period June 1, 1998 through August 31, 1998 reporting taxable sales in the amount of \$171,137.00 and tax due in the amount of \$14,118.80 was submitted to the Division's Suffolk District Office Tax Compliance Section. This return contains only the signature of the professional partnership that prepared the return.³

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In her determination, the Administrative Law Judge noted that Tax Law § 1133(a) places personal liability for the tax imposed, collected or required to be collected by Article 28 upon any "person required to collect any tax imposed by this article." Such a "person" is defined to include corporate officers and employees who are under a duty to act for such corporation in complying with the requirements of Article 28 (Tax Law § 1131[1]).

The Administrative Law Judge recited applicable case law which established factors to be considered in determining whether a corporate officer is a person required to collect tax on behalf of a corporation. Based on an analysis of these factors, the Administrative Law Judge determined that petitioner was properly held responsible for the sales tax obligations of the corporation. The Administrative Law Judge found that petitioner was president of the corporation; she and her husband each owned 50% of its stock; she was the general manager of

² The corporation's name has been handwritten directly beneath petitioner's typewritten name on the check.

³ Directly above the signature of the preparer, on the line labeled "Printed Name of Preparer if other than Taxpayer" appear the handwritten initials "MPS" and the date "9-18-98."

the restaurant; she had authority over the checking accounts and signed checks in payment of sales tax, and she was authorized to sign tax returns (and other returns) and did, in fact, do so.

The Administrative Law Judge found that petitioner failed to establish by clear and convincing evidence that she had no duty to act on behalf of the corporation because she either lacked the necessary authority over corporate affairs or she had the necessary authority, but she was thwarted by others in carrying out her corporate duties through no fault of her own.

The Administrative Law Judge rejected petitioner's argument that the Notice of Determination should be canceled because the Division failed to present any admissible evidence of the basis for the assessment and an unsigned final amended sales and use tax return cannot be relied upon as the basis for the amount of the corporate tax liability and petitioner's tax liability.

The Administrative Law Judge held that the unsigned final amended sales and use tax return, in the possession of the Division, was evidence of the corporation's self-assessment of any tax reported and unpaid and such return was specifically authorized by the State Administrative Procedure Act to be admitted into evidence in an administrative hearing. The Administrative Law Judge also held that a notice of determination is entitled to a presumption of correctness, and the burden is on the taxpayer to show that the notice is incorrect.

The Administrative Law Judge concluded that while petitioner asserted that the corporation's sales tax liability for the period in issue was approximately \$14,000.00, she failed to submit the corporation's books and records or any other probative evidence to support that assertion. Therefore, the Administrative Law Judge determined that petitioner failed to establish by clear and convincing evidence that the amount of tax assessed was erroneous.

The Administrative Law Judge also rejected petitioner's argument that the penalty should be abated because she made every effort to ensure that the sales tax due for the period in issue was timely paid. The Administrative Law Judge found that reasonable cause for failure to timely pay over sales and use taxes does not include financial inability or the need to use the taxes collected for other more pressing financial obligations.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that the Administrative Law Judge imposed an improper burden of proof on her. Petitioner maintains that establishing facts by clear and convincing evidence is a burden applicable only in cases where a taxpayer's records are inadequate. Petitioner alleges that her burden of proof, if she had one, was to establish facts by a preponderance of the evidence. Petitioner argues that the facts she presented were uncontroverted and credible and should have met her burden of proof.

Petitioner asserts that because she was discharged prior to the time that the sales tax return and payment was due for the period at issue, she is not liable for the corporation's failure to pay over the tax it collected to the State. Petitioner argues that there is nothing in the record to support the determination of the Administrative Law Judge that petitioner had authority over the financial affairs of the corporation subsequent to her discharge on August 17, 1998.

Petitioner believes that despite the personal liability imposed upon persons required to collect tax by Tax Law § 1133, petitioner is not liable for such tax because she was not a person required to file a tax return under the provisions of Tax Law § 1137 after her discharge from the corporation. Petitioner disputes the Administrative Law Judge's finding that she was ever an officer of the corporation.

In opposition to petitioner's exception, the Division argues that the Administrative Law Judge properly held petitioner subject to the burden to prove, by clear and convincing evidence, that she was not personally liable for the taxes of the corporation. The Division agrees with the findings and conclusions of the Administrative Law Judge and requests that the determination 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. Commissioner 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; *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 Administrative Law Judge correctly determined that petitioner was an officer of the corporation who was personally liable for the sales tax obligations of the corporation, despite her protestations to the contrary. Petitioner was much more than a nominal officer, as were the taxpayers who were held personally liable in *Matter of Blodnick v. New York State Tax Commn.* (*supra*). Petitioner was in charge of the day-to-day operation of the restaurant, handled the finances of the corporation and filed and paid sales tax on behalf of the corporation.

Additionally, as stated by the Appellate Division in *Blodnick*, the Division is not responsible for demonstrating the propriety of an assessment: “The taxpayer is responsible for establishing by clear and convincing evidence that the method used to arrive at the assessment and the assessment itself are erroneous” (*Matter of Blodnick v. New York State Tax Commn.*, *supra*, 507 NYS2d, at 538). As to whether or not the assessment lacked a rational basis, the assessment was based on the sales tax return for the period at issue filed by the corporation. Petitioner has not disputed the accuracy of this return, and she admitted to estimating the sales tax liability of the corporation for the period at issue to be \$14,000.00, an amount nearly identical to that reported due by the corporation.

While petitioner claims that she had no further authority over the operation of the restaurant subsequent to August 17, 1998, the fact that the sales tax return was not due to be filed until September 20, 1998 does not relieve petitioner of her liability.

Generally speaking, the liability for taxes due is fixed from the time the taxes are to be collected, not from the time the payment and return was due (*see, e.g., Matter of Schwartz*, Tax Appeals Tribunal, August 19, 1999). However, where the responsible officer is prevented from carrying out his responsibilities to see to it that the taxes so collected are remitted to the State, such liability does not lie (*see, Chevlowe v. Koerner, supra; Matter of Kadish*, Tax Appeals Tribunal, November 15, 1990; *Matter of Stern*, Tax Appeals Tribunal, September 1, 1988).

If the restaurant closed its doors on the day that petitioner was fired and there was no further business transacted, the amount of tax due at the end of the tax period would have been based solely on business conducted while petitioner was in charge of the operation of the restaurant. Here, despite petitioner's allegations, she was not prevented from carrying out her responsibilities to remit the tax collected to the State subsequent to August 17, 1998 as she successfully remitted \$8,000.00 on behalf of the restaurant on or about September 17, 1998.

Petitioner's dilemma arises from the cash position of the restaurant at or subsequent to the time it closed on August 17, 1998. When petitioner remitted the check for \$8,000.00, approximately \$6,000.00 of the \$14,000.00 in sales tax purportedly collected on behalf of the restaurant had apparently been expended for other purposes. Otherwise, petitioner would have been able to remit the entire amount that she estimated was due and owing instead of just making a partial remittance. However, this has no bearing on whether or not petitioner was a

person required to collect the tax on behalf of the restaurant. Petitioner was correct to remit the amount available to the State at her earliest opportunity. This mitigated the overall outstanding tax liability of the corporation for that final tax period. However, it did not relieve her from liability for the unpaid balance still remaining.

Similarly, we agree with the Administrative Law Judge that the lack of available funds with which to pay the outstanding sales tax was not reasonable cause for the failure to timely pay the tax due. As a result, petitioner has not shown that the penalty asserted against her should be abated.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Jennifer Vallone is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Jennifer Vallone is denied; and
4. The Notice of Determination issued on September 28, 2000 is sustained.

DATED: Troy, New York
August 21, 2003

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner