

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter	of the Petition	:	
	of	:	
ADOLPHUS BEGINA,		:	DECISION
OFFICER OF INSTITUTIONAL TRADING CORPORATION		:	
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, 1979		:	
through August 31, 1982.		:	

Petitioner, Adolphus Begina, officer of Institutional Trading Corporation, 1 6th Avenue, South Farmingdale, New York 11735, 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, 1979 through August 31, 1982 (File No. 51988).

A hearing was held before Sandra F. Heck, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 19, 1986 at 1:30 P.M. Petitioner appeared by Albert Podrid, Esq. The Audit Division appeared by John P. Dugan, Esq. (Michael B. Infantino, Esq., of counsel).

ISSUES

I. Whether a petition was timely filed to protest the second of two assessments at issue herein.

II. 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.

III. Whether the audit methodology employed by the Audit Division to estimate Institutional Trading Corporation's sales tax liability was proper.

IV. Whether the reorganization of Institutional Trading Corporation relieved petitioner of his obligation to collect sales tax as an officer of such corporation.

FINDINGS OF FACT

1. On January 27, 1984, the Audit Division issued to petitioner, Adolphus Begina, president of Institutional Trading Corporation, two notices of determination and demands for payment of sales and use taxes due. The first notice, Notice Number S840127118C, was for the period March 1, 1979 through August 31, 1982 and asserted a base tax due of \$49,866.11, together with a penalty of \$12,069.25 and interest of \$16,262.36, for a total amount due of \$78,197.72. The second notice, Notice Number S840127119C, was for the period September 1, 1982 through February 28, 1983 and asserted a base tax due of \$3,318.17, together with a penalty of \$579.47 and interest of \$447.34, for a total amount due of \$4,344.98.

2. Institutional Trading Corporation (hereinafter "ITC") is a broker of institutional textiles (e.g., sheets, pillowcases, towels, bedspreads) which sells to a variety of institutions, such as restaurants, hotels, motels, nursing homes and hospitals. ITC purchases the institutional textiles from mills located in the southern United States and the mills deliver the goods directly to ITC's vendees.

3. Petitioner was the president of ITC and owned one-third of the issued and outstanding stock from the commencement of ITC's business in 1979 until October 1981. There were two other shareholders of ITC, Jerry Rosen and Howard Saltzman, each of whom owned one-third of the shares.

4. Petitioner received 100 percent of his wages from ITC during the audit period and was primarily responsible for the day-to-day running of ITC.

Petitioner signed ITC's New York State corporation franchise tax returns as president for the years 1979, 1980 and 1981. The 1981 return was signed by petitioner on November 11, 1982. On August 10, 1984, petitioner signed a power of attorney as president of ITC, which power of attorney authorized Leonard Zimmerman, C.P.A. to represent ITC before the Department of Taxation and Finance. In a letter sent by petitioner to ITC's trustee in bankruptcy, petitioner stated that he was the president of ITC from its inception until "sometime after it went into Chapter XI" (December 1982).

5. The notices of determination and demands for payment of sales and use taxes due described in Finding of Fact "1" hereof were mailed to petitioner at 1 6th Avenue, Farmingdale, New York 11738, by certified mail on January 27, 1984. The notices were not returned by the Post Office. Petitioner claims that he never received the second notice covering the period September 1, 1982 to February 28, 1983.

6. Petitioner mailed a letter on April 25, 1984 protesting the first of the two assessments, Notice Number S840127118C. A perfected petition dated September 23, 1985, protesting only the first assessment, was received by the Tax Appeals Bureau on September 27, 1985.

7. During the audit period, March 1, 1979 through February 28, 1983, ITC was not registered with the Tax Commission as a vendor, nor did it file sales tax returns. Petitioner explained that his talents were primarily in the area of sales and he was inexperienced in the financial aspects of running a business. As a result, petitioner relied on the advice of his accountant, who advised petitioner that ITC need not register as a sales tax vendor because most of its sales were to exempt organizations and out-of-state vendees (e.g., hospitals, Amtrak).

8. At the commencement of the audit in June 1983, the auditor sent an appointment letter to ITC at 1955 Merrick Road, Merrick, New York 11566. The letter was sent certified mail, return receipt requested. The receipt was returned, dated June 16, 1983, bearing the signature of Al Davis. Al Davis was identified as the controller of Med-Apparel Corp. of America.¹

9. Upon visiting the premises at 1955 Merrick Road, Merrick, New York, the auditor discovered that ITC was no longer in business at that location. The auditor inquired at the Post Office and was informed that ITC's new address was 588 Broadway, New York, New York. The auditor then found a number for ITC in the telephone book and called the number. The auditor was informed that the number was changed and was given a new number, which he called. The auditor spoke with a Mr. Rosen, who seemed familiar with ITC. It was revealed at the hearing that Mr. Rosen was a one-third shareholder of ITC and the president of Med-Apparel Corp. of America.

10. Mr. Rosen informed the auditor that ITC had filed for bankruptcy under Chapter XI of the United States Code. The bankruptcy petition was filed in December 1982, case number 82 Bkcy. 12381, and was signed by petitioner as president of ITC. The petition stated that ITC's address was 588 Broadway, New York, New York 10012.

11. Upon visiting the premises at 588 Broadway, the auditor was provided with the sales journal, cash receipts journal, sales invoices and general ledger. The records that were provided were not complete and did not cover the entire audit period. The only person available at 588 Broadway was the recep-

1 The relationship between ITC and Med Apparel Corp. of America is more fully discussed in Findings of Fact "13" through "17".

tionist, who provided the records and informed the auditor that there were no other records available for ITC. Based on a determination that ITC's books and records were inadequate to conduct a complete audit, the auditor decided to perform a test period audit covering January through April 1982.

12. The audit methodology is fully detailed as follows:

a) The sales invoices for ITC for January through April 1982 totalled \$855,517.39. An examination of the invoices indicated \$107,386.72 were taxable sales, resulting in a determination that 12.13 percent of ITC's sales were taxable. The taxable sales invoices had sales tax charged on them, but when they were posted in the sales journal, the amount of sales tax was not separately stated. The auditor accepted the remaining sales (\$748,130.67) as nontaxable sales for resale although resale certificates were not presented by petitioner.

b) The auditor determined audited gross sales for the audit period from ITC's federal income tax returns for the year ended February 29, 1980 (\$522,647.00) and from the sales journal for November 1, 1981 through November 30, 1982 (\$2,631,925.09). (A sales journal for the entire audit period was not made available to the auditor.) The total sales from the income tax returns and the sales journal over a 25-month period (\$3,154,572.09) revealed average monthly sales of \$126,182.88. The average monthly sales figure was multiplied by 45.5² to generate \$5,741,321.04 in audited gross sales.

2 The 45.5 figure represented the months March 1, 1979 through December 16, 1982. There was no explanation at the hearing why the entire audit period (March 1, 1979 through February 28, 1983) was not used.

c) The 12.13 taxable sales percentage was applied to the \$5,741,321.04 audited gross sales to result in audited taxable sales of \$696,422.24 for the audit period.

d) Based on an analysis of sales invoices during the four-month test period, the auditor determined that the following percentages of ITC's sales were made in each of the following jurisdictions: New York City - 64%; Nassau County - 16%; Suffolk County - 11%; Sullivan County - 4%; New York State - 4%; and Salamanca - 1%.

e) The maximum penalty and interest were recommended because of ITC's apparent willful failure to pay sales tax collected.

13. Pursuant to an "Agreement and Plan of Reorganization" dated August 13, 1981 between Med-Apparel Corp. of America (hereinafter "Med-Apparel") and Jerry Rosen, Adolphus Begina and Howard Saltzman, petitioner exchanged all of his shares in ITC for eight shares of Med-Apparel (out of 50 issued and outstanding shares). Prior to the reorganization, Jerry Rosen was the sole shareholder of Med-Apparel. No certificate of dissolution was filed by ITC.

14. Petitioner explained that the purpose of the "Agreement and Plan of Reorganization" described in Finding of Fact "13" was an attempt by ITC to break into the New York market without warehousing and further financing.

15. Petitioner claimed that it was only after the reorganization that he started to deal with non-exempt organizations (e.g., restaurants, motels, hotels). Petitioner also claimed that it was agreed during the reorganization that he would be responsible for purchasing and sales, and that Jerry Rosen would be responsible for all financial matters, including the payment of taxes. The "Agreement and Plan of Reorganization" did not specify Jerry Rosen's or petitioner's obligations after the reorganization. Petitioner assumed that

Med-Apparel's accountant was paying taxes. Med-Apparel's bookkeeper maintained all the records.

16. After the reorganization, Med-Apparel and ITC worked from the same premises at 588 Broadway, New York, New York. After the reorganization, ITC and Med-Apparel used the same factor, Marine Midland Bank, which was responsible for collecting accounts receivable. The proceeds, minus the bank's fee, was turned over to Med-Apparel which in turn gave money to petitioner to pay bills.

17. In April 1983, petitioner resigned from Med-Apparel. He did not take any books and records with him. Petitioner had no notice that sales taxes were due until he received the notices described in Finding of Fact "1" herein. Petitioner claimed that the books and records were in the possession and control of the trustee in bankruptcy and were unavailable to petitioner. Petitioner failed to substantiate that the trustee was in possession of the books and records and that said trustee refused to make such books and records available for audit.

CONCLUSIONS OF LAW

A. That section 1138(a)(1) of the Tax Law provides, in pertinent part, that:

"If a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available.... Notice of such determination shall be given to the person liable for the collection or payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the tax commission for a hearing, or unless the tax commission of its own motion shall redetermine the same."

B. That section 1147(a)(1) of the Tax Law specifies the requirements for mailing notices of determination under Article 28. Section 1147 provides that where no return has been filed or no other application made, a notice shall be

mailed by certified mail to such address as may be obtainable. The mailing of such notice shall be presumptive evidence of the receipt of the notice by the addressee. Petitioner has failed to overcome the presumption that he received both of the assessments at issue herein. Therefore, there has been no petition timely filed to protest the second of the assessments issued herein, Notice Number S840127119C, and the tax assessed therein is finally and irrevocably fixed.

C. That under section 1133(a) of the Tax Law, every person required to collect any tax imposed by Article 28 shall be personally liable for the tax imposed, collected or required to be collected. Under section 1131(1) "[p]ersons required to collect tax" is defined 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]." The question of whether to impose personal liability on a corporate officer for sales and use taxes is a factual question in each case (Vogel v. New York State Department of Taxation and Finance, 98 Misc.2d 222 [1979]; Chevlowe v. Koerner, 95 Misc.2d 388 [1978]). The courts, in reviewing these cases, considered the extent of the officer's involvement in the financial affairs and management of the corporation. In the instant case, petitioner was the president of ITC, he was responsible for running the corporation on a day-to-day basis, he paid bills and he signed tax returns for the corporation. The fact that petitioner relied on his business associate to pay the sales taxes does not relieve petitioner of his obligations under the Sales Tax Law. The responsibility to collect and pay sales tax is a non-delegable duty.

D. That section 1132(c) of the Tax Law provides, in part, that the receipts from all sales of tangible personal property are presumed to be

subject to sales tax unless the vendor has taken from the purchaser a properly executed resale certificate. In the instant case, petitioner failed to present any resale certificates or other documentary evidence to substantiate his claim that almost all of ITC's sales prior to 1981, the date of reorganization, were exempt resale sales. It should be noted that the assessments reflect the determination by the Audit Division that 87.87 percent of ITC's sales during the test period were allowed as sales for resale. The sales which were determined to be taxable actually had sales tax collected on them, which tax was not remitted to the state. The failure to remit such taxes is a violation of the fiduciary duty owed by petitioner as trustee of the state's money (see Tax Law §1132[a]).

E. That where petitioner's records are either incomplete or unavailable so as to make it impossible to conduct a complete audit to verify taxable sales receipts, the use of a test period is justified (Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 A.D.2d 858 [1981]).

F. That a petitioner challenging the assessment of sales and use taxes has the burden of demonstrating that the method of audit or the amount of tax assessed was erroneous (Urban Liquors, Inc. v. State Tax Comm'n., 90 A.D.2d 576 [1982]). Petitioner herein has failed to sustain his burden of proof.

G. That petitioner has failed to establish that ITC ceased to exist as a corporation required to collect sales tax after its reorganization. In fact, all of the evidence presented by petitioner indicated that ITC continued to exist and that petitioner remained its president during the entire audit period. The fact that ITC went through a reorganization during the audit period does not relieve petitioner of his obligation to collect sales tax as an officer of ITC.

H. That the petition of Adolphus Begina, officer of Institutional Trading Corporation, is denied and the notices of determination and demands for payment of sales and use taxes due issued January 27, 1984, Notice Numbers S840127118C and S840127119C, are sustained, together with such additional interest and penalties as may be lawfully due and owing.

DATED: Albany, New York

STATE TAX COMMISSION

SEP 26 1986

Rodrick Anderson
PRESIDENT

Francis R. Koenig
COMMISSIONER

[Signature]
COMMISSIONER