

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**LLOYD W. MILNE** : DECISION  
 : DTA NO. 819152  
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, 1993 through February 28, 1998. :

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Petitioner Lloyd W. Milne, 17 Columbine Lane, Norwalk, Connecticut 06851, filed an exception to the determination of the Administrative Law Judge issued on January 29, 2004. Petitioner appeared by Alston & Bird, LLP (Richard C. Kariss, Esq., of counsel). The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Robert A. Maslyn, Esq., of counsel).

Petitioner did not file a brief on exception. The Division of Taxation filed a letter in lieu of a formal brief in opposition. 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 petitioner is liable for the sales and use taxes due from Pneumatic Tool, Sales & Repair Co., Inc., as a person responsible for the collection and payment of sales tax pursuant to Tax Law §§ 1131 and 1133.

II. Whether the audit method employed by the Division of Taxation in its audit of Pneumatic Tool, Sales & Repair Co., Inc., was reasonable or whether petitioner has shown error in either the audit method or result.

III. Whether penalty asserted in the subject Notice of Determination should be abated.

***FINDINGS OF FACT***

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

On March 29, 2001, following an audit, the Division of Taxation (“Division”) issued to petitioner, Lloyd W. Milne, a Notice of Determination which assessed \$159,314.54 in additional sales and use taxes due, plus penalty and interest, for the period June 1, 1993 through February 28, 1998. The notice informed petitioner that the Division had determined that he was a corporate officer or a person responsible for the collection and payment of sales and use taxes due from Pneumatic Tool, Sales & Repair Co., Inc. (“the corporation”) and therefore personally liable for the sales and use taxes due from that corporation.

Pursuant to a Bureau of Conciliation and Mediation Services Conciliation Order dated June 28, 2002, the Division modified the subject Notice of Determination by recomputing the tax due to \$137,436.42, plus penalty and interest, for the period June 1, 1993 through May 31, 1996. The conciliation order thus canceled tax asserted in the notice for the period June 1, 1996 through February 28, 1998.

The corporation was in the business of selling and servicing compressors, air tools, generators, lighting equipment and repair tools and was located at 129-02 23<sup>rd</sup> Avenue, College Point, Queens, New York. Petitioner and one Roger Lourie acquired the business in 1989.

Initially, the business was successful, as sales increased by about one-third between 1989 and the latter part of 1992. At around that time, however, the market changed from the hand-held pneumatic tools and compressors in which the corporation had invested to boom-mounted tools, and the corporation could not afford to stock such new kinds of tools. As a result, the corporation lost one-third to one-half of its sales base within a matter of months.

Petitioner and Lourie each owned 50 percent of the shares of the corporation. While this two-man corporation did not place much importance on corporate form or titles, petitioner was president and treasurer during the period of his involvement with the corporation. Lourie held the titles of chairman of the board of directors and secretary.

Petitioner and Lourie divided the duties and responsibilities of the business. Lourie was responsible for sales. Petitioner was responsible for collecting receivables and for the financial statements. As the company downsized, petitioner became the purchasing agent and shipper. Petitioner also prepared and filed the corporation's Federal income tax returns and New York corporate returns through the 1995 tax year. Petitioner had access to the corporation's books and records during the time of his involvement with the corporation.

With respect to the period at issue, i.e., June 1, 1993 through May 31, 1996, as both petitioner and Lourie were aware, although the corporation collected sales tax from certain of its customers and although petitioner prepared sales tax returns, the corporation did not pay any sales tax or file such returns with respect to this period.

Petitioner had authority to sign checks for the corporation, as did Lourie. It was petitioner's understanding that any corporate checks in excess of \$1,000.00 required the

signatures of both principals. According to petitioner, however, the corporation's bank rarely, if ever, enforced this requirement.

Notwithstanding his authority to do so, petitioner chose not to sign any corporate checks after 1992. During that time Lourie paid the bills and signed the checks.

The hiring of employees was a joint responsibility between petitioner and Lourie. Only one employee was hired during the time of petitioner's involvement with the corporation.

Although he worked full time at the corporation, petitioner drew no salary from 1993 through his departure from the corporation in 1996 as a result of the corporation's financial difficulties. Petitioner also lost his entire direct investment in the corporation of approximately \$500,000.00.

Over time, conflicts arose between petitioner and Lourie, eventually leading to petitioner's resignation from the corporation effective June 1, 1996. He had no involvement with the operations of the corporation after that date. Following petitioner's resignation, Lourie denied him access to the corporation's books and records.

The audit of the corporation began with a letter from the Division to Lourie dated July 21, 1999. By this letter the Division requested that the corporation make its books and records for the period June 1, 1993 through May 31, 1999 available for review. The Division also scheduled a date to begin its review of the corporation's records. The corporation did not respond to the July 21 letter and did not appear at the scheduled date and time. The Division therefore issued a letter dated August 19, 1999 similarly requesting that the corporation make its books and records available for review for the specified period.

The Division's auditor eventually did meet with Lourie who advised that the corporation had books and records available for the year 1997, but had no records for the years 1993 through 1996.

Petitioner became aware of the audit of the corporation by a letter from the auditor in September 1999. The letter also requested that petitioner produce any corporate records in his possession. In response, petitioner met with the auditor to discuss his involvement with the corporation and advised the auditor that he had no corporate records.

On audit, the Division generally reviewed the corporation's records for 1997 and reviewed in detail the corporation's sales activity for the month of December 1997. Such review indicated the sales journal was accurate. The Division therefore accepted the taxable and nontaxable sales figures and sales tax collected amount as set forth in the sales journal and thus assessed tax for 1997 based upon the corporation's own records. Such records showed total sales of \$341,913.61 and taxable sales of \$133,255.06 for 1997.

The corporation presented no sales records for the period June 1, 1993 through May 31, 1996. The Division therefore deemed gross receipts as reported on the Federal corporate returns (obtained from the Internal Revenue Service) as taxable sales and computed the corporation's sales tax liability for this period accordingly. The Division made no allowance for nontaxable sales for this period.

The corporation's Federal returns reported the following amounts as gross receipts for the years 1993 through 1996:

Year	1993	1994	1995	1996
Gross Receipts	\$861,482.00	\$546,366.00	\$526,641.00	\$216,859.00

The Division did not make an allowance for nontaxable sales for the years before 1997, such as extending the 1997 taxable ratio to those years, because of the absence of any documentation supporting such nontaxable sales and the large amount of sales tax liability indicated by the balance sheet on the Federal returns. Specifically, the corporation's Federal returns reported the following amounts as sales tax payable under current liabilities on Schedule L (Balance Sheet per Books) for the years 1993 through 1997:

Year	Beginning Balance	Ending Balance
1993	\$67,068.00	\$47,787.00
1994	\$47,787.00	\$59,012.00
1995	\$59,012.00	\$29,425.00
1996	\$29,425.00	\$103,452.00
1997	\$103,452.00	\$112,461.00

Petitioner subsequently filed a petition under Chapter 7 of the United States Bankruptcy Code in United States Bankruptcy Court, District of Connecticut. The date of such petition is not in the record. Petitioner was granted a discharge under Chapter 7 pursuant to an Order of the Bankruptcy Court dated May 7, 2002. The Order contains an "Explanation of Bankruptcy Discharge in a Chapter 7 Case" which lists "debts for most taxes" among "common types of debts which are not discharged in a chapter 7 bankruptcy case." Petitioner also submitted a "Schedule E. Creditors Holding Unsecured Priority Claims" which was apparently a part of his bankruptcy filing. This schedule lists the sales tax liability at issue herein as such an unsecured priority claim.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

In his determination, the Administrative Law Judge noted that Tax Law § 1133(a) imposes personal liability upon any person required to collect the tax imposed by Article 28 of the Tax Law. The Administrative Law Judge further observed that a person required to collect tax is defined to include, among others, corporate officers and employees who are under a duty to act for such corporation in complying with the requirements of Article 28.

The Administrative Law Judge referenced applicable case law concerning the determination of whether a person is responsible for collecting and remitting sales tax for a corporation. The Administrative Law Judge pointed out that petitioner bears the burden of proof to show that he was not such a person. The Administrative Law Judge determined that based on the facts in this case, petitioner was a responsible officer of the corporation.

The Administrative Law Judge held that petitioner had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The Administrative Law Judge determined that petitioner had consented to an arrangement whereby Lourie was responsible to pay the corporation's liabilities. However, such an arrangement did not excuse petitioner from responsibility. Further, the Administrative Law Judge agreed with the Division that it was not a defense to petitioner's position that another party (in this case Lourie) may also be liable for taxes due from the corporation because Tax Law § 1133(a) creates joint and several liability for unpaid sales tax.

The Administrative Law Judge also held that petitioner's resignation from the corporation as of June 1, 1996 and Lourie's subsequent refusal to allow access to the corporate records did

not relieve petitioner from responsibility with respect to the period of his involvement because such responsibility runs from the time taxes are due.

The Administrative Law Judge found that on audit, the corporation failed to maintain or make available upon the Division's request any source documentation of its sales for the period at issue in this matter, i.e., June 1, 1993 through May 31, 1996. Therefore, the Administrative Law Judge concluded that the Division was authorized to estimate the corporation's sales tax liability. The Administrative Law Judge upheld the method chosen by the Division for its estimation of tax due for the period at issue, which was to use the gross receipts as reported on the corporation's Federal income tax returns. The Administrative Law Judge noted that the use of gross receipts as reported on Federal income tax returns to estimate taxable sales has been found to be reasonable in similar situations and the Division's presumption that all of the corporation's sales were taxable was consistent with Tax Law § 1132(c). The Administrative Law Judge found that petitioner had failed to meet his burden of establishing error in either the audit method or results.

Finally, the Administrative Law Judge found that petitioner did not establish the existence of reasonable cause and an absence of willful neglect in the corporation's failure to file sales tax returns and to pay sales tax during the period at issue. Accordingly, the Administrative Law Judge sustained the penalty imposed. The Administrative Law Judge rejected petitioner's arguments that penalty should be abated because he had fulfilled his limited duties as a "co-responsible corporate officer" and that all returns of the corporation were "prepared and correctly recorded on corporate books and financial statements." The Administrative Law Judge also rejected petitioner's assertion that he was relieved of the liability at issue by the bankruptcy



discharge order dated May 7, 2002. The Administrative Law Judge noted that liability for sales tax, which is required to be collected by a seller from its customer, is governed by the “trust fund” provisions of the Bankruptcy Code and is not dischargeable in bankruptcy.

***ARGUMENTS ON EXCEPTION***

On exception, petitioner argues that the Administrative Law Judge erroneously failed to find that petitioner did not have authority to sign corporate checks subsequent to 1993 and he was prevented from signing checks thereafter. Further, petitioner maintains that the arrangement of corporate responsibilities rendered petitioner incapable of paying the corporation’s liabilities and of being a responsible officer. Petitioner alleges that he had no access to the corporate records at the time of audit and other corporate officers are the parties responsible for the tax.

Petitioner asserts that the Division did not make an adequate request for corporate books and records at the time of audit. Therefore, petitioner believes that the Division was unreasonable in not projecting the 1997 taxable to nontaxable sales ratio for the entire audit period. Petitioner argues that the Division’s audit methodology using all of the corporation’s gross sales for the audit period with no allowance for exempt or nontaxable sales was unreasonable and the amount of tax assessed was erroneous.

Petitioner also maintains that the record reflects reasonable cause and an absence of willful neglect on behalf of petitioner in relation to the corporation’s failure to file returns and pay tax during the period at issue.

The Division, in opposition, supports the Administrative Law Judge’s determination and urges that petitioner has failed to set forth any basis in his exception for reversing the findings of the Administrative Law Judge.

***OPINION***

We find that the Administrative Law Judge completely and adequately addressed the issues presented to him and correctly applied the relevant law to the facts of this case. Petitioner has offered no evidence below, and no argument on exception, that would provide a basis for us to modify the determination in any respect. Thus, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Lloyd W. Milne is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Lloyd W. Milne is denied; and
4. The Notice of Determination dated March 29, 2001 is sustained.

DATED: Troy, New York  
February 17, 2005

/s/Donald C. DeWitt  
Donald C. DeWitt  
President

/s/Carroll R. Jenkins  
Carroll R. Jenkins  
Commissioner