

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SHLOMO AYAL	:	SMALL CLAIMS DETERMINATION
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 March 1, 2002 through February 28, 2003.	:	DTA NO. 820867

Petitioner, Shlomo Ayal,¹ 301 East 78th Street, Apt. 12G, New York, New York 10021-1331, 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 March 1, 2002 through February 28, 2003.

A small claims hearing was held before Frank W. Barrie, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on January 25, 2007, with all briefs to be submitted by June 7, 2007, which date began the three-month period for the issuance of this determination. Petitioner appeared by Donald Jay Pols, Esq. The Division of Taxation appeared by Daniel Smirlock, Esq. (Ersilia Slaven at hearing, Justine Clarke Caplan, Esq., on brief).

ISSUES

I. Whether the Division of Tax Appeals has jurisdiction to resolve a dispute between petitioner and the Tax Compliance Division regarding the application of proceeds from the execution of a levy on a business bank account.

¹ At the start of his testimony, petitioner stated that his name was Shlomo Ayal, which therefore has been used in the caption for this matter. In contrast, on the petition, petitioner's name was listed as Ayal Shlomo a/k/a Shlomo Ayal.

II. If so, whether the Tax Compliance Division erred in applying proceeds from the levy to outstanding corporate tax assessments instead of to an outstanding sales tax assessment.

FINDINGS OF FACT

1. Petitioner, Shlomo Ayal, by his corporate entity, Star Magic (New York), Inc., operated a retail store on Lexington Avenue in Manhattan which sold gift and novelty items. In the course of its operation, the corporation fell behind in its payment of sales tax and certain unspecified corporate taxes. With regard to the corporation's sales tax liabilities, the Division of Taxation ("Division") proceeded against petitioner based upon his status as a person responsible for the collection of sales tax due from the retail store.

2. In November of 2004, petitioner was unable to refinance the mortgage on his Manhattan residence because of a lien on his real property resulting from a warrant filed against him by the Tax Compliance Division. This warrant showed sales and use taxes due, plus penalty and interest, totaling \$70,026.11, consisting of the following taxes due: \$8,698.09 for the period ending May 31, 2002; \$12,196.87 for the period ending August 31, 2002; \$10,976.03 for the period ending November 30, 2002; and \$10,976.03 for the period ending February 28, 2003. The Tax Compliance Division by a Notice of Pending Warrant Vacate dated May 16, 2005 vacated this warrant after agreeing not to hold petitioner responsible for the three sales tax quarters ending August 31, 2002, November 30, 2002 and February 28, 2003, which left petitioner liable for taxes plus penalty and interest on sales taxes due from his business only for the quarter ending May 31, 2002.

3. Earlier, the Division had issued a Notice of Estimated Determination dated March 15, 2004 against petitioner as an officer/responsible person of Star Magic for sales and use taxes due from the corporation, asserting sales tax due of \$12,196.87 plus penalty and interest for the sales tax period ending May 31, 2002. Prior to the issuance of this notice to petitioner as an

individual, the Tax Compliance Division had levied a business bank account which Star Magic (New York), Inc., maintained with the Chase Manhattan Bank. In executing its levy, the Tax Compliance Division applied the proceeds to older assessments of “corporate tax” in petitioner’s words instead of the corporation’s later sales tax assessments. According to petitioner, if the proceeds from the levy had been applied to the sales tax assessments, there would not be a balance due for the sales tax quarter that remains at issue.

CONCLUSIONS OF LAW

A. The jurisdiction of the Division of Tax Appeals (“Tax Appeals”) is limited by statute. Tax Law § 2008 provides, in relevant part, that a taxpayer may commence a proceeding in the Division of Tax Appeals to protest a notice “which gives a person the right to a hearing in the division of tax appeals under this chapter [Chapter 60 of the Consolidated Laws of New York] or other law.” Petitioner is not protesting a particular notice of tax due. In fact, he claimed at the hearing that he had never seen the Notice of Estimated Determination dated March 15, 2004 until the hearing. Rather, he is seeking to challenge the allocation of proceeds from the Division’s execution of a levy on a business bank account. He argues that the proceeds should not have been applied to older corporate tax assessments but instead to the more recent sales tax assessment for which he is personally liable as a responsible person of the corporation. This argument cannot be addressed in this forum because the Division of Tax Appeals has “no jurisdiction to review the collection activities undertaken by the Division with regard to fixed and final assessments [citations omitted]” (*Matter of Broadmerkel*, Tax Appeals Tribunal, August 9, 2001 [wherein the Tribunal affirmed the administrative law judge’s determination that the Division of Tax Appeals had no jurisdiction to review the imposition of an income execution]). Petitioner’s reliance upon the earlier decision of the Tax Appeals Tribunal in *Matter of O’Connor* (February 24, 1994) is

misplaced. In *O'Connor*, the Tribunal, in reversing the administrative law judge, decided that the taxpayer therein had established that he paid tax due in the amount of \$23,073.48 “by delivering” five checks to the Division of Taxation’s Mineola office. The Tribunal noted it had jurisdiction because “petitioner is *only* seeking to obtain the application of tax he claims to have paid (emphasis added).” The matter at hand is not a similar “application of payments” case. In this case, petitioner is not merely “seeking to obtain the application of tax he claims to have paid” but rather is seeking a determination that the Division’s collection activities were improper so that his liability for unpaid sales tax should be further reduced for proceeds of a levy that he contends were improperly applied to corporate tax assessments rather than a sales tax assessment. In short, the Division of Tax Appeals simply lacks jurisdiction to consider whether the Division of Taxation improperly executed its levy on a business bank account by applying proceeds of such levy to older tax assessments rather than the later sales tax assessment, for which petitioner has personal liability.

B. Furthermore, even if the Division of Tax Appeals had jurisdiction to address petitioner’s contention that the Tax Compliance Division acted wrongfully in its collection activities, he has failed to shoulder his burden of proving by clear and convincing evidence that the older “corporate tax assessments” were under protest so that collection activities were required to be suspended. Consequently, Tax Law § 171-f(5)(c) required these older debts to be credited first upon collection of proceeds from the levy. In addition, petitioner has not offered clear and convincing evidence to prove that the proceeds from the levy were a higher amount than the \$5,296.20 which was posted by the Tax Compliance Division. Not only did petitioner fail to provide bank records, affidavits or certified letters proving the amount of the debit made by Chase Manhattan Bank, he provided a photocopy of a document of questionable authenticity to support

his claim that the Tax Compliance Division obtained \$8,928.00² instead of \$5,296.20 pursuant to its levy.

C. Nonetheless, it is observed that the Division has indicated in its brief that petitioner's remaining balance as of May 10, 2007 consists of tax of \$1,075.52, plus penalty of \$1,092.31 and interest of \$1,841.76, a significant reduction in the amount originally set forth in the warrant filed against him by the Tax Compliance Division, as detailed in Finding of Fact "2."

D. The petition of Shlomo Ayal dated October 2, 2005 is denied.

DATED: Troy, New York
August 16, 2007

/s/ Frank W. Barrie
PRESIDING OFFICER

² In his brief, petitioner reduced the amount he claimed had been debited to \$7,806.00