

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
NORMAN S. HOLLANDER : DETERMINATION
for Revision of a Determination or for Refund : DTA NO. 819005
of Sales and Use Taxes under Articles 28 and :
29 of the Tax Law for the Period June 1, 1995 :
through February 28, 1999. :

Petitioner, Norman S. Hollander, 10 Valentine Drive, Albertson, New York 11507, 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, 1995 through February 28, 1999.

A small claims hearing was held before Dennis M. Galliher, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on March 30, 2004 at 1:15 P.M., with all briefs to be submitted by May 15, 2004, which date began the three-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Mark F. Volk, Esq. (Wiltsie Finch).

ISSUE

Whether petitioner had sufficient involvement in and control over the activities of Quality Gutter Supply Corp. so as to be considered a person responsible to collect and remit sales and use taxes on behalf of such entity pursuant to Tax Law §§ 1131(1) and 1133(a).

FINDINGS OF FACT

1. By a contract of sale dated November 16, 1998, Elmar Holdings Corporation, whose two equal shareholders were petitioner, Norman S. Hollander, and David Fusilier, purchased the real estate and business operations of Quality Gutter Supply Corp., Inc. (“Quality”). This transaction closed on January 13, 1999. Quality, a manufacturer and supplier of gutter products, was a New Jersey business started by Emanuel Logothetis and Charles Willey and continued by their sons, Peter Logothetis and Richard Willey. Quality’s business included sales of gutter products to customers located in New York, with deliveries made to such customers via Quality’s delivery truck. Quality was not a registered vendor for New York sales tax purposes and did not file New York sales tax returns or remit New York sales tax during the period in issue.

2. The Division of Taxation (“Division”) conducted a sales tax field audit of Quality’s business for the period June 1, 1995 through November 30, 1999. It is undisputed that, by letters dated June 7, 1999 and October 16, 2000, the Division properly requested Quality to make available for audit review all of its records, including specifically those related to sales and use taxes, for the audit period. It is also undisputed that Quality did not have or make available for audit complete books and records, including specifically sales invoices or sales records. Among those sales records which were available were lists of customers, including New York customers, for the years 1997, 1998 and 1999, and a list of total sales to each New York customer for the year 1999. This latter information, however, provided no specific dates on which the sales occurred, but rather only listed the total amount of sales to each New York customer for 1999.

3. Using the limited amount of information provided, including a detailed review of the total sales to New York customers for the year 1999, the Division's auditor calculated Quality's gross sales to be \$26,734,775.00 for the audit period, its sales to New York customers to be \$2,447,177.00 for the audit period, and its New York sales tax liability thereon to be \$201,892.10.

4. On November 24, 2000, the Division issued to petitioner a Notice of Determination assessing sales tax due for the period June 1, 1995 through February 28, 1999 in the amount of \$201,892.10, plus penalty and interest. This notice was based upon the foregoing audit results and was issued to petitioner as a person responsible to collect and remit sales and use taxes on behalf of Quality per Tax Law §§ 1131(1) and 1133(a).

5. Petitioner challenged the notice by requesting a conciliation conference with the Division's Bureau of Conciliation and Mediation Services. A conciliation conference was held and, by a Conciliation Order (CMS No. 183871) dated February 22, 2002, the amount assessed against petitioner was reduced to \$20,976.26, plus penalty and interest. This remaining amount assessed against petitioner represents the tax due on Quality's sales to New York customers for the year 1999 only, in recognition that petitioner did not own or operate Quality prior to 1999, and for which petitioner was unable to supply a valid sales tax exemption document.

6. Petitioner continued his challenge against the remaining reduced assessment by filing a petition with the Division of Tax Appeals. Petitioner has offered no evidence to refute the dollar amount of tax remaining in issue. In this regard, petitioner asserts that he attempted to obtain additional sales tax exemption documents from Quality's customers, but was unsuccessful. Petitioner also notes that all of Quality's records were turned over to the Trustee as part of Quality's Chapter 7 bankruptcy proceeding on April 18, 2001. In this regard, petitioner

explained that Quality's former co-owner, Richard Willey, allegedly in violation of an agreement not to compete with Quality after its sale to petitioner and David Fusilier, nonetheless opened a gutter products business directly across the street from Quality's premises. This action resulted in the loss of customers as well as a great deal of work, a severe deterioration of Quality's business condition and, ultimately, its move to seek bankruptcy protection. Petitioner also explained that his co-owner of Quality, David Fusilier, stole money, as well as computers and business records, from Quality's premises.

7. Petitioner admitted that he and David Fusilier were equal shareholders of Quality (through Elmar). He described his area of responsibility as sales and marketing, with Mr. Fusilier's area being financial matters and tax reporting. Petitioner also admitted that he and David Fusilier were officers of Elmar doing business as Quality, although he did not specify which particular corporate officer titles each held. Petitioner signed the purchase agreement with respect to the acquisition of Quality's premises and its business, but averred that he had no check signing authority on behalf of Quality.

SUMMARY OF PETITIONER'S POSITION

8. Ultimately, petitioner alleges that Quality's business was ruined by the combined impact of Richard Willey's opening a competing business across the street together with the financial mismanagement and theft of money and equipment by David Fusilier. Petitioner alleges that there are funds available to the Division to satisfy the outstanding liability at issue via the results of lawsuits filed by Quality against Mr. Willey and others, and that the Division should also pursue David Fusilier (in addition to petitioner) as a person responsible for the amount at issue herein.

CONCLUSIONS OF LAW

A. The issue in this case concerns petitioner’s potential liability for unpaid sales and use taxes, and attendant penalty and interest. Exposure to such liability arises under Tax Law § 1133(a), which states that:

Every person required to collect any tax imposed by this article [Article 28] shall be personally liable for the tax imposed, collected or required to be collected under this article. . . .

Tax Law § 1131(1), in turn, defines “persons required to collect tax” and a “person required to collect any tax imposed by this article [Article 28]” to include any officer or employee of a corporation who, as such officer or employee, is “under a duty to act for such corporation in complying with any requirement of [Article 28].”

B. The mere holding of corporate office does not, *per se*, impose sales tax liability upon an officeholder (*see, Vogel v. New York State Dept. of Taxation & Fin.*, 98 Misc 2d 222, 413 NYS2d 862; *Chevlowe v. Koerner*, 95 Misc 2d 388, 407 NYS2d 427, 430; *Matter of Unger*, Tax Appeals Tribunal, March 24, 1994, *confirmed* 214 AD2d 857, 625 NYS2d 343, *lv denied* 86 NY2d 705, 632 NYS2d 498). Rather, whether a person is an officer or employee liable for tax must be determined based upon the particular facts of each case (*see, Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022, 513 NYS2d 564; *Stacey v. State*, 82 Misc 2d 181, 368 NYS2d 448; *Chevlowe v. Koerner, supra*, 407 NYS2d at 429; *Matter of Hall*, Tax Appeals Tribunal, March 22, 1990, *confirmed* 176 AD2d 1006, 574 NYS2d 862; *Matter of Martin*, Tax Appeals Tribunal, July 20, 1989, *confirmed* 162 AD2d 890, 558 NYS2d 239; *Matter of Autex Corp.*, Tax Appeals Tribunal, November 23, 1988). Factors to be considered, as set forth in the Commissioner’s regulations, include whether the person was authorized to sign the corporate tax

return, was responsible for managing or maintaining the corporate books or was permitted to generally manage the corporation (20 NYCRR 526.11[b][2]). As summarized in *Matter of Constantino* (Tax Appeals Tribunal, September 27, 1990):

[t]he question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and the decisions of this Tribunal have identified a variety of factors as indicia of responsibility: the individual's status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual's knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; the individual's economic interest in the corporation (*Cohen v. State Tax Commn.*, *supra*, 513 NYS2d 565; *Blodnick v. State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536,538, *appeal dismissed* 69 NY2d 822, 513 NYS2d 1027; *Vogel v. New York State Dept. of Taxation & Fin.*, *supra*, 413 NYS2d at 865; *Chevlowe v. Koerner*, *supra*, 407 NYS2d at 429; *Matter of William D. Barton*, [Tax Appeals Tribunal, July 20, 1989]; *Matter of William F. Martin*, *supra*; *Matter of Autex*, *supra*).

C. Summarized in terms of a general proposition, the issue to be resolved is whether petitioner had, or could have had, sufficient authority and control over the affairs of the corporation to be considered a person under a duty to collect and remit the unpaid taxes in question (*Matter of Constantino*, *supra*; *Matter of Chin*, Tax Appeals Tribunal, December 20, 1990). In order to prevail, "petitioner was required to establish by clear and convincing evidence that he was not an officer having a duty to act on behalf of the corporation, i.e., that he lacked the necessary authority or he had the necessary authority, but he was thwarted by others in carrying out his corporate duties through no fault of his own [citations omitted]" (*Matter of Goodfriend*, Tax Appeals Tribunal, January 15, 1998).

D. As a starting point, it is clear that petitioner bears the burden of proof to overcome the presumed correctness of the Division's assessment (*Matter of Mera v. Tax Appeals Tribunal*,

204 AD2d 818, 611 NYS2d 716; *Matter of Blodnick v. State Tax Commn., supra.*) In turn, upon review of the entire record, it becomes clear that petitioner has not met this burden and is properly held responsible for the sales tax obligation in issue.

E. As set forth in the Findings of Fact, petitioner owned 50 percent of the stock of Elmar doing business as Quality, was an officer of the corporation, and signed the purchase agreement by which he and Mr. Fusilier acquired Quality's business. Petitioner did not dispute his status or involvement in Quality and its business activities, and there is no evidence to show that petitioner did not have or could not have exercised sufficient authority and control over Quality's affairs so as to be excused from responsibility for its tax obligations (*see, Matter of Shah*, Tax Appeals Tribunal, February 25, 1999).

F. The principal arguments advanced by petitioner are that the Division should have pursued David Fusilier who was also allegedly responsible as a shareholder and officer of the corporation, and that sufficient funds exist and will be available to satisfy the liability in question. These arguments are unavailing. The Division is under no obligation to pursue other allegedly responsible persons before proceeding against petitioner (*see, Matter of Risoli v. Commissioner of Taxation and Finance*, 237 AD2d 675, 654 NYS2d 218). Further, petitioner's assertion that sufficient funds exist to pay off the assessment at issue is irrelevant to the question of petitioner's status as a person responsible for the payment of such assessment.¹ Petitioner was properly held responsible for the sales tax obligation, including the accompanying

¹ Any payments or recoveries applicable to the same period for which petitioner is assessed, which serve to reduce the amount of tax, penalty or interest due for such period, would inure to petitioner's benefit and likewise reduce the assessment against petitioner (Tax Law § 1138[a][3][B]; *see, Matter of Halperin v. Chu*, 138 AD2d 915, 526 NYS2d 660, *appeal dismissed in part, denied in part*, 72 NY2d 938, 532 NYS2d 845).

penalty and interest, imposed with regard to Quality's nonpayment of sales taxes for the period remaining in issue.

E. The petition of Norman S. Hollander is hereby denied and the Notice of Deficiency dated November 24, 2000, as reduced pursuant to the Conciliation Order dated February 22, 2002, together with penalty and interest thereon, is sustained.

DATED: Troy, New York
August 5, 2004

/s/ Dennis M. Galliher
PRESIDING OFFICER