

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :

of :

IRVING REINSTEIN :

DECISION

for Revision of a Determination or for Refund
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Periods September 1, 1972 :
through November 30, 1972, September 1, 1977 :
through May 31, 1978, and September 1, 1978 :
through May 31, 1979. :

Petitioner, Irving Reinstein, 175 West 79th Street, New York, New York 10024, 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 periods September 1, 1972 through November 30, 1972, September 1, 1977 through May 31, 1978, and September 1, 1978 through May 31, 1979 (File No. 45709).

A formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 26, 1984 at 11:00 A.M., with all briefs to be submitted by January 16, 1985. Petitioner appeared by Joel E. Abramson, Esq. The Audit Division appeared by John P. Dugan, Esq. (Kevin A. Cahill, Esq., of counsel).

ISSUES

I. Whether petitioner was a person required to collect sales tax within the meaning and intent of sections 1131(1) and 1133(a) of the Tax Law.

II. Whether the Audit Division properly assessed sales tax within the statute of limitations provided for in section 1147(b) of the Tax Law.

III. Whether the assessments should be cancelled as a result of the Audit Division's failure to mail the notices by registered or certified mail.

IV. Whether the Audit Division is collaterally estopped from assessing tax against petitioner where a fellow officer's assessment was cancelled at a pre-hearing conference.

V. Whether petitioner's failure to be afforded a pre-hearing conference resulted in a denial of due process and equal protection of the law.

VI. Whether petitioner's failure to collect and pay over sales tax was due to reasonable cause.

FINDINGS OF FACT

1. On October 28, 1982, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Irving Reinstein, as an officer of West Side Glatt Corp., in the amount of \$7,788.00, plus penalty of \$934.56 and interest of \$553.05, for a total due of \$9,275.61 for the period March 1, 1978 through May 31, 1978.

2. On October 28, 1982, the Audit Division issued a Notice and Demand for Payment of Sales and Use Taxes Due against petitioner in the amount of \$20,952.48, plus penalty of \$4,037.01 and interest of \$15,407.02, for a total due of \$40,666.51 for the periods September 1, 1972 through November 30, 1972, September 1, 1977 through February 28, 1978 and September 1, 1978 through February 28, 1979. On October 29, 1982, the Audit Division issued a second notice and demand against petitioner in the amount of \$3,021.52, plus penalty of \$755.38 and interest of \$1,281.13, for a total due of \$5,058.03 for the period March 1, 1979 through May 31, 1979.

3. Due to an administrative error, all of the notices were mailed six to eight weeks after the notice date entered on the notices themselves. As a result, an issue of timeliness of petition raised by the Audit Division was conceded to be without merit. The three notices were sent to petitioner by

first class mail not registered or certified mail. Additionally, the Audit Division conceded that the portion of the October 28, 1982 notice and demand covering the period September 1, 1972 through November 30, 1972 was issued erroneously and should be cancelled.

4. Petitioner was the president of West Side Glatt Corp. ("the corporation"). The corporation operated a delicatessen-restaurant in New York City from on or about July 1, 1977 until June, 1979. The only other officer of the corporation was Emanuel Glouberman, the vice-president or treasurer. Prior to managing the delicatessen, petitioner had been a public school teacher and had no experience in running a business. Petitioner's duties at the delicatessen included making sandwiches, supervising the kitchen operations and operating the cash register. He was responsible for hiring and firing the waiters and other employees, including the bookkeeper. Petitioner signed corporate checks and the sales tax returns. Mr. Glouberman also hired employees and signed checks. Mr. Glouberman hired the accountant for the corporation. Petitioner set the hours of operation and the item prices for the delicatessen.

5. Each day, petitioner totalled the daily receipts from the cash register tapes and recorded the sales in a daily calendar book. He did not list separate totals for taxable and nontaxable sales. Petitioner turned the daily book over to the bookkeeper to assist in preparation of the sales tax returns. He did not give the bookkeeper the register tapes. Petitioner was unaware of how the bookkeeper determined the sales tax due. Once the bookkeeper had prepared the sales tax returns, she gave them to petitioner for his signature. Petitioner signed the returns and gave them back to the bookkeeper for mailing. The bookkeeper would also prepare checks for petitioner's signature.

6. For the periods September 1, 1977 through February 28, 1978 and September 1, 1978 through May 31, 1979, the corporation filed sales tax returns with no remittance. Petitioner was unaware that returns were being filed without remittance; he never checked the books of the corporation, however, to determine whether payment was being made. The notices and demands were based on the returns filed without remittance during the aforementioned periods.

7. For the period March 1, 1978 through May 31, 1978, the corporation did not file any sales tax return and, as a result, the Audit Division issued an estimated assessment for that period. On March 26 or 27, 1978, a fire occurred at the delicatessen doing \$7,500.00 in damage. As a result, the business ceased operations until early June, 1978. Since no business was carried on, petitioner did not file a return for that period.

8. Mr. Glouberman was also assessed sales tax as an officer of the corporation in amounts similar to petitioner. At a pre-hearing conference, however, the assessments against Mr. Glouberman were resolved and cancelled. Petitioner did not receive a pre-hearing conference and he now maintains that the Audit Division is collaterally estopped from collecting the taxes due from him after cancelling the assessments against Mr. Glouberman and that, moreover, petitioner's failure to be afforded a pre-hearing conference resulted in a denial of his constitutional rights of due process and equal protection.

9. Petitioner also argued that the assessments should be cancelled on the basis of the following alleged errors:

a) The notices were issued beyond the three year statute of limitations provided for in section 1147(b) of the Tax Law.

b) The notices were not mailed by registered or certified mail.

c) The notices were invalid because section 1133(b) of the Tax Law was listed as the basis of liability rather than 1133(a).

d) The Notice of Hearing did not meet the requirements of section 601.9(a) of the Rules of Practice and Procedure of the State Tax Commission.

CONCLUSIONS OF LAW

A. That section 1133(a) of the Tax Law provides, in part, that every person required to collect the taxes imposed under the Sales Tax Law is also personally liable for the tax imposed, collected, or required to be collected under such law. Section 1131(1) of the Tax Law defines "persons required to collect tax" as used in section 1133(a) to include any officer or employee of a corporation, or a dissolved corporation, who as such officer or employee is under a duty to act for the corporation in complying with any requirement of the Sales Tax Law.

B. That 20 NYCRR 526.11(b)(2) describes an officer or employee under a duty to act as a person who is authorized to sign a corporation's tax returns or who is responsible for maintaining the corporate books, or who is responsible for the corporation's management. Other "[i]ndicia of this duty...include factors...such as the officer's day-to-day responsibilities and involvement with the financial affairs and management of the corporation" and "the officer's duties and functions..." (Vogel v. New York State Department of Taxation and Finance, 98 Misc.2d 222, 225).

C. That inasmuch as petitioner was the president of the corporation, signed corporate checks and tax returns, hired and fired employees, supervised the bookkeeper and supplied her with the information necessary to complete the sales tax returns, and was generally active in all aspects of running the delicatessen, he was a person required to collect sales tax within the meaning

and intent of sections 1131(1) and 1133(a) of the Tax Law. "[C]orporate officials responsible as fiduciaries for tax revenues cannot absolve themselves merely by disregarding their duty and leaving it to someone else to discharge." (See Ragonesi v. New York State Tax Commission, 88 A.D.2d 707.)

D. That inasmuch as the delicatessen was not operating during the period for which no return was filed, no tax is due for the period March 1, 1978 through May 31, 1978 and the assessment for that quarter is cancelled. It should be noted, however, that a return should have been filed for that quarter regardless of whether or not the corporation had any taxable sales to report.

E. That section 1147(b) of the Tax Law provides, in part, that "no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return; provided, however, that where no return has been filed as provided by law the tax may be assessed at any time." With respect to the notices and demands issued in response to the returns filed with no remittance, such notices were not assessments of additional tax, but were merely bills for collection of the tax shown on the sales tax returns as filed by the corporation. Accordingly, the three-year statute of limitations is inapplicable (Cadalso v. State of New York, Sup. Ct., Albany County, December 27, 1978, Casey, J.). With respect to the notice of determination and demand, no return was filed for the quarter for which the notice was issued and, therefore, the statute of limitations is, again, inapplicable.

F. That the requirement that a notice of determination be mailed by registered or certified mail as provided in section 1147(a)(1) of the Tax Law does not apply to notices and demands and thus sending the notices and demands by first class mail was sufficient notice. Since the notice of determination sent by first class mail is to be cancelled, the question of whether failure to

mail it by registered or certified mail was sufficient to warrant cancellation of the assessment is rendered moot.

G. That the laws of New York State are presumed to be constitutionally valid at the administrative level of the State Tax Commission; however, the providing of a pre-hearing conference as set forth in 20 NYCRR 601.4(b) is strictly discretionary and, clearly, none of petitioner's constitutional rights were violated by his failure to be afforded such a conference.

H. That the printing of "1133(b)" on the notices rather than "1133(a)" as the basis for petitioner's liability appears to have been a typing error and petitioner has not shown that he was prejudiced in any way by the error. The notices clearly stated that he was liable as an officer and, therefore, petitioner's argument is without merit. Petitioner's argument that the Notice of Hearing did not comply with the Rules of Practice is equally without merit. The notice complied with all the requirements of the rules and, even if it did not, such an error would not warrant cancellation of the entire assessment. Petitioner's collateral estoppel argument, as discussed in Finding of Fact "8", is also without merit. There was no prior litigation of Mr. Glouberman's case; the matter was settled prior to hearing.

I. That petitioner has not shown that the corporation's failure to pay over the sales tax collected was due to reasonable cause and not willful neglect as provided in section 1145(a)(1)(ii) of the Tax Law. Delegation of the duty to mail in tax payments to a bookkeeper is not reasonable cause and the penalties imposed are sustained.

J. That the petition of Irving Reinstein is granted to the extent indicated in Finding of Fact "3" and Conclusion of Law "D"; that the Notice and Demand for Payment of Sales and Use Taxes Due issued October 28, 1982 is to be modified


accordingly; that the Notice and Demand for Payment of Sales and Use Taxes Due issued October 29, 1982 is sustained; that the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued October 28, 1982 is cancelled; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

MAY 23 1985

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER