

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
ELLEN E. BULLWINKEL : DETERMINATION
for Revision of a Determination or for Refund of Sales : DTA NO. 819228
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Period December 1, 1998 through February 28, :
2001.

Petitioner, Ellen E. Bullwinkel, 9 Sparrow Lane, Huntington, New York 11743, 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, 1998 through February 28, 2001.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on August 29, 2003 at 10:30 A.M., with all briefs to be submitted by December 1, 2003, which date began the six-month period for the issuance of this determination. Petitioner appeared by Milton Shaiman, Esq. The Division of Taxation appeared by Mark F. Volk, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether petitioner was personally liable for the sales and use taxes due on behalf of Fyfe and Drum Tavern, Inc., as a person required to collect and pay such taxes under Tax Law §§ 1131(1) and 1133(a).

FINDINGS OF FACT

1. On October 29, 2001, the Division of Taxation (“Division”) issued four¹ notices of determination as follows:

| Period Ended | Tax | Interest | Penalty | Credits | Total Due |
|----------------------|----------|----------|---------|---------------------|-----------|
| 2-28-99 | 2,519.55 | 834.02 | 747.36 | 735.36 ² | 3,365.57 |
| 5-31-99 | 2,527.80 | 826.93 | 758.18 | 0.00 | 4,112.91 |
| 5-31-00 | 2,114.50 | 374.45 | 549.69 | 0.00 | 3,038.64 |
| 2-28-01 ³ | 2,482.47 | 188.81 | 421.98 | 0.00 | 3,093.26 |

Each of the notices indicated that petitioner was being held liable as an officer/responsible person of Fyfe and Drum Tavern, Inc.

2. For the sales tax quarters ended February 28, 1999 and May 31, 1999, the corporation late filed a nonremit sales tax return on October 21, 1999 and September 20, 1999, respectively. For the quarter ended May 31, 2000, the corporation filed a sales tax return late, but the check remitted in payment of tax due was dishonored.

¹ Notices of estimated determination were also issued to petitioner for the quarters ended August 31, 2000 and November 30, 2000 in the amounts (including interest and penalty) of \$3,409.20 and \$3,251.05, respectively. Estimated sales tax was assessed because, as of the date of issuance, the corporation (Fyfe and Drum Tavern, Inc.) had filed no sales tax returns for these quarters. These assessments were later canceled by the Division due to the fact that the corporation filed returns for the quarters corresponding to these assessments.

² This credit resulted in a payment of \$735.36 from an income execution on Gino Taliercio.

³ The notice for the quarter ended February 28, 2001 was also a Notice of Estimated Determination due to the fact that the corporation had not filed a tax return for this sales tax quarter. On or about June 20, 2002, the corporation filed nonremit returns for the quarters ended August 31, 2000, November 30, 2000 and February 28, 2001. While the assessments for the quarters ended August 31, 2000 and November 30, 2000 were subsequently canceled by the Division (*see*, Footnote “1”) because they reflected tax due for these quarters, the assessment for the quarter ended February 28, 2001 was not canceled because the return reported tax due of \$0.00.

3. For the sales tax quarter ended February 28, 2001, the Division, in its amended answer to the petition,⁴ adjusted the assessment based upon a return filed for this quarter to reflect a penalty of \$50.00 for late filing pursuant to Tax Law § 1145(a)(1)(i), but assessed no tax or interest for this quarter.

4. Fyfe and Drum Tavern, Inc. initially applied for and was granted a liquor license to operate a tavern known as the Fyfe and Drum Tavern at 570 Suffolk Avenue, Brentwood, New York in 1975. Gino Taliercio, the boyfriend of petitioner, worked as a bartender at the tavern for the owner, Georgia Grant. In or about 1992, Mr. Taliercio was informed by the owner of the tavern that if he was able to obtain a liquor license, she would sell the tavern to him. Mr. Taliercio was advised by his attorney that due to some incidents in his past, he would likely have difficulty in obtaining the liquor license. Therefore, he convinced petitioner to apply for the license in her name.

5. Petitioner thereupon agreed to purchase the stock of Fyfe and Drum Tavern, Inc. for approximately \$80,000.00. Petitioner signed a note in that amount which was payable to the prior owners of the corporate stock and she also signed the lease for the premises.

6. While neither petitioner nor Mr. Taliercio had any recollection of ever having seen the corporation's bylaws or having attended any meetings of the corporation's board of directors, the Application for Approval of Corporate Change filed with the State Liquor Authority in 1992 indicates that petitioner was the president/director of the corporation and was the sole stockholder, owning 200 shares of common stock of the corporation. Neither petitioner nor Mr.

⁴ Leave to file an amended answer was requested by the Division on April 4, 2003 and was granted pursuant to a letter of the Assistant Chief Administrative Law Judge of the Division of Tax Appeals on April 8, 2003.

Taliercio know the whereabouts of the corporate books (including the stock certificates) and petitioner admitted that she never asked to see the corporate books.

7. In March 1997, petitioner, as president, and Gino Taliercio, as secretary, signed a Corporate Resolution Bank Account Loan Authority Security Agreement with European American Bank granting either petitioner or Mr. Taliercio authority to be the signatory for corporate bank accounts.

8. During the first year after petitioner purchased the stock of the Fyfe and Drum Tavern, she visited the premises with some degree of regularity. However, Mr. Taliercio managed the entire operation. Petitioner performed no work at the tavern. After the first year of her ownership, Mr. Taliercio told petitioner not to come to the tavern because he felt that the atmosphere was not right for her. In addition, petitioner admitted that she stopped coming to the tavern because "I couldn't take being in the place."

9. Petitioner signed some checks and documents on behalf of the corporation and authorized Mr. Taliercio to sign her name whenever he deemed it necessary. Petitioner also gave Mr. Taliercio a stamp of her signature for his use in signing corporate documents. Petitioner's stamped signature appears on sales tax returns filed for the quarters ended November 30, 1995, May 31, 1999 and August 31, 1999 and on the corporation's 1997 New York State franchise tax return.

Petitioner's signature appears on the corporation's 1996 Federal income tax return for an S corporation. Upon her examination of the return at the hearing held in this matter, petitioner was unable to determine whether she actually signed the return or the stamp was used.

Gino Taliercio, as secretary, signed the corporation's sales tax return for the quarter ended February 28, 1999.

10. In or about 1995, the tavern began having financial difficulties which were primarily due to a deterioration of the surrounding neighborhood. Mr. Taliercio signed the checks to pay the bills and if there was money left over, he took it as a salary. He gave the records to his attorney, Milton Shaiman, who prepared the tax returns. Mr. Taliercio did not keep petitioner apprised of the financial status of the business and she was unaware that taxes were not being paid until notices began coming to her house.

11. A warrant was issued on August 2, 2002 by the Commissioner of Taxation and Finance against Gino Taliercio in the sum of \$22,043.33 and an income execution was issued on October 3, 2002 to his employer, Payroll Transfers International, Inc., of Tampa, Florida directing the employer to withhold and pay over weekly sums in an amount up to ten percent of all moneys due to Mr. Taliercio.

SUMMARY OF PETITIONER'S POSITION

12. Petitioner contends that it is Gino Taliercio who is the person who should be personally liable for the sales and use taxes due from Fyfe and Drum Tavern, Inc., since she had little or no involvement in the day-to-day operation of the business. It was Mr. Taliercio who managed the tavern, determined which bills were to be paid and wrote the checks in payment thereof. At the hearing, Mr. Taliercio acknowledged his responsibility for the unpaid taxes of the corporation and stated that amounts were being paid weekly on the corporation's unpaid sales tax liability.

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 she 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. She owned 100 percent of the shares of the corporate stock, and she was the president of the corporation. Although she did not receive a salary from the tavern, she initially came to the tavern on a regular basis and could have continued to do so if she desired. Petitioner

also made a substantial personal investment (\$80,000.00) in the corporation. She obtained a liquor license on behalf of the corporation and in doing so, held herself out to the State Liquor Authority as the sole stockholder and sole officer and director of the corporation. Petitioner also had the authority to sign checks and tax returns on behalf of the corporation, but chose to exercise that authority on a limited basis for reasons of personal convenience, i.e., it was easier to let her boyfriend, Gino Taliercio, sign the checks using her signature stamp because he was on premises on a full-time basis. 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 rarely signed corporate checks during the period at issue does not weigh significantly in her favor because she chose not to sign; she was not prevented from signing (*see, Matter of DeFeo*, Tax Appeals Tribunal, March 9, 1995). She thus consented to an arrangement whereby Gino Taliercio 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). The fact that petitioner, as president, failed to exercise her responsibility does not absolve her from liability. A corporate officer is not at liberty to disregard her duty and leave it to someone else to complete (*Matter of Blodnick v. State Tax Commn., supra; Matter of Martin*, Tax Appeals Tribunal, July 20, 1989, *confirmed* 162 AD2d 890, 558 NYS2d 239; *accord, Capoccia v. State Tax Commn.*, 105 AD2d 528, 529, 481 NYS2d 476, 477).

D. There exists a good deal of similarity between the facts of this case and those of *Matter of Tafeen* (Tax Appeals Tribunal, January 3, 2002) where that petitioner, whose late husband operated a retail liquor store, entered into an agreement with another person (Theodore Polon) who agreed to operate the liquor store if petitioner maintained the liquor license (because

Mr. Polon was unable to obtain a license) and signed the checks and documents required for operation of the business. Petitioner did not work at the store, hire or fire employees, order inventory or review the store's bank accounts or other records. She gave the store manager check signing authority after which she did not sign any more checks on behalf of the business. Petitioner did not ask to see any of the bank statements or other records of the liquor store.

The Tribunal affirmed the determination of the Administrative Law Judge who held petitioner to be personally liable for the unpaid sales tax liability of the liquor store. The Administrative Law Judge determined that petitioner had participated in misleading the State Liquor Authority into believing that she was involved in the operation of the store and that, while claiming that she knew nothing about its daily operations, the fact remained that as owner, sole shareholder and holder of the liquor license, petitioner was under an obligation to assure that tax was remitted.

The Administrative Law Judge, citing *Matter of Goodfriend* (Tax Appeals Tribunal, January 15, 1998), pointed out that petitioner was required to establish by clear and convincing evidence that, notwithstanding her status as sole shareholder and president of the corporation which owned the liquor store and holder of its liquor license, by virtue of which she had actual authority over its operation, she was thwarted by others in carrying out her corporate duties through no fault of her own. This she failed to do and, in the present matter, so, too, did petitioner.

Petitioner was uninvolved in the operation of the Fyfe and Drum Tavern by her own choice. Even if unexercised, petitioner had authority over the operations of the tavern and her abdication of her responsibility for operating the business does not absolve her from liability for the taxes which should have been collected and remitted by her business.

E. Petitioner contends, and Gino Taliercio concurs, that it was Mr. Taliercio who was the person who was personally liable for taxes due from the corporation since he managed the business, signed most of the corporation's checks and utilized petitioner's signature stamp on tax returns and various other corporate documents which required her signature. It is not a defense, however, to petitioner's position that another party (in this case, Gino Taliercio) may also be liable for taxes due from the corporation.

Tax Law § 1133(a) provides that “*every* person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article” (emphasis added), thereby creating joint and several liability for unpaid sales tax. Even though the Division initiated proceedings to collect the tax from Mr. Taliercio (as evidenced by the warrant and income execution filed against him), the Division is not obligated to collect unpaid sales tax (plus penalty and interest) solely from other responsible officers. Moreover, the Division is under no obligation to pursue other responsible persons before proceeding against petitioner (*see, Matter of Risoli v. Commissioner of Taxation and Finance*, 237 AD2d 675, 654 NYS2d 218).

F. The petition of Ellen E. Bullwinkel is denied and the notices of determination issued to petitioner on October 29, 2001, as modified by Finding of Fact “3”, are sustained.

DATED: Troy, New York
May 13, 2004

/s/ Brian L. Friedman _____
ADMINISTRATIVE LAW JUDGE