

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition
of
EILEEN CAMEROTA
for Redetermination of Deficiencies of for Refund of New
York State Personal Income Tax Under Article 22 of the Tax
Law for the Periods October 1, 2016 through December 31,
2016, and April 1, 2017 through September 30, 2017, and for
Revision of Determinations or for Refund of New York State
Sales and Use Taxes Under Articles 28 and 29 of the Tax Law
for the Period March 1, 2017 through February 28, 2018.

DETERMINATION
DTA NO. 829528

Petitioner, Eileen Camerota, filed a petition for redetermination of deficiencies of for refund of New York State personal income tax under Article 22 of the Tax Law for the periods October 1, 2016 through December 31, 2016, and April 1, 2017 through September 30, 2017, and for revision of determinations or for refund of New York State sales and use taxes under articles 28 and 29 of the Tax Law for the period March 1, 2017 through February 28, 2018.

A videoconferencing hearing was held, via CISCO Webex before James P. Connolly, Administrative Law Judge, on February 12, 2021, with all briefs due by July 2, 2021, which date began the six-month period for the issuance of this determination. Petitioner appeared by Goodrich & Bendish (Peter T. Goodrich, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Melanie Spaulding, Esq., of counsel). Pursuant to 20 NYCRR 3000.15 (f), the case was reassigned to Kevin R. Law, Administrative Law Judge, who renders the following determination.

ISSUES

I. Whether petitioner was a person required to collect, truthfully account for and pay over withholding taxes with respect to Brenmac Corp., for the periods of October 1, 2016 through December 31, 2016, and April 1, 2017 through September 30, 2017, and willfully failed to do so, thereby becoming liable for a penalty imposed pursuant to Tax Law § 685 (g).

II. Whether petitioner was personally liable for the sales and use taxes due on behalf of Brenmac Corp., as a person required to collect and pay such taxes under Tax Law §§ 1131 (1) and 1133 (a) for the period March 1, 2017 through February 28, 2018.

FINDINGS OF FACT

1. On February 15, 2018, the Division of Taxation issued notices of determination to Eileen Camerota, petitioner, that assert liability under the authority of Tax Law § 1133 (a) as follows:

Notice Number	Tax Period	Tax Asserted	Interest	Penalty
L-047735141	09/01/17-11/30/17	\$7,805.86	\$238.23	\$907.14
L-047735142	06/01/17-08/31/17	\$17,229.66	\$1,308.95	\$2,614.69
L-047735143	03/01/17-05/31/17	\$5,226.61	\$540.33	\$1,450.44

On April 26, 2018, the Division issued an additional notice of determination to petitioner that asserts liability under the authority of Tax Law § 1133 (a) as follows:

Notice Number	Tax Period	Tax Asserted	Interest	Penalty
L-047976191	12/01/17-02/28/18	\$7,821.09	\$166.92	\$905.36

Each of the four notices of determination set forth above explains that petitioner had been found liable for sales taxes determined to be due as an officer or responsible person of Brenmac Corp. (Brenmac).

2. On April 26, 2018, the Division issued notices of deficiency that assert penalties against petitioner under the authority of Tax Law § 685 (g) as follows:

Notice Number	Tax Period	Penalty Asserted
L-047976190	4/01/17-6/30/17	\$5,764.55
L-047976189	10/01/16-12/31/16	\$2,785.17
L-047976188	07/01/17-09/30/17	\$7,466.31

Each notice of deficiency explains that petitioner, as an officer or responsible person, has been found liable for a penalty in an amount equal to withholding taxes not paid by Brenmac.

3. The Division made its determination that petitioner was an officer or responsible person of Brenmac based upon the following records:

(i) a copy of a form DTF-17 application to register for a sales tax certificate of authority for Brenmac. The application indicates that Brenmac's address is 941 McLean Ave, Yonkers, New York. Petitioner is listed as Brenmac's president and lists the same phone number for petitioner as was listed for petitioner on the petition filed in this matter. In addition, petitioner is listed as having check signing authority and is responsible for making business decisions. The signature line on the form is blank. The tax preparer is listed as Bilotta & Santoli. The Division's tax compliance agent testified that the application was electronically filed and signed by petitioner.

(ii) a copy of an electronically filed form CT-4 general business corporation franchise tax return of Brenmac for the year 2014. The Division's tax compliance agent testified that the application was electronically filed by petitioner. The authorized person is listed as petitioner. The signature line for the authorized person states "Official title." Petitioner's name is not listed on the signature line nor is there a "wet signature." Directly below this line it states "President." Bilotta and Santoli, CPA's, is listed as the paid preparer. The following statement appears on the

bottom on each page of the copy of the return submitted into the hearing record: “This is a representation of the data on the e-filed return.”

(iii) a copy of a DTF-17-ATT schedule of business locations for a consolidated filer for Brenmac. The Division’s tax compliance agent testified that this form was filed electronically by petitioner and signed by petitioner. Petitioner is listed on the form as responsible person of Brenmac. On the signature line appears the following typewritten statement: “I certify that I have read and understand the instructions.” Petitioner’s name is not listed on the signature line nor is there a “wet signature.” The phone number that is listed for petitioner is the same telephone number that is listed for petitioner on the petition filed in this matter.

(iv) a copy a form NYS-45 Web quarterly combined withholding, wage reporting, and unemployment insurance return of Brenmac for the period October 1, 2017 until December 31, 2017. The face of the return indicates that it was filed on January 12, 2018. The Division’s tax compliance agent testified that the application was electronically filed and signed by petitioner. Review of this return indicates that the signature line is blank. The payment details section of this return indicates that a payment from Brenmac’s Bank of America account was made on January 12, 2018. The return also indicates that it was submitted by petitioner.

4. The Division did not provide any evidence concerning authentication of petitioner’s alleged signature nor did it indicate on the four exhibits detailed above where an electronic signature appears.

5. At the hearing in this matter, petitioner testified that she had nothing to do with Brenmac and that she was neither a shareholder nor an officer, director or an employee of Brenmac. She explained that Brenmac was her son, John McLoughlin’s, business, and that upon starting out, she had executed a line of credit to assist her son with his new business as he had

previously gone bankrupt and was in the midst of a divorce. She also denied submitting or allowing any documents to be submitted in her name reflecting that she was associated with Brenmac. She further testified when she started receiving notices from the Division regarding Brenmac, she gave them to her son, who told her he would handle it. When her bank account was levied upon, she reached out to her representative, Mr. Goodrich, for assistance. Upon Mr. Goodrich's counsel, a resignation dated February 27, 2018 was sent to Brenmac that provides, in pertinent part, as follows:

WHEREAS, upon information and belief EILEEN B. CAMAROTA [sic] was appointed as an Officer of [Brenmac] but has never knowingly acted in any capacity as an officer of the corporation; and

WHEREAS, upon information and belief EILEEN B. CAMEROTA may have also been elected a Director of [Brenmac] but has never knowingly acted in any capacity as a director of the corporation; and

WHEREAS, upon information and belief EILEEN B. CAMEROTA desires to resign as an Officer and Director of [Brenmac];

NOW, LET IT BE KNOWN that EILEEN B. CAMEROTA, hereby tenders her resignation from any and all offices of [Brenmac] as of the date hereof; and

EILEEN B. CAMEROTA hereby tenders her resignation as a Director of the corporation as of the date hereof.

6. Petitioner's son, John McLoughlin, also testified in the hearing in this matter. Mr. McLoughlin testified that he owned Brenmac and that his mother had nothing to do with it other than signing a line of credit so Brenmac could obtain credit. He testified that she was not issued shares nor was she ever appointed as an officer or director of the corporation. He further testified that she had no check signing authority nor could she hire or fire employees. Mr. McLoughlin admitted to providing his mother's information to Bilotta and Santola, the accountants who electronically filed the documents referenced in finding of fact 3 because he

was in the midst of a divorce. Mr. McLoughlin admitted to putting Brenmac in his mother's name because he lost everything to his ex-wife in said divorce. He further validated a copy of a letter he sent to the Division after his mother's bank account was seized by the Division that indicated he was the owner of Brenmac and that she had no involvement with the corporation.

CONCLUSIONS OF LAW

A. Tax Law § 685 (g) imposes upon any person required to collect, truthfully account for, and pay over withholding taxes who willfully fails to collect and pay over such taxes, “a penalty equal to the sum of the total amount of the tax evaded, or not collected, or not accounted for and paid over.” Tax Law § 685 (n) defines “person,” for purposes of Tax Law § 685 (g), to include, among others, corporate officers and employees who are under a duty “to perform the act in respect of which the violation occurs.”

B. 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 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 any requirement of article 28 (Tax Law § 1131 [1]).

C. The determination of whether an individual is a person under a duty to collect and pay over withholding taxes is similar in scope and analysis to the question of whether one is a responsible individual for sales and use tax purposes; both inquiries require an examination of the facts to determine whether the individual in question had the authority and responsibility to exercise control over the corporation (*see e.g. Matter of Ragonesi v New York State Tax Commn.*, 88 AD2d 707,708 [3d Dept 1982] [withholding tax]; *Matter of Coppola v Tax Appeals Trib. of State of N.Y.*, 37 AD3d 901, 903 [3d Dept 2007] [sales tax]). Factors to be considered

include whether the individual owned stock, was an officer, signed tax returns, and exercised authority over employees and corporate assets (*see e.g. Matter of Hopper v Commissioner of Taxation & Fin.*, 224 AD2d 733, 737 [3d Dept 1996], *lv denied* 88 NY2d 808 [1996], *regarg denied* 88 NY2d 1065 [1996] [withholding tax]; *Matter of Coppola v Tax Appeals Trib. of State of N.Y.*).

D. A careful review of the record in this matter establishes that petitioner was not a person responsible to collect and pay over either withholding or sales and use taxes on behalf of Brenmac pursuant to Tax Law §§ 685 (n) and 1131 (1). The testimony and documentary evidence, in total, indicates that petitioner was neither a shareholder, officer, director, an employee nor anyone else with a duty to act on behalf of Brenmac. Petitioner had no involvement with Brenmac other than signing a line of credit for Brenmac in an effort to assist her son, the true owner of Brenmac, a position that he admitted to under oath at the hearing in this matter and in a letter sent to the Division after petitioner's bank account was levied. The evidence clearly establishes that petitioner's son was the sole shareholder and president of Brenmac and that he used his mother's identity when setting up Brenmac in an effort to preserve his assets during his divorce. Upon realizing that Brenmac's corporate filings indicated that she was an officer or director of Brenmac, petitioner immediately sent a letter resigning those positions based upon the advice of her attorney.

E. The Division's reliance on Brenmac's filings, while certainly reasonable when the notices currently being protested were issued, is overcome by the totality of the evidence. Although these documents indicate they were filed or submitted by petitioner, she denied having knowledge of same and testified she never authorized these filings in her name. Although it is beyond question that electronic signatures have the same force and effect as a traditional

signature (State Technology Law § 304 [2] [“the use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand”]), the Division has only demonstrated that these documents were filed electronically. There has been no showing same were electronically signed. First, the Division did not introduce any evidence that these filings were signed by anyone either electronically or by hand. The Division’s mere assertions to that effect are insufficient. There is no indication that these documents were signed electronically, much less by petitioner who has denied ever doing so throughout this proceeding. An electronic signature is defined as “an electronic sound, symbol or process, attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the record” (State Technology Law § 302 [3]). The record lacks any evidence of an electronic sound, symbol or process, attached to or logically associated with Brenmac’s filings upon which the Division has relied. In addition, assuming these documents were electronically signed, the Division failed to provide any evidence that authenticates petitioner’s signature and that it was her intent to sign these filings (*id.*)

F. Based upon the foregoing, the petition of Eileen Camerota is granted, and the notices of determination, dated February 15, 2018 and April 26, 2018, and the notices of deficiency, dated April 26, 2018, are cancelled.

DATED: Albany, New York
December 30, 2021

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE