

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
LLOYD W. MILNE : DETERMINATION
for Revision of a Determination or for Refund of Sales : DTA NO. 819152
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Period June 1, 1993 through February 28, 1998. :

Petitioner, Lloyd W. Milne, 17 Columbine Lane, Norwalk, Connecticut 06851, 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, 1993 through February 28, 1998.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on May 6, 2003 at 10:30 A.M., with all briefs to be submitted by October 7, 2003, which date began the six-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Mark F. Volk, Esq. (Robert A. Maslyn, Esq., of counsel).

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.

IV. Whether petitioner's obligation for the unpaid sales tax at issue was discharged in a bankruptcy proceeding.

FINDINGS OF FACT

1. 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.

2. 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.

3. 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 23rd 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.

4. 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.

5. 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.

6. 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.

7. 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.

8. 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.

9. 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.

10. 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.

11. 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.

12. 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.

13. 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.

14. 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.

15. 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.

16. 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.

17. 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

18. 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

19. 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.

CONCLUSIONS OF LAW

A. Tax Law § 1133(a) imposes upon any person required to collect the tax imposed by Article 28 of the Tax Law personal liability for the tax imposed, collected or required to be collected. 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 (Tax Law § 1131[1]). Petitioner bears the burden of proof to show that he was not such a person (*see*, 20 NYCRR 3000.15[d][5]).

B. The holding of corporate office does not automatically impose tax liability upon an office holder (*Chevlowe v. Koerner*, 95 Misc 2d 388, 407 NYS2d 427). Rather, the resolution of whether a person is responsible for collecting and remitting sales tax for a corporation so that the person would have personal liability for the taxes not collected or paid depends on the facts of each case (*Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022, 513 NYS2d 564; *Stacy v. State*, 82 Misc 2d 181, 368 NYS2d 448). The Commissioner's regulations examine whether the person is authorized to sign the corporation's tax returns, is in charge of maintaining corporate records, or is responsible for managing the corporation (20 NYCRR 526.11[b][2]). In *Matter of Constantino* (Tax Appeals Tribunal, September 27, 1990), the Tax Appeals Tribunal stated:

The 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 [citations omitted] (*Matter of Constantino, supra*).

C. The facts in this case indicate that petitioner was a responsible officer of the corporation. He was a 50 percent shareholder of the corporation, and while the corporation did not place much importance on titles, he was the president and treasurer during the period at issue. With respect to the operations of the corporation, petitioner was responsible for collecting receivables and for the corporation's financial statements. Later, he became purchasing agent and shipper. He had access to the corporation's books and records, and he prepared and filed the corporation's Federal income tax returns and New York corporate returns. He also prepared, but did not file, the corporation's New York sales tax returns. Although he did not receive a salary

because of the corporation's financial difficulties, he did work full time at the corporation and also made (and ultimately lost) a substantial personal investment in the corporation. Petitioner also had the authority to sign checks on behalf of the corporation, but chose not to exercise that authority. The foregoing facts indicate 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 (*see, Matter of Constantino, supra*). That petitioner did not sign corporate checks during the period at issue does not weigh significantly in his favor because he chose not to sign; he was not prevented from signing (*see, Matter of DeFeo*, Tax Appeals Tribunal, March 9, 1995). He thus consented to an arrangement whereby Lourie was responsible to pay the corporation's liabilities. Such an arrangement does not excuse petitioner from responsibility (*see, Matter of LaPenna*, Tax Appeals Tribunal, March 14, 1991).

Additionally, as the Division correctly notes in its brief, it is not a defense to petitioner's position that another party (in this case Lourie) may also be liable for taxes due from the corporation. Tax Law § 1133(a) creates joint and several liability for unpaid sales tax. The Division thus was not obligated to collect unpaid sales tax (plus penalty and interest) from other responsible officers.

Finally, petitioner's resignation from the corporation as of June 1, 1996 and Lourie's subsequent refusal to allow access to the corporate records does not relieve petitioner from responsibility with respect to the period of his involvement. Such responsibility runs from the time taxes are due (*see, Matter of Kadish*, Tax Appeals Tribunal, November 15, 1990).

D. 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. Under such circumstances the Division was authorized to estimate

the corporation's sales tax liability (Tax Law § 1138[a][1]; *Matter of Licata v. Chu*, 64 NY2d 873, 487 NYS2d 552). Any audit methodology utilized by the Division to estimate sales must be reasonably calculated to reflect taxes due, but exactness in the outcome of the audit is not required (*Matter of Markowitz v. State Tax Commn.*, 54 AD2d 1023, 388 NYS2d 176, 177, *affd* 44 NY2d 684, 405 NYS2d 454; *Matter of Lefkowitz*, Tax Appeals Tribunal, May 3, 1990). The burden rests with the petitioner to show by clear and convincing evidence that the methodology was unreasonable or that the amount assessed was erroneous (*Matter of Meskouris Bros. v. Chu*, 139 AD2d 813, 526 NYS2d 679; *Matter of Surface Line Operators Fraternal Org. v. Tully*, 85 AD2d 858, 446 NYS2d 451, 452).

E. In this case, in the absence of any other records, the Division estimated tax due for the period at issue on the basis of gross receipts as reported on the corporation's Federal income tax returns. The Division presumed that all of the corporation's gross receipts were subject to sales tax. 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 (*see, e.g., Matter of Scotto*, Tax Appeals Tribunal, January 16, 1992; *Matter of House of Audio of Lynbrook*, Tax Appeals Tribunal, January 2, 1992; *Matter of Sidel*, Tax Appeals Tribunal, July 3, 1991). The Division's presumption that all of the corporation's sales were taxable is consistent with Tax Law § 1132(c), which provides that all transactions upon which sales tax is imposed are subject to sales tax until the contrary is established and places the burden of proving that any receipt is nontaxable upon the person required to collect the tax. Given the lack of evidence of exempt sales during the relevant period, it was not error for the Division to rely on the statutory presumption of Tax Law § 1132(c). The Division's decision not to make any allowance for exempt or nontaxable sales is also consistent with the large amount of sales tax liability indicated

by the balance sheet on the Federal returns. Such liability is not consistent with a high percentage of exempt sales. Petitioner has thus failed to meet his burden of establishing error in either the audit method or results.

F. The Division asserted penalty herein pursuant to Tax Law § 1145(a)(1)(i). Tax Law § 1145(a)(1)(i) states that any person failing to file or pay over any sales or use tax to the Commissioner of Taxation and Finance (“the Commissioner”) “shall” be subject to a penalty. This penalty may be canceled if the Commissioner determines that the failure was “due to reasonable cause and not due to willful neglect” (Tax Law § 1145[a][1][iii]). Consistent with this statute, the Commissioner’s regulations provide that penalty imposed under Tax Law § 1145(a)(1)(i) “must be imposed unless it is shown that such failure was due to reasonable cause and not due to willful neglect” (20 NYCRR 2392.1[a][1]). Reasonable cause includes any cause for delinquency which would appear to a person of ordinary prudence and intelligence as reasonable cause for the delay in filing a tax return and paying the tax imposed under Articles 28 and 29 (*see*, 20 NYCRR 2392.1[d]).

G. Petitioner has not established 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, penalty must be sustained. Petitioner asserts that the penalty should be abated because he 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.” This assertion is rejected. As noted previously herein, petitioner was a responsible officer of the corporation. As such, petitioner was under a duty to act for such corporation in complying with the requirements of Article 28. Such requirements include the filing of returns and the remittance of tax and are not limited to the internal preparation of

returns, for it is well established that “corporate officials responsible as fiduciaries for tax revenues cannot absolve themselves merely by disregarding their duty and leaving it for someone else to discharge” (*Matter of Ragonesi v. State Tax Commn.*, 88 AD2d 707, 451 NYS2d 301). Petitioner’s assertion thus does not constitute evidence of reasonable cause for his failure. Furthermore, petitioner’s knowledge that the corporation failed to file returns and failed to pay sales tax over the entire three-year period at issue indicates willful neglect by petitioner and supports the imposition of penalties.

H. Petitioner asserts that he was relieved of the liability at issue by the bankruptcy discharge order dated May 7, 2002. This contention, too, is rejected. Liability for sales tax, which is required to be collected by a seller from its customer (*see*, Tax Law § 1132[a]), is governed by the “trust fund” provisions of the Bankruptcy Code and is not dischargeable in bankruptcy (*see, DeChiaro v. New York State Tax Commn.*, 760 F2d 432 [2nd Cir]; 11 USC 507[a][8][C]; 523[a][1][A]).

I. The petition of Lloyd W. Milne is denied and the Notice of Determination dated March 29, 2001 is sustained.

DATED: Troy, New York
January 29, 2004

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE