

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

ARTHUR JOHNSON :

DECISION
DTA NO. 826174

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 December 1, 2005 through August 31, 2006 and :
December 1, 2006 through February 28, 2007.

Petitioner, Arthur Johnson, filed an exception to the determination of the Administrative Law Judge issued on October 27, 2016. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Adam L. Roberts, Esq., of counsel).

Petitioner did not file brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner did not file a reply brief. Oral argument was not requested. The six-month period for issuance of this decision began on April 28, 2017, the date that petitioner's reply brief was due.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether the Division of Taxation properly assessed petitioner as a responsible person for sales tax due on behalf of A & J Security Patrol Agency, Inc.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except findings of fact 8 and 10, which we have modified to more accurately reflect the record. As so modified, these

facts are set forth below.

1. The Division of Taxation (Division) conducted a review of an entity named A & J Security Patrol Agency, Inc. (A & J). The auditor reviewed filed returns, forms W-2, certificates of authority as well as other documents and determined that petitioner, Arthur Johnson, was a responsible officer for the periods in issue.

2. The Division's records indicated that A & J filed untimely forms ST-100, sales tax returns, and did not remit the stated sales tax due as reflected on the forms.

3. Notice of determination, No. L-027943599, dated November 20, 2006, was issued to petitioner for sales and use taxes due for the period ending February 28, 2006 in the amount of \$1,974.49 plus interest and penalty. The tax amount of \$1,974.49 was the exact amount of sales tax reported due on line 18 of form ST-100 filed by A & J for the period ending February 28, 2006.

4. Notice of determination, No. L-027943600, dated November 20, 2006, was issued to petitioner for sales and use taxes due for the period ending May 31, 2006 in the amount of \$3,425.00 plus interest and penalty. The tax amount of \$3,425.00 was the exact amount of sales tax due reported on line 18 of form ST-100 filed by A & J for the period ending May 31, 2006.

5. Notice of determination, No. L-027943598, dated November 20, 2006, was issued to petitioner for sales and use taxes due for the period ending August 31, 2006 in the amount of \$2,712.50 plus interest and penalty. The tax amount of \$2,712.50 was the exact amount of sales tax reported due on line 18 of form ST-100 filed by A & J for the period ending August 31, 2006.

6. Notice of determination, No. L-030896700, was issued to petitioner dated November 3, 2008 for sales and use taxes due for the period ending February 28, 2007 in the amount of

\$1,512.00 plus interest and penalty. The tax amount of \$1,512.00 was the exact amount of sales tax reported on line 17 of form ST-100 filed by A & J for the period ending February 28, 2007.

7. The Division issued three additional assessments, Nos. L-030896697, L-030896698 and L-030896699, that were also protested by the petition in this matter. All three assessments have been canceled and are no longer at issue.

8. A & J was in the business of selling protective security services in New York. Petitioner testified that he was an officer for the corporation. Petitioner stated that he was not an owner, but was hired to run, and did run, the day-to-day operations of the business.

9. Petitioner is a certified New York State instructor for security guards. He registered the company in his name on behalf of the owners, due to his expertise in the field.

10. Petitioner testified that Arlene Perry was a retired police officer who was the bookkeeper for A & J. Petitioner believes that Ms. Perry was an owner, but he cannot be certain. It is noted that, on three of the four forms ST-100 in evidence, petitioner is listed as owner/CEO or president.

11. At the conclusion of the formal hearing, the record was left open so that petitioner could provide proof that payment was made on the four outstanding assessments. Petitioner did not submit any additional documentation post-hearing.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began her determination by citing provisions of the Tax Law that provide for collection of sales tax and imposition of personal liability on persons responsible for the paying over of the same. According to the Administrative Law Judge, Tax Law § 1133 (a) imposes personal liability upon any person required to collect the tax imposed by article 28 of the Tax Law for the tax required to be collected. Those persons include corporate

officers and employees who are under a duty to act for a corporation in compliance with article 28.

Even so, the Administrative Law Judge noted that the case law concerning responsible persons has stated that the holding of corporate office does not necessarily impose personal liability for the collection and paying over of sales tax. Those decisions have required the consideration of other factors, including whether a person was authorized to sign the corporation's tax returns, was responsible for maintenance of the corporate books or was permitted to generally manage the corporation.

The Administrative Law Judge observed that petitioner did not dispute that he was an officer and charged with the daily operations of the corporation. She found petitioner's argument that he cannot be held personally liable for the sales taxes because A & J is a corporation to be without merit because it is in direct contravention of the statute imposing personal liability on responsible persons. The Administrative Law Judge concluded that petitioner was a responsible person acting on behalf of A & J.

The Administrative Law Judge commented that a corporation's filed sales tax returns are evidence of such corporation's self-assessment of any tax reported and unpaid. She further observed that petitioner failed to provide any proof of having actually paid the self-assessed amounts, despite being given additional time after the hearing date to do so.

The Administrative Law Judge next described the imposition of a penalty for failure to timely file sales tax returns or pay over collected sales taxes under the Tax Law, noting that such penalties may only be abated if a taxpayer can show reasonable cause. However, as petitioner neglected to even make an argument in support of penalty abatement, the Administrative Law Judge sustained the penalty as imposed.

Finally, the Administrative Law Judge granted the petition only so far as indicated in finding of fact 7, but otherwise denied the petition and sustained the remaining four notices of determination in full.

SUMMARY OF ARGUMENTS ON EXCEPTION

Petitioner states that A & J did not collect any sales tax from its clients and that he filed amended sales tax returns for the tax periods at issue, apparently for a refund of sales tax petitioner believes was paid. He claims that any sales tax that was remitted was done in error by A & J's bookkeeper. Petitioner also claims that there was no basis for the Division's calculation of tax, penalty and interest due.

The Division urges this Tribunal to affirm the Administrative Law Judge's determination. It relies on its brief submitted in opposition to the petition, in which it argues that the evidence submitted supports the conclusion that petitioner was a person responsible for the collection and paying over of sales tax for the periods at issue. It claims that petitioner has failed to bear his burden of showing through clear and convincing evidence that he was not in fact a person responsible for collection and paying over of sales tax.

OPINION

We begin with the statute under the Tax Law providing for the imposition of sales tax on the sale of protective guard, patrol and watchman services of every nature (Tax Law § 1105 [c] [8]). As the protective security services provided by A & J fall under this definition of services subject to sales tax, it was under an obligation to collect sales tax on the sales of such services as trustee for and on account of the state (Tax Law § 1132 [a]). We note that petitioner presented no argument in support of his claim that no sales tax was due with regard to the protective

security services furnished by A & J. The Tax Law imposes personal liability upon any person required to collect sales tax for the tax imposed, collected or required to be collected (Tax Law § 1133 [a]). The definition of a person required to collect sales tax includes corporate officers and employees who are under a duty to act for such corporation in complying with the requirements of Article 28 of the Tax Law (Tax Law § 1131 [1]).

As noted by the Administrative Law Judge, the mere holding of a corporate office does not, per se, impose tax liability upon an office holder. Whether an officer or employee of a corporation is a person required to collect, truthfully account for, or pay over the sales tax is to be determined in every case on the particular facts involved (20 NYCRR 526.11 [b] [2]). Among the factors to be considered are whether a person was authorized to sign sales tax returns, whether such person was responsible for maintaining the corporate books or was permitted to generally manage the business (*see Vogel v New York State Dept. of Taxation & Fin.*, 98 Misc2d 222 [Sup Ct, Monroe County 1979, Maestrella, J.]; *Chevlowe v Koerner*, 95 Misc2d 388 [Sup Ct, Queens County 1978, Buschmann, J.]; *Matter of Unger*, Tax Appeals Tribunal, March 24, 1994, *confirmed sub nom Matter of Landu v Tax Appeals Trib. of State of N.Y.* 214 AD2d 857 [3d Dept 1995], *lv denied* 86 NY2d 705 [1995]).

We agree with the Division that the Administrative Law Judge correctly determined that petitioner was a person responsible on behalf of A & J. The record supports the Administrative Law Judge's finding that petitioner was a corporate officer and acted as a general manager of the business. Petitioner himself testified that he was not only a corporate officer, but also registered the business in his name and ran the company. Based on these facts, we find that petitioner was a responsible person within the meaning of Tax Law § 1131 and was thus personally liable for the amount of sales tax due for the tax periods at issue (*see* Tax Law § 1133 [a]).

We also agree with the Division that the Administrative Law Judge correctly determined that amounts asserted in the notices of determination were self-assessed by A & J on its filed sales tax returns for the tax periods at issue. The sales tax returns are evidence of the corporation's self-assessment of sales taxes due and unpaid (*see Matter of Megson v New York State Tax Commn.*, 105 AD2d 481 [3d Dept 1984]). The taxpayer bears the burden of showing by clear and convincing evidence that the method used to arrive at the assessment and the assessment itself are erroneous (*Matter of Vallone*, Tax Appeals Tribunal, August 21, 2003; *Blodnick v New York State Tax Commn.*, 124 AD2d 437 [3d Dept 1986]). Petitioner cannot merely allege that there is no basis for the Division's calculations when such calculations were based upon tax due as reported by A & J. Although given the opportunity to provide evidence that the sales tax was actually paid, petitioner failed to do so. Thus, he failed to bear his burden of showing that the assessment itself was erroneous.

We also affirm the Administrative Law Judge's determination with regard to the Division's imposition of penalties pursuant to Tax Law § 1145 (a) (1) (i) for failure to timely pay the tax imposed by Article 28. We concur with the Administrative Law Judge that petitioner failed to show reasonable cause and lack of wilful neglect in collecting and paying over the sales tax at issue here. As noted above, sale of protective guard, patrol and watchman services are subject to sales tax (Tax Law § 1105 [c] [8]). Petitioner's position that A & J did not collect sales tax does not constitute reasonable cause or show lack of wilful neglect in his obligation on behalf of A & J to collect and pay the sales tax due. Thus, we must sustain the penalty as imposed by the Division in its notices of determination for the tax periods at issue.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Arthur Johnson is denied;

2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Arthur Johnson is denied; and
4. The notices of determination dated November 20, 2006 and November 3, 2008 are sustained.

DATED: Albany, New York
October 12, 2017

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina
Anthony Giardina
Commissioner