

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

JOSEPH H. GRAY :

DECISION
DTA NO. 819116

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, 1997 through August 31, 1999. :

Petitioner Joseph H. Gray, 12 Elaine Place, Plainview, New York 11803, filed an exception to the determination of the Administrative Law Judge issued on November 6, 2003. Petitioner appeared *pro se*. The Division of Taxation appeared by Mark F. Volk, Esq. (Robert A. Maslyn, Esq., of counsel).

Petitioner filed a brief in support of his exception and the Division of Taxation filed a letter in lieu of a formal brief in opposition. Petitioner filed a reply brief. Petitioner's request for oral argument was denied.

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

ISSUES

I. Whether the Division of Taxation properly determined additional sales and use taxes due from Lynbrook Stationers, Inc. for the period March 1, 1997 through August 31, 1999.

II. Whether petitioner was liable for the tax due as a person required to collect sales and use taxes on behalf of Lynbrook Stationers, Inc. for the period in issue pursuant to Tax Law §§ 1131(1) and 1133(a).

FINDINGS OF FACT

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

On or about March 13, 2000, the Division of Taxation (“Division”) began an audit of Lynbrook Stationers, Inc., an office supply business located in Lynbrook, New York, for the period March 1, 1997 through November 30, 1999 (the “audit period”). On that date, an appointment letter was sent to the corporation requesting books and records pertaining to sales tax for the audit period.

After two meetings with the corporation’s representative, Mr. David Rosenblum, the only records produced were incomplete bank records, canceled checks, some sales invoices and a schedule indicating other deposits. Although further requests for records were made, no other documentation was forthcoming. Specifically, the Division requested but was not provided with worksheets related to sales tax returns, the general ledger, sales journal, cash receipts journal, purchase journal, check disbursements journal, bank deposit slips, resale certificates or exempt organization certificates.

Given the incomplete information provided, the auditor decided that there was insufficient data to perform a detailed audit and the decision was made to acquire the corporation’s bank records in order to analyze its deposits for the entire audit period to establish taxable sales. After this was accomplished, non-sale deposits and sales tax paid with returns filed were subtracted

from the deposits to arrive at actual taxable sales of \$1,601,390.50. In addition, after examining the incomplete invoices provided by the representative, it was determined that six percent of total sales were nontaxable. Therefore, it was agreed that six percent of the actual taxable sales were also exempt, leaving taxable sales determined on audit of \$1,505,307.08 and additional tax due of \$127,951.10.

Mr. Rosenblum consented to the Statement of Proposed Audit Change for Sales and Use Tax on February 16, 2001, agreeing that Lynbrook Stationers, Inc. was liable for additional sales and use taxes in the sum of \$127,951.10 plus interest for the audit period. No such consent was executed by or on behalf of petitioner.

Petitioner executed a Consent Extending the Period of Limitation for Assessment on March 31, 2000, permitting the Division until June 20, 2001 to assess him personally for any sales and use taxes due from Lynbrook Stationers, Inc.

Petitioner was, at times, the vice-president, secretary and treasurer of Lynbrook Stationers, Inc., owned 50 percent of its stock, received compensation from the corporation and was a director during the audit period. Over the course of approximately 20 years, petitioner invested over five hundred thousand dollars in the business. He signed all¹ sales and use tax returns on behalf of the corporation during the audit period (with the exception of February 1999 only) and had the authority to sign and did sign checks on the corporation's operating account, including checks remitting sales tax to the Division. Petitioner shared the daily managerial duties with Mr. Steve Zanville, including the hiring and firing of employees. In addition, petitioner reviewed invoices on a daily basis and was in charge of overseeing accounts payable.

¹All sales and use tax returns for the audit period, except the return for February 1999, were entered into the record.

Petitioner's involvement with the corporation ended on or about October 8, 1999, when he ceased working for the corporation. In a letter, dated October 22, 1999, to petitioner from the corporation's president, Steve Zanville, petitioner was informed that Mr. Zanville intended to "dissolve our relationship as joint stockholders." Although Mr. Zanville did not explain how he intended to accomplish the dissolution, it was apparent that he understood petitioner was no longer with the corporation as of October 8, 1999, but that he would be responsible for any "debt of [sic] financial obligations" incurred prior to October 8th.

On August 24, 2000, the auditor met with the corporation's representative, petitioner and his wife to discuss the case and transcribe bank statements.

Based upon all the information the auditor collected, a notice of determination was issued to petitioner, dated April 5, 2001, as a person responsible for the sales and use taxes determined to be due from Lynbrook Stationers, Inc. The notice asserted additional tax due of \$127,951.10 plus interest of \$34,398.92 for the period March 1, 1997 through August 31, 1999.²

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge first addressed whether the signed consent to fix the amount of taxes due, executed by Mr. Rosenblum on behalf of the corporation, provided the necessary rational basis for the assessment issued against petitioner. The Administrative Law Judge stated that since Mr. Rosenblum was not petitioner's representative in this matter, he had no authority to legally bind petitioner to the terms of the consent.

Next, the Administrative Law Judge determined that the Division established that its audit methodology was proper and reasonable given the failure of petitioner to produce most of the

²The period does not include the quarter September 1 through November 30, 1999 because petitioner had left the company on October 8, 1999.

records which the Division had requested and because the few records that were submitted were simply inadequate.

The Administrative Law Judge rejected petitioner's argument that he was prevented from having access to the office and, thus, was unable to obtain the meticulous records which he claimed were maintained while he was a co-owner of the business since such records were ultimately destroyed by Mr. Zanville. The Administrative Law Judge noted that such assertion by petitioner was unsupported by the record herein.

Lastly, the Administrative Law Judge concluded that petitioner was, in fact, a responsible officer for the corporation since petitioner was a 50% stockholder, an officer and director, signed all but one of the sales and use tax returns during the audit period, received compensation from the corporation, signed checks and had responsibility for the daily management of the business, including the hiring and firing of employees. Thus, the Administrative Law Judge held that there were sufficient factors which pointed to the conclusion that petitioner was a person responsible for the collection and payment of sales and use taxes due by the corporation under Tax Law §§ 1131(1) and 1133(a).

ARGUMENTS ON EXCEPTION

Petitioner claims that the Administrative Law Judge failed to address many factual issues in what petitioner termed a unique case. Petitioner continues to assert that Mr. Zanville destroyed all of the financial documents of the corporation. Moreover, petitioner urges that it was Mr. Zanville who was in complete and total control of all the corporate affairs after October 8, 1999. Petitioner continues to maintain that retention of the complete seven-year

history of meticulous financial and accounting material would have been Mr. Zanville's sole responsibility after October 8, 1999. Petitioner states that he was legally barred from the business located at 24 Atlantic Avenue. Petitioner argues that:

the only evidence in this case concerning the financial and accounting documentation that would support the accurate payment of sales taxes to the state is that it was not available after I was officially discharged from the corporation on October 8, 1999. Failure to maintain such records cannot be blamed on me but rather on the person or persons who had the authority and control over the affairs of the corporation (Petitioner's brief on exception, unnumbered pp. 2-3).

In opposition, the Division points out that each of the arguments made in the exception was presented to the Administrative Law Judge and was rejected entirely.

The Division states that the extensive nature of petitioner's duties and responsibilities on behalf of the corporation establish that he was an officer/responsible person on behalf of Lynbrook Stationers, Inc. With respect to petitioner's argument that he was removed from the corporation and barred from its premises, the Division notes that petitioner submitted no evidence, other than exhibit "1," which was inadequate to prove his argument. Furthermore, the Division states that the fact that petitioner was not active in the corporation during the audit is not material. The Division maintains that petitioner was actively involved with the corporation's business during the period which was under audit and that is the decisive time frame. Thus, the Division requests that the determination be sustained.

OPINION

We have considered petitioner's exception and briefs and find that the arguments contained therein were presented to the Administrative Law Judge below. Petitioner has not provided any basis for us to modify the determination in any respect. Thus, since the

Administrative Law Judge adequately and completely dealt with the issues presented to him, we sustain his determination for the reasons set forth therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Joseph H. Gray is denied;
2. The determination of the Administrative Law Judge is sustained;
3. The petition of Joseph H. Gray is denied; and
4. The notice of determination, dated April 5, 2001, is sustained.

DATED: Troy, New York
August 26, 2004

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner