STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
HARVEY RUSSACK, OFFICER OF NOHOS UNIQUE CLOTHING WAREHOUSE, INC.	:	DETERMINATION DTA NO. 811409
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, 1986 through February 28, 1991.	:	

Petitioner, Harvey Russack, officer of Nohos Unique Clothing Warehouse, Inc., 58 Pond View Lane, Chappaqua, New York 11051, 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, 1986 through February 28, 1991.

A hearing was held before Nigel G. Wright, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on April 7, 1994 at 11:15 A.M. Briefs were submitted by petitioner on August 29, 1994 and October 17, 1994 and by the Division of Taxation on September 30, 1994. Petitioner appeared by Beldock, Levine & Hoffman (Myron Beldock, Esq., and Daniel M. Kummer, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (John Matthews, Esq., of counsel).

ISSUES

I. Whether petitioner, the controlling stockholder and vice president of Nohos Unique Clothing Warehouse, Inc., is personally liable under Tax Law § 1133 for the sales and use taxes of the corporation when the financialofficers of the corporation deliberately withheld from him any information as to taxes due.

II. Whether consents to extend the limitation period on assessments against a corporation signed by its president are binding on petitioner, another officer of the corporation.

III. Whether petitioner, if he is held to be responsible for the sales taxes of the corporation, is also responsible for interest and penalties on those taxes.

IV. Whether petitioner has shown that any failure on the part of the corporation to file or pay sales and use taxes under Tax Law § 1145(a)(1)(iii) was due to reasonable cause and not willful neglect.

FINDINGS OF FACT

(a) Petitioner, Harvey Russack, in 1973 became involved with Fresh Water, Inc., a family business and the predecessor of Nohos Unique Clothing Warehouse, Inc. ("Unique"). Fresh Water, Inc., operated a clothing and military surplus store on lower Broadway in New York City near New York University. In 1975, Unique was formed with petitioner retaining 100% ownership. Around 1978, a family tragedy caused petitioner to want to leave the business. He ultimately did not leave, but did look for someone to handle the day-to-day operations of the business.

(b) In 1980, Richard Wolland, who had had extensive experience at E. J. Korvette, joined the business and was manager of the store from that time. It was understood he would greatly expand the business.

(c) In 1982, Unique hired David Berdon & Co. ("Berdon") as its certified public accountant. This was at the suggestion of Mr. Wolland and after interviews with petitioner.

(d) In 1985, the business was separated into Nohos Unique Clothing Warehouse Realty, Inc. ("Realty"), of which petitioner retained complete ownership, and Unique, owned by Realty to the extent of 82.5% and by Mr. Wolland (17.5%). Mr. Wolland became president of Unique with petitioner as both chairman and vice president.

(e) In 1989, Unique acquired and moved into a new and much larger building at 726 Broadway, other stores were acquired and an office was rented at 704 Broadway.

In 1985, Unique's receipts had been less than it had projected and it failed to pay some sales taxes. It entered into a deferred payment agreement with the Division of Taxation ("Division"). Petitioner had expressed some concern with this. (This matter is not, however, in

issue in this case.)

(a) Petitioner admits that he had ultimate legal control of Unique through his stock ownership and as chairman of the board of directors.

(b) Petitioner had made many loans to the business and had guaranteed other loans to the business. Petitioner drew a salary from Unique. He regarded this as partly for his work with Realty.

(c) Petitioner had desk space at Unique's offices at 704 Broadway. His personal interest in the business involved style and design. He had other interests, aside from Unique, in the clothing business. He very seldom came to the office.

The organizational chart of Unique during this time showed everyone reporting to Mr. Wolland and no one to petitioner. Petitioner was shown on the chart with a horizontal line over to Mr. Wolland.

In April 1988, Unique hired Melson Muneses as its comptroller. For this job he had been interviewed by Berdon and petitioner. He reported to Mr. Wolland.

The responsibility for conducting and controlling Unique's daily financial activities, maintaining general ledgers and payroll records, making payments of Federal and State taxes, and preparing tax returns and financial statements was that of Unique's controller, Melson Muneses, and the independent certified public accountant, Berdon.

(a) Although petitioner had check-signing power, he in fact rarely exercised it and then, generally, only when other signatories were unavailable. The vast majority of corporate checks were signed by Mr. Wolland or by a signature stamping machine under the control of Mr. Muneses.

(b) Petitioner did not sign Federal or State tax returns or checks for Federal or State tax payments. His machine signature did appear on some sales tax checks. That machine, however, was under the control of Mr. Muneses. Petitioner did not have, during the relevant periods, the responsibility, under Unique's management structure, to direct that a payment be made to a taxing authority rather than to some other corporate creditor.

(a) Petitioner kept up with the reports and statements of both the certified public accountants and Unique's own accountants. However, although petitioner, from his own testimony, had contracted with the certified public accountant, Berdon, for full audits including the policing of tax payments, Berdon's report states that it is merely a compilation of information received from management.

(b) Both the outside accountants' reports and the corporation's own statements regularly showed little or no current sales tax liability (and further they showed reduced sales tax liabilities for the pre-1986 deferred payment agreement).

(c) Petitioner regularly attempted to obtain information and records concerning financial affairs and regularly attempted to ascertain whether, and be assured that, Unique's tax obligations were current.

(a) Throughout the relevant period, petitioner regularly sought and received assurances from Mr. Wolland and Mr. Muneses that Unique's financial obligations, including its tax payments, were current. In particular, when petitioner did visit Unique's office, he regularly inquired of Mr. Muneses as to whether Unique was meeting both its current sales tax payments, and its obligations to make regular payments under the deferred payment agreement to retire an arrears balance arising from the earlier sales tax problem.

(b) Mr. Muneses admitted at the hearing that he always responded to petitioner's questions by saying that everything was in order, even on occasions when he knew that not to be the case and, in addition, that on Mr. Wolland's instructions, he withheld from Mr. Russack financial information concerning Unique's disbursements that the latter had requested.

In making those findings, I have relied on testimony of petitioner himself, Mr. Muneses and also Mr. Wolland, the office manager, all of whom I find entirely credible.

In early 1991, Unique filed under Chapter 11 of the Bankruptcy Act.

(a) The period of limitation for assessment against Unique was extended by consents signed by its president, Richard Wolland. The first consent was signed on June 15, 1990 for the period December 1, 1986 through August 31, 1987 and extended the limitation period to

December 20, 1990. The second consent was signed on November 12, 1990 for the period December 1, 1986 through February 29, 1988 and extended the limitation period to June 20, 1991. The third consent was signed on May 30, 1991 for the period December 1, 1986 through August 31, 1988 and extended the limitation period to December 20, 1991.

(b) Two notices of determination were issued to petitioner on April 19, 1991. One was for the quarter ending May 31, 1990 in the amount of $41,025.16 plus penalty and interest and the other for the quarter ending August 31, 1990 in the amount of $139,637.52 plus penalty and interest. Both of these were for taxes shown on returns filed by Unique which were not paid in full.

(c) A further notice of determination was issued against petitioner on August 23, 1991 for the period December 1, 1986 through May 31, 1990 in the amount of $110,951.88 plus interest. This was based on a finding of taxes not reported on any return.

CONCLUSIONS OF LAW

A. Petitioner, Harvey Russack, is not personally liable under Tax Law § 1133(a) for the sales and use taxes of Unique. While he was a vice-president and a director of Unique, he was not also, as required in Tax Law § 1131(1), "under a duty to act for such corporation . . . in complying with any requirement of [the sales and use tax law]." The duties specified by the law are the collection of the tax from the customer, separately stating the tax on any receipt given (Tax Law § 1132), keeping of records (Tax Law § 1135), filing of returns (Tax Law § 1136) and paying over the tax to the State (Tax Law § 1137). These duties are not attributed to Mr. Russack in any way, as chairman or vice-president or otherwise, by the certificate of incorporation or other documents of the corporation nor are they his duties under the actual practices of the business (see, Matter of Autex Corp., Tax Appeals Tribunal, November 23, 1988). Contrary to the arguments of the Division, the liability under Tax Law §§ 1131(1) and 1133(a) is not absolute. With regard to such liability, one court has stated, of a corporate secretary, that:

> "such officer is not held to be an insurer for the corporation (12 N.Y. Jur., Corporations, § 722, supra). This officer is only held to the performance of his

> duties with the ordinary care a normal prudent person would use under similar circumstances, and the officer also may rely on reports and information supplied by other officers (Business Corporation Law, § 715, subd. h, par. 1; see also, Business Corporation Law, § 720). Thus, unless the Legislature expressly provides, there is no sound reason or policy for imposing more stringent standards for personal liability of an officer for payment of sales taxes than such officer would be subject to in other situations" (Matter of Vogel v. Dept. of Taxation & Fin., 98 Misc 2d 222, 413 NYS2d 862, 866).

(The authorities cited in the Vogel case apply, of course, not just to corporate secretaries but to all officers and directors.) Similar rulings have been made by the Tax Appeals Tribunal (Matter of Constantino, Tax Appeals Tribunal, September 27, 1990). I can also note, because New York courts (e.g., Matter of Chevlowe v. Koerner, 95 Misc 2d 388, 407 NYS2d 427) have found section 1133(a) similar to Federal tax provisions, that the Federal courts also have made similar rulings (see, Anderson v. United States, 91-2 US Tax Cas [CCH] ¶ 50,503 [SD Ohio 1991]). In this case, it is completely clear that petitioner was kept in the dark by the deliberate actions of Mr. Wolland, the president, and Mr. Muneses, the treasurer. The rule against absolute liability would be undercut by the Division's arguments that all delegation of duties to Mr. Wolland or Mr. Muneses was improper. These arguments include that petitioner could have arbitrarily fired Mr. Wolland and Mr. Muneses, or petitioner could have (at least if he had learned of the sales tax problem a year earlier) taken control and retrenched the business in various ways to avoid liquidation. The Division's further argument that petitioner's mere attempts to get information showed that, despite the untruthful assurances he received, he was exercising direct responsibility, is simply preposterous.

B.[1] The consents to extend the limitation period against the corporation were signed by the president, Richard Wolland, and are not effective to extend the limitation period as to

---

[1]Although this case is disposed of on the grounds stated in paragraph "A", I must, under the instructions of the Tax Appeals Tribunal in Matter of United States Life Ins. Co. (Tax Appeals Tribunal, March 24, 1994), continue and discuss, in paragraphs "B", "C" and "D", the other issues raised in this case. In United States Life Ins. Co., the Tribunal stated that the Administrative Law Judge "should, as a general rule, address every issue raised by the parties in the proceeding before them so long as the issue has not been subsequently abandoned by the parties."

petitioner, another officer of the corporation. The extension of a limitation period for an assessment is permitted by Tax Law § 1147(c) where there is a consent signed by the "taxpayer". The consent form used refers only to the amount of sales and use taxes "due from the vendor", Unique, and provides for a signature by the vendor. It in no way purports to refer to any other "person required to collect tax" as defined in Tax Law § 1131(1), such as the officers of the corporation. I note that the former State Tax Commission had ruled that an extension would not bind an officer who had already resigned when the consent was signed, although he was of course a person required to collect tax for part of the period in question under Tax Law § 1131(1) (Matter of Rossi, State Tax Commission, September 16, 1983 [TSB-H-83(216)S]). Any cases applying the consent to the officer who signed the consent, in his individual capacity, must stand on a different footing (see, Matter of Najjar, State Tax Commission, February 24, 1987 [TSB-H-87(78)S]; see also [with respect to Federal income tax cases] Newton v. United States, 1978-2 US Tax Cas [CCH] ¶ 9806 [ND Ga 1978]). The limitation period of Tax Law § 1147(b) dates from "the filing of a return." In the case of an assessment against an officer, the return specified cannot be the return of the officer since he files no return (under Tax Law § 1134[b] only registered vendors file returns). The return specified must be the return of the corporation (see, Matter of Mast, Tax Appeals Tribunal, July 29, 1993). Any other reading of the statute would result in an unlimited limitation period against officers which would be unconscionable (especially where, as often happens, the corporation has already been liquidated and records and witnesses are no longer available) and thus should be avoided. (This issue affects the notice of determination issued on August 23, 1991 with respect to the six sales tax quarters from December 1, 1986 through May 31, 1988.)

C. Petitioner, if he is liable for the taxes of his corporate employer, would be liable also for the penalties and interest due on those taxes. Tax Law § 1145(a)(1)(i) provides that:

> "any person failing to file a return or to pay or pay over any tax . . . shall be subject to a penalty of ten percent of the amount of tax due . . . ."

(This section also provides for interest at specified percentages of tax due.) The regulation under this section, 20 NYCRR 536.1, refers to the return and payment provisions of 20 NYCRR 533.3 and 533.4, and thus to Tax Law §§ 1136 and 1137. Those sections require the filing of returns and payment of tax by persons who are registered vendors under Tax Law § 1134. Petitioner argues that he, as an officer of a vendor corporation, would not be liable for penalty and interest because Tax Law § 1133(a), imposing liability on an officer, specifies only "tax" and thus he is protected from liability for such penalty and interest. In support of this construction, he cites the express holding in the case of Laks v. Division of Taxation (183 AD2d 316, 590 NYS2d 958) a Fourth Department case in 1992. In Laks, the court said that if the Legislature had so intended to refer to penalties and interest, it could have explicitly said so, citing Matter of Velez v. Division of Taxation (152 AD2d 87, 547 NYS2d 444). Velez dealt with the liability of a purchaser of business assets for the taxes of the seller of the business, which the business did not file for or pay over. The court states that Tax Law § 1141(c), providing for such transferee liability, does not also mention penalty and interest and therefore such penalty and interest did not apply to a transferee.

The Division, to the contrary, relies on Matter of Hall v. Tax Appeals Tribunal (176 AD2d 1006, 574 NYS2d 862), an Appellate Division, Third Department case in October 1991 which had confirmed a decision of the Tax Appeals Tribunal of March 22, 1990. The Hall case, just as this case, deals with the liability of an officer of a corporation for the taxes of that corporation which the corporation did not file for or pay over. Tax Law § 1145 dealing with penalties does not expressly refer to officers of corporations or other persons liable under Tax Law § 1133(a) and Tax Law § 1133(a) does not mention penalties and interest. However, the court said that, in contrast to the case of purchasers of business assets dealt with in Velez (supra), Tax Law § 1145(a) imposes penalty and interest on "any person" who fails to timely file and pay. This, as I have said, confirmed the decision of the Tax Appeals Tribunal. The Tribunal in the Hall case had pointed out that the officer is liable as a "person required to collect tax" under Tax Law § 1131(1) for the tax because he was under a duty to act for the corporation

in filing and paying the tax of the corporation. The Tribunal then reasoned that the requirements to file and pay the tax are among the most essential under the law and are imposed on corporate officers as "persons" under Tax Law § 1131(1), thus "there is a clear and logical integration" with the provisions of Tax Law § 1145(a)(1) with respect to liability for penalty and interest on the tax.

Whatever the merits of this controversy, my own course is clear. I am bound by the decisions of the Tax Appeals Tribunal and the courts. The Tax Appeals Tribunal has already decided that it will follow its own previous decisions in Hall as affirmed by the Third Department (Matter of Basile, Tax Appeals Tribunal, December 2, 1993; Matter of Layden, Tax Appeals Tribunal, November 3, 1994). I can add that the Laks case on which petitioner relies has, during the course of these proceedings, been overruled in the Fourth Department (Lorenz v. Division of Taxation, ___ AD2d ___, 1995 WL 42065 [4th Dept 1995]). It does this in view of the Hall case and the Tribunal's earlier decision in Matter of DACS Trucking (March 21, 1991). The Hall case is described above. The DACS case was a decision of the Tax Appeals Tribunal which had followed the Tribunal's decision in Hall reversing a determination of the Division of Tax Appeals issued prior to Hall. The Lorenz court states further:

> "Therefore, to the extent that our decision in Laks can be read as holding that a corporate agent may not be held liable for penalties and interest, it is no longer to be followed" (Lorenz v. Division of Taxation, supra).

In short, I must find against petitioner on this issue.

D. Petitioner has not shown any reasonable cause why Unique did not file or pay sales and use taxes. The delinquency penalty at issue here is assessed under Tax Law § 1145(a)(1)(i) for the failure of the corporation in filing and paying taxes. The reasonable cause and lack of willful neglect relevant to the power to remit the penalty must refer to that of the corporation and not the individual. In this case, it is clear that the primary cause of the delinquency was the actions of the corporation's president, Mr. Wolland. So far as it appears, these actions were for the benefit of the corporation and not of Mr. Wolland personally and they must be attributed to the corporation. Clearly, those activities do not come within the terms of the regulation

defining reasonable cause (20 NYCRR 536.5). Petitioner argues, in part, that at least he, and presumably the corporation, relied on the independent certified public accountant, David Berdon and Co. Even if this would be a valid excuse, it has not been shown in this case that the certified public accountant was conducting full audits that could be thus relied on.

E. I wish to say that in this case the attorneys for both sides did an unusually fine job in representing their respective interests.

F. The petition of Harvey Russack, officer of Nohos Unique Clothing Warehouse, Inc., is granted and the notices of determination issued April 19, 1991 and August 23, 1991 are cancelled.

DATED: Troy, New York
April 13, 1995

/s/ Nigel G. Wright
ADMINISTRATIVE LAW JUDGE