

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ROBERT STERN	:	DETERMINATION
OFFICER OF BRIDGES SUMMIT PARK JEWELRY, INC.	:	
	:	
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, 1981	:	
through May 31, 1982.	:	

Petitioner, Robert Stern, Officer of Bridges Summit Park Jewelry, Inc., 908 South Manlius Road, Fayetteville, New York 13066, filed a petition 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, 1981 through May 31, 1982 (File No. 801488).

A hearing was held at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York 13202, on May 1, 1987 at 9:00 A.M., with all briefs to be filed by August 2, 1987. Petitioner appeared by Menter, Rudin, Trivelpiece, P.C. (Edward M. Zachary, Esq., of counsel). The Audit Division appeared by John P. Dugan Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether the State Tax Commission had jurisdiction to proceed administratively against petitioner with respect to his personal liability for unpaid sales taxes of Bridges Summit Park Jewelry, Inc. for the period December 1, 1981 through February 28, 1982.

II. Whether petitioner is personally liable for sales taxes determined due from Bridges Summit Park Jewelry, Inc. for the period March 1, 1982 through May 31, 1982 and, if so, whether the penalty and that portion of interest exceeding the minimum interest should be cancelled.

FINDINGS OF FACT

1. On November 20, 1983, the Audit Division issued a Notice and Demand for Payment

of Sales and Use Taxes Due against petitioner, Robert S. Stern, for the period December 1, 1981 through February 28, 1982. Said notice assessed tax due of \$6,663.13, plus penalty and interest of \$3,139.49, for a total of \$9,802.62. Petitioner was held personally liable as a responsible officer of Bridges Summit Park Jewelry, Inc. ("Bridges") for taxes determined due from said corporation. The liability of the corporation resulted from its filing of a sales tax return for the above period without remitting the amount of tax due shown thereon.

2. The Audit Division also issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due on November 20, 1983 against petitioner covering the period March 1, 1982 through May 31, 1982 for taxes due of \$9,296.25, plus penalty and interest of \$3,764.97, for a total of \$13,061.22. Bridges failed to file a sales tax return for this period, and the Audit Division estimated the tax due from the corporation in accordance with section 1138(a) of the Tax Law. Petitioner was again held personally liable as a responsible officer of the corporation.

3. In the latter part of 1979, petitioner, together with Joel Jaffe, formed Bridges. Petitioner became the secretary-treasurer and owned 50 percent of the stock. Mr. Jaffe was also an officer and owned the other 50 percent of the stock. There were no other officers of the corporation. Bridges operated a retail jewelry store located in Niagara Falls, New York. Petitioner and Mr. Jaffe were also the sole officers and stockholders of Shaws Millcreek Mall Jewelry, Inc. ("Shaws") which operated a jewelry store in Erie, Pennsylvania. This corporation was formed in 1981.

4. In May 1982, Shaws obtained a loan for \$60,000.00 from The First National Bank of Pennsylvania. The note was executed by petitioner and Mr. Jaffe in their capacities as officers of the corporation. Petitioner individually executed an Agreement of Guaranty in favor of the bank. The entire proceeds of the loan were deposited in Shaws checking account although petitioner intended the money to be used to pay outstanding debts of both Shaws and Bridges, including unpaid taxes.

5. In approximately May 1982 petitioner and Mr. Jaffe had a falling out over the business operations. This was due in part to financial difficulties of Mr. Jaffe and suspicions by petitioner

that Mr. Jaffe was misappropriating funds from Bridges.

6. The books and records of Bridges were maintained at a jewelry store in Niagara Falls that Mr. Jaffe operated as a sole proprietor. In May 1982, petitioner removed the business records from these premises to the offices of Bridges. When this happened, Mr. Jaffe contacted the banks that held the checking accounts of Bridges and Shaws and told them not to honor any checks drawn on those accounts.

7. On June 9, 1982 and June 15, 1982, The First National Bank of Pennsylvania seized the inventories of Shaws and Bridges, respectively. The retail value of the inventory at Bridges was \$168,776.00. After the seizure, the bank denied petitioner's request for access to Bridges' premises so that he could obtain possession of the books and records.

8. Petitioner's responsibilities in the operation of Bridges and Shaws were to see that merchandise was properly displayed and that personnel were performing their duties; and to order merchandise. Petitioner signed checks and received income from the business. He was aware that Bridges did not file a sales tax return for the period ending May 31, 1982.

CONCLUSIONS OF LAW

A. That where timely and correct returns are submitted, lacking only the remittance of tax shown as due thereon, the issuance of a Notice and Demand is not statutorily authorized and during the period in issue the State Tax Commission was not empowered to administratively determine petitioner's liability for the unpaid taxes at issue. (Parsons v. State Tax Commission, 34 NY2d 190.) Notwithstanding the enactment of Tax Law section 171, subdivision twenty-first (L 1979, ch 714, eff. January 1, 1980), the Tax Law did not confer administrative jurisdiction on the Tax Commission to recover unpaid taxes where correct returns had been filed. (Hall v. New York State Tax Commission, 108 AD2d 488.) Finally, it should be noted that section 1138(a) of the Tax Law has been amended, effective April 17, 1985 (L 1985, ch 65), such that under the facts presented herein, the issuance of a Notice of Determination and Demand by the Commissioner of Taxation and Finance would be authorized, and the Tax Appeals Tribunal would have jurisdiction to determine petitioner's liability.

B. That with respect to the period December 1, 1981 through February 28, 1982, where returns were filed lacking the remittance of tax shown as due, the State Tax Commission did not have the authority to administratively determine petitioner's liability. With respect to the period March 1, 1981 through May 31, 1981, however, no return was filed and the State Tax Commission had authority under section 1138(a) of the Tax Law to administratively determine the tax liability under such circumstances.¹

C. That section 1133(a) of the Tax Law provides, in part, that every person required to collect the taxes imposed under Article 28 of the Tax Law is also personally liable for the tax imposed, collected, or required to be collected under such law. Section 1131(1) of the Tax Law defines "(p)ersons required to collect tax" as used in section 1133(a) to include any officer or employee of a corporation, or a dissolved corporation, who as such officer or employee is under a duty to act for the corporation in complying with any requirement of Article 28 of the Tax Law.

D. That the determination of whether an individual is a person or officer under a duty to act for the corporation is based upon the facts presented (*Vogel v. New York State Department of Taxation and Finance*, 98 Misc 2d 222). The relevant factors include, but are not limited to: the individual's daily involvement in the corporation; the individual's participation and involvement in the financial affairs of the corporation; whether the individual prepared and signed the sales and use tax returns; the individual's authority to draft checks on the firm's bank account; and, in the case of a closely-held corporation, the individual's knowledge of the affairs of the firm and benefits from the firm's profits.

E. That petitioner, at all times, was a person under a duty to act for the corporation. He was actively involved in the business operations. Petitioner was an officer and stockholder; he signed checks, exercised authority over employees, realized income and was aware of Bridges'

¹It should be noted that currently where no return is filed, pursuant to the Laws of 1986 (ch 282), the Commissioner of Taxation and Finance has authority to issue a notice of determination under Tax Law § 1138(a) and the Division of Tax Appeals has authority to grant a hearing and issue a determination on liability.

sales tax obligations. Such duties and obligations may not be delegated to others and petitioner's arguments to the contrary are without merit. Accordingly, petitioner is personally liable for the taxes due from Bridges pursuant to section 1133(a) of the Tax Law.

F. That section 1145(a)(1)(i) of the Tax Law provides for the imposition of penalty and interest for failure to file a return or pay over any tax when due. Former subparagraph (ii) of said section provides for the remission of penalty and that portion of interest that exceeds the minimum rate when the Tax Commission determined that the failure or delay was due to reasonable cause and not due to willful neglect.

G. That 20 NYCRR 536.1(b) (former 20 NYCRR 536.5[b]) provides:

"Reasonable Cause. In determining whether reasonable cause exists, either as a basis for remitting assessed interest or penalties or as grounds for remitting interest or penalties upon the late filing of a return or payment, the taxpayer's previous compliance record may be taken into account. Reasonable cause for failure to file a return on time must be affirmatively shown by the taxpayer in a written statement. Grounds for reasonable cause, where clearly established, may include the following:

- (1) death or serious illness of the taxpayer, a responsible officer or employee of the taxpayer, or his unavoidable absence from his usual place of business;
- (2) destruction of the taxpayer's place of business or business records by fire or other casualty;
- (3) timely prepared returns misplaced by the taxpayer or a responsible employee of the taxpayer and discovered after the due date;
- (4) inability to obtain and assemble essential information required for the preparation of a complete return despite reasonable efforts;
- (5) pending petition to Tax Commission or formal hearing proceedings involving a question or issue affecting the computation of tax for the year, quarter, month or other period of delinquency; or
- (6) any other cause for delinquency which appears to a person of ordinary prudence and intelligence as a reasonable cause for delay in filing a return and which clearly indicates an absence of gross negligence or willful intent to disobey the taxing statutes. Past performance will be taken into account. Ignorance of the law, however, will not be considered reasonable cause."

H. That petitioner failed to establish reasonable cause.

I. That the petition of Robert Stern, Officer of Bridges Summit Park Jewelry, Inc. is

dismissed for lack of jurisdiction with respect to the period December 1, 1981 through February 28, 1982; that with respect to the period March 1, 1982 through May 31, 1982, the petition is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued November 20, 1983 is sustained.

DATED: Albany, New York
October 16, 1987

ADMINISTRATIVE LAW JUDGE