

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOHN D. HUNT	:	DETERMINATION
	:	DTA NO. 817036
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, 1992 through May 31, 1995.	:	

Petitioner, John D. Hunt, 31 Jenna Court, Holbrook, New York 11741, 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 June 1, 1992 through May 31, 1995.

The Division of Taxation, appearing by Terrence M. Boyle, Esq. (Robert A. Maslyn, Esq., of counsel), brought a motion to dismiss on the grounds that the petition failed to state a cause for relief. Together with its notice of motion, the Division of Taxation submitted an affirmation in support of its motion, with attachments. Petitioner, appearing by Arthur Mandell, CPA, did not respond to the motion. Petitioner's response was due on November 17, 1999,¹ which date began the 90-day period for the issuance of this determination.

Upon review of the pleadings, and the affirmation and other documents submitted in support of the Division of Taxation's motion, Roberta Moseley Nero, Administrative Law Judge, renders the following determination.

¹In determining the due date for petitioner's response pursuant to 20 NYCRR 3000.5(b), it was assumed that the Division's motion was served on the day it was filed, October 18, 1999.

ISSUE

Whether the petition should be dismissed for failure to state a cause for relief.

FINDINGS OF FACT

1. On December 9, 1996 the Division of Taxation ("Division") issued to petitioner a notice of determination (notice number L-012955241-3) for sales and use taxes due for the period June 1, 1992 through November 30, 1993 for \$12,235.24 in tax, plus penalty and interest.

On February 3, 1997, the Division issued to petitioner a notice of determination (notice number L-013141635-1) for sales and use taxes due for the period December 1, 1993 through May 31, 1995 for \$30,291.98 in tax, plus penalty and interest.

Both of these notices specifically stated:

This notice is issued because you are liable as an Officer/Responsible Person for taxes determined to be due in accordance with sections 1138(a), 1131(1), and 1133 of the New York State Tax Law.

Our records indicate that you are/were an Officer/Responsible Person of:
FORESS SYSTEMS INC.

2. Foress Systems, Inc. filed for Chapter 7 bankruptcy in the United States Bankruptcy Court for the Southern District of New York on November 20, 1996. On February 24, 1997, the Division filed a proof of claim against Foress Systems, Inc. with the Bankruptcy Court. The notice of claim included claims against Foress Systems, Inc. for sales and use taxes due for the same periods as are at issue in the present proceeding.

3. On January 8, 1999, a conciliation order was issued to petitioner reducing the tax due to \$282.97 for notice number L-012955241-3 and \$7,469.81 for notice number L-013141635-1, plus applicable interest for each notice and canceling the penalty for both notices.

4. On April 6, 1999 the present petition was filed with the Division of Tax Appeals contesting the recomputed amount of tax due as set forth in the conciliation order. In the section of the petition where petitioner is to allege the errors made by the Division and to assert facts in support of the petition, petitioner stated as follows:

Petitioner was assessed as a responsible officer of Foress Systems, Inc. as a result of a sales & use tax audit of that corporation (ID #112693937) for the period 6/1/92 to 5/31/95. Foress Systems, Inc. filed for bankruptcy under Chapter 7 of the Bankruptcy Code, US Bankruptcy Court, Southern District of New York, Index No. 96B-45172-JLG. I have been advised by Ira Spiegel, accountant for the trustee, that collection procedures underway should produce adequate funds to fully resolve the corporate tax liability. Since any settlement reached by the Chapter 7 trustee impacts petitioner's liability, petitioner respectfully requests a redetermination of the conciliation order issued based upon that expected settlement.

There is no assertion in the petition that the Division made any error in its audit of Foress Systems, Inc., or that petitioner was not a person responsible for the collection and payment of sales and use taxes on behalf of Foress Systems, Inc.

CONCLUSIONS OF LAW

A. The Division has brought a motion to dismiss the petition in this matter for failure to state a cause for relief (Tax Law § 2006[5][vi]; 20 NYCRR 3000.9[a][1][vi]). It is concluded that there are no facts at issue in this matter.² Furthermore, petitioner does not assert that the Division made any error in its audit of Foress Systems, Inc., or that petitioner was not a person responsible for the collection and payment of sales and use taxes on behalf of Foress Systems, Inc., pursuant to Tax Law § 1133. The only assertion made by petitioner is that since Foress Systems, Inc. is in bankruptcy, and petitioner has been informed that the corporate liability is

² Findings of Fact "1" and "2" are based upon the evidence submitted by the Division. However, as these facts merely amplify those set forth in the petition, and do not conflict in any manner with the facts as set forth in the petition, it cannot be found that there are any facts in issue.

expected to be paid in full, petitioner's liability should be recomputed based upon this "expected" payment. This is a question of law that may be decided by a motion to dismiss for failure to state a cause for relief (*Matter of Barr*, Tax Appeals Tribunal, February 15, 1996; *see also, Rosner v. Paley*, 65 NY2d 736, 492 NYS2d 13, 14). Therefore, the only question to be resolved is if, as a matter of law, the petition as filed requests any type of relief that can be granted by the Division of Tax Appeals (*Matter of Barr, supra*).

B. Petitioner has failed, as a matter of law, to state a cause for relief. The fact that a corporation has filed for bankruptcy does not affect the ability of the Division to proceed against corporate officers or other responsible persons for the collection of sales tax, as these liabilities are separate and distinct (*see, Matter of Barr, supra; Matter of Swanson*, Tax Appeals Tribunal, November 4, 1993; *Matter of Kadish*, Tax Appeals Tribunal, November 15, 1990). Furthermore, the Tax Appeals Tribunal specifically held in *Matter of Barr (supra)*, that where a petition is filed requesting only that proceedings concerning a corporate officer's personal liability be held in abeyance pending corporate bankruptcy proceedings, it does not state a claim for relief and must be dismissed on motion of the Division.³ If such a proceeding cannot be held in abeyance as a matter of law, there is certainly no authority to modify petitioner's liability by the amount of any "expected" payments on behalf of Forness Systems, Inc.

³ As pointed out by the Division in its papers in support of this motion, payment of the corporate liability on which petitioner's liability is based, will result in an adjustment to petitioner's liability (*Halperin v. Chu*, 134 Misc 2d 105, 509 NYS2d 692, 694, *affd* 138 AD2d 915, 526 NYS2d 660, *lv denied, appeal dismissed* 72 NY2d 938, 532 NYS2d 845; *Matter of Kadish, supra*).

C. The petition of John D. Hunt is dismissed for failure to state a cause for relief pursuant to Tax Law § 2006(5)(vi) and 20 NYCRR 3000.9(a)(vi).

DATED: Troy, New York
February 3, 2000

/s/ Roberta Moseley Nero
ADMINISTRATIVE LAW JUDGE