

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
BEN-ZION SUKY : DETERMINATION
DTA NO. 829768
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 December 1, 2014 through :
February 28, 2015. :

Petitioner, Ben-Zion Suky, 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 December 1, 2014 through February 28, 2015.

A videoconferencing hearing via CISCO Webex was held before Barbara J. Russo, Administrative Law Judge, on November 15, 2021, at 10:30 a.m., with the final brief to be submitted by June 17, 2022, which date began the six-month period for the issuance of this determination. Petitioner appeared by Ishimbayev Law Firm, P.C. (Dmitriy Ishimbayev, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Melanie Spaulding, Esq., of counsel, and Bruce Lennard, Esq., of counsel, on the brief).

ISSUE

Whether petitioner was a person required to collect and remit tax under Tax Law §§ 1131 (1) and 1133 so that he is personally liable for sales tax determined due from US Suite Management, LLC, for the period December 1, 2014 through February 28, 2015.

FINDINGS OF FACT

1. US Suite Management, LLC (US Suite Mgmt.), operated a management company in New York, New York, during the period December 1, 2014 through February 28, 2015 (the audit period or period at issue).

2. US Suite Mgmt. failed to timely file a sales and use tax return and pay the sales tax due for the period at issue. The Division of Taxation (Division) determined that US Suite Mgmt. had outstanding sales tax liabilities for the period at issue.

3. The Division issue a notice of estimated determination, notice number L-048917422, dated October 18, 2016 (notice), to petitioner, Ben-Zion Suky, as an officer/responsible person of US Suite Mgmt., asserting tax due in the amount of \$49,639.19 plus interest and penalty for the period at issue.

4. The Division presented the testimony of Margaret Ramsey, Tax Compliance Agent II, during the hearing. Ms. Ramsey testified that the Division determined petitioner was an officer/responsible person of US Suite Mgmt. for the period at issue based on her review of documents signed by petitioner on behalf of the LLC as a member and managing partner. The Division introduced into the record the following documents:

- A check, dated October 27, 2011, from US Suite Mgmt. to New York State Sales Tax. Ms. Ramsey testified that the check bears petitioner's signature.
- An Installment Payment Agreement (IPA), dated April 4, 2012, between US Suite Mgmt. and the Division for the periods ending February 29, 2012 and November 30, 2011. Ms. Ramsey testified that the IPA is signed by petitioner.
- An authorization agreement for automatic payment deductions, dated April 10, 2012, authorizing the Division to deduct payments from the bank account of US Suite Mgmt., Petitioner's signature appears on the authorization agreement as "Managing Member."

- An electronically filed partnership return, form IT-204, for US Suite Mgmt. for the tax year 2013. The name “Ben-Zion Suky” is typed on the line for “signature of general partner.”
- A consent to extension of time, form AU-2.10, signed by petitioner as “Managing Partner” on October 6, 2014, on behalf of US Suite Mgmt., consenting that the amount of time for assessment for the period December 1, 2010 through May 31, 2012 be extended to June 20, 2016.
- A consent to extension of time, form AU-2.10, signed by petitioner as “Managing Partner” on February 17, 2015, on behalf of US Suite Mgmt., consenting that the amount of time for assessment for the period December 1, 2010 through November 30, 2012 be extended to December 20, 2016.
- A responsible person questionnaire, form AU-431, dated June 25, 2014, for US Suite Mgmt. Petitioner is listed in the identification section as “responsible person” with the title “Managing Partner.” The form indicates that petitioner is responsible for preparing or supervising the preparation of sales tax returns and ensuring the remittance of tax; participates in making significant business decisions; is responsible for maintaining and managing the business; derives substantial income or has a substantial economic stake in the business; and has the authority to manage the business with knowledge and control over financial affairs, pay or direct payment of bills or other business liabilities, sign checks, act on behalf of the business with the Tax Department, sign consents extending periods of limitation, sign power of attorney for the business, sign consent fixing tax, sign installment payment agreements, hire and fire employees, and negotiate loans, borrow money for the business, or guarantee business loans. In response to the question, “If he or she signs checks, under what circumstances does he or she do so,” the answer “All” is written. Petitioner’s signature appears on the line for “signature of preparer” and his title is listed as “managing partner.”
- A power of attorney form for US Suite Mgmt., signed by petitioner as “Managing Member” on January 30, 2014. Petitioner’s signature is acknowledged by a notary public.

5. Petitioner testified that US Suite Mgmt. was formed to manage property located at 440 West 41st Street, New York, New York, and that he invested over \$2,000,000.00 in the project. According to petitioner, the members of US Suite Mgmt. are companies called Aura, U-Trend, and 440 West 41st Street, LLC, which own 35%, 35%, and 30% of US Suite Mgmt., respectively. Petitioner testified that Aura was the managing member of US Suite Mgmt. and

claims that he was not a member of US Suite Mgmt. Petitioner testified that he was affiliated with US Suite Mgmt. through 440 West 41st Street, LLC, of which he was a 30% owner. Petitioner did not present any documentary evidence regarding the structure, ownership, formation, or management of US Suite Mgmt., Aura, U-Trend, or 440 West 41ST Street, LLC. According to petitioner, Aura signed most of the checks but because it is a company in Israel, not physically present in the United States, it gave him authority to sign checks. Petitioner admitted that he signed the consents to extensions of time, dated October 6, 2014 and February 17, 2015, and power of attorney form, dated January 30, 2014, on behalf of US Suite Mgmt., but denied that he signed the check dated October 27, 2011, the IPA, authorization agreement for automatic payment deductions, or the responsible person questionnaire (*see* finding of fact 4). Petitioner testified that he was a “limited partner” of US Suite Mgmt. and was not a member, limited member or general manager, but offered no explanation as to why he signed the consents as “Managing Partner” and the power of attorney as “Managing Member.” Petitioner further testified that he was authorized to make payments on behalf of US Suite Mgmt., that Aura authorized the payment of bills, and that he hired and fired employees with Aura’s consent. When asked whether he was involved with management decisions, petitioner responded that Aura “authorized me what to do and I did for them.”

6. The signatures on the check dated October 27, 2011, IPA, authorization agreement for automatic payment deductions, and responsible person questionnaire are similar to petitioner’s signatures on the consents to extension of time, dated October 6, 2014 and February 17, 2015, and power of attorney form, dated January 30, 2014 (*see* finding of fact 4), as well as petitioner’s signature on the petition filed in this matter.

7. At the conclusion of the hearing, the parties were given the following deadlines for the filing of briefs: petitioner's brief was due by January 18, 2022, the Division's brief was due by February 22, 2022, and petitioner's reply brief was due by March 22, 2022. The undersigned administrative law judge instructed the parties as follows during the hearing:

“It is the responsibility of the parties to meet this schedule. All requests for extensions must be in writing, stating the reason for the request and filed within the limits prescribed for filing the brief. Any brief or other documents not filed in accordance with the schedule will be returned to the party that filed them. Parties are responsible for sending copies of anything submitted to the Division of Tax Appeals to the other party. Each party is responsible for meeting this due date, regardless of whether they received anything from the other party.”

On January 18, 2022, in response to a written request from petitioner, the parties' deadlines for filing briefs were extended as follows: petitioner's brief was extended to February 17, 2022, the Division's brief was extended to March 24, 2022, and petitioner's reply brief was extended to April 21, 2022. On February 17, 2022, in response to an additional extension request from petitioner, the parties' deadlines for filing briefs were further extended as follows: petitioner's brief was extended to April 1, 2022, the Division's brief was extended to May 6, 2022, and petitioner's reply brief was extended to June 3, 2022. On May 2, 2022, in response to a written request from the Division, the parties' deadlines were further extended as follows: the Division's brief was extended to May 20, 2022, and petitioner's reply was extended to June 17, 2022.

On June 27, 2022, the Division of Tax Appeals received petitioner's reply brief. The envelope for the reply brief does not bear a United States Postal Service (USPS) postmark or any other indication of the mailing date. The envelope has a sticker that reads “Certified Mail” and in the area of the envelope where postage would be placed states, “First-Class Mail U.S. Postage

And Fees Paid Letterstream.” The cover page of petitioner’s reply brief bears a bar code under the caption “USPS Certified Mail” and a number “9214 8901 4298 0470 5376 87.” According to USPS.com, the certified tracking results for tracking number 9214 8901 4298 0470 5376 87 show, in relevant part, the following tracking history: “June 20, 2022 Pre-Shipment Info Sent to USPS, USPS Awaiting Item,” “June 20, 2022, 9:59 pm Shipment Received, Package Acceptance Pending Phoenix, AZ 85026,” “June 21, 2022, 5:38 pm Accepted at USPS Regional Origin Facility Phoenix AZ Distribution Center,” “June 21, 2022, 6:53 pm Arrived at USPS Regional Origin Facility Phoenix AZ Distribution Center.”

On July 5, 2022, the undersigned administrative law judge sent correspondence to the parties stating as follows:

“We received petitioner’s reply brief on June 27, 2022. There is no postmark on the correspondence and the USPS tracking information indicates that it was mailed on June 20, 2022. Pursuant to my correspondence dated May 2, 2022, petitioner’s reply brief was required to be filed by June 17, 2022. As such, petitioner’s reply brief is late and will not be considered in rendering a determination in this matter.”

In response, by correspondence dated July 5, 2022, petitioner’s representative, Dmitriy Ishimbayev, requested that the reply brief be accepted, contending that it was timely submitted on June 17, 2022. Mr. Ishimbayev states that his office transmitted, “through a third-party provider, a copy of the Petitioner’s Reply Brief to the office of Division of Tax Appeals on June 17, 2022.” Mr. Ishimbayev further states he also emailed an electronic copy of the document to individuals in the Division of Tax Appeals Hearing Support Unit and the Division’s attorney. Attached to Mr. Ishimbayev’s correspondence is a receipt from “Online Certified Mail Website<production@letterstream.com>” dated Friday June 17, 2022 at 6:07 p.m. to Dmitriy Ishimbayev, subject “Certified Mail Accepted,” stating:

“Thank you for using OnlineCertifiedMail.com for your certified mail needs. Your saved visa card ending in [number redacted] was charged \$8.99 on 06/17/2022. Thank you for your payment! Job IDs: 6453964. Your unique certified mail tracking number(s) 9214890142980470537687 . . . (New York State Division of Tax Appeals).”

Also attached to the correspondence is an unsigned “affirmation of service” from Mr. Ishimbayev stating that on June 17, 2022 he personally mailed petitioner’s reply to respondent’s brief “via Online Certified Mail Service” and emailed an electronic copy of the document to certain individuals in the Division of Tax Appeals Hearing Support Unit and the Division’s attorney.

CONCLUSIONS OF LAW

A. Addressing first the timeliness of petitioner’s reply brief, the Tax Appeals Tribunal Rules of Practice and Procedure (Rules) provide that the administrative law judge is authorized to “fix the time for filing of legal memoranda” and “[i]f the parties also wish to submit briefs, they may do so, *within the time restrictions fixed by the administrative law judge*” (20 NYCRR 3000.15 [c] [3], [d] [6], emphasis added).

In this matter, the final deadline for the filing of petitioner’s reply brief was June 17, 2022. The reply brief was received by the Division of Tax Appeals on June 27, 2022 and the envelope did not contain a USPS postmark or any other mark indicating the mailing date. The USPS tracking information for the certified control number appearing on the cover page of the reply brief indicates that it was “Received, Package Acceptance Pending Phoenix, AZ” on June 20, 2022, at 9:59 p.m., and was “Accepted at USPS Regional Origin Facility Phoenix AZ Distribution Center” on June 21, 2022. Petitioner’s representative argues that he timely

submitted the reply brief by transmitting it on June 17, 2022 “through a third-party provider,” to wit, “Online Certified Mail Service.”

The Rules provide in relevant part as follows:

“Date of filing. If any document required to be filed under this Part within a prescribed period or on or before a prescribed date under authority of any provision of article 40 of the Tax Law is, after such period or date, delivered by United States mail to the New York State Division of Tax Appeals or Tax Appeals Tribunal, Agency Building 1, Empire State Plaza, Albany, New York 12223, the date of the United States postmark stamped on the envelope or other appropriate wrapper in which such document is contained will be deemed to be the date of filing. Where delivery is made by courier, delivery, messenger or similar services, the date of delivery will be deemed to be the date of filing” (20 NYCRR 3000.22 [a] [1]).

The Rules further provide that in order to be considered timely filed, the document in question, contained in a properly addressed envelope or wrapper,

“must be deposited in the mail of the United States within the prescribed period or on or before the prescribed date with sufficient postage prepaid. For this purpose, such document is considered to be deposited in the mail of the United States when it is deposited with the domestic mail service of the United States Postal Service” (20 NYCRR 3000.22 [a] [2] [ii]).

The Rules further provide that the envelope or wrapper containing the document must bear a date stamped by the USPS which is within, on, or before the prescribed date for filing (20 NYCRR 3000.22 [a] [2] [iii]). If the envelope or wrapper containing the document does not have a USPS postmark, as was the case here, then whether the item was timely mailed is determined by 20 NYCRR 3000.22 (b), which provides, in relevant part:

(ii) the document must be received....not later than the time when an envelope or other appropriate wrapper which is properly addressed and mailed and sent by the same class of mail would ordinarily be received if it were postmarked at the same point of origin by the United States Postal Service within the prescribed period or on or before the prescribed date for filing...” (20 NYCRR 3000.22 [b] [ii]).

In this case, the deadline for the filing of petitioner's reply brief was June 17, 2022. The Division of Tax Appeals received the reply brief on June 27, 2022, ten days beyond the filing deadline. Such time is later than a document would ordinarily be received when mailed through USPS (*see Matter of Coleman*, Tax Appeals Tribunal, June 8, 2020; *Matter of V & Z Deli, Inc.*, Tax Appeals Tribunal, March 18, 2010 [holding that 23 days is not within the time that a document mailed and postmarked by the USPS would ordinarily be received]; *Matter of Brenner*, Tax Appeals Tribunal March 1, 1990 [18 days was not within the time that a document mailed and postmarked by the USPS would ordinarily be received]; *cf.*, *Matter of Harron's Elec. Serv.*, Tax Appeals Tribunal, February 19, 1988 [holding that five days is not later than the date a document would ordinarily be received when mailed through the USPS]).

The Rules further provide that a document received after the time when it would ordinarily be received could still be deemed timely if petitioner establishes:

“(i) that it was actually deposited in the mail before the last collection of the mail from the place of deposit which was postmarked (except for metered mail) by the United States Postal Service within the prescribed period or on or before the prescribed date for filing the document;

(ii) that the delay in receiving the document was due to a delay in the transmission of the mail; and

(iii) the cause of the delay” (20 NYCRR 3000.22 [b] [2]),

and also provide that for purposes of registered and certified mail:

“(c) **Registered and certified mailing.** (1) If an envelope or wrapper containing a document is sent by United States registered mail the date of such registration is treated as the postmark date and the date of filing.

(2) If an envelope or wrapper containing a document is sent by United States certified mail and the sender's receipt is postmarked by the postal employee to whom such envelope is presented, the date of the postmark on such receipt is treated as the postmark date of the document and the date of filing” (20 NYCRR 3000.22 [c]).

In this case, petitioner has not established that the reply brief was actually deposited in the mail with the USPS within the prescribed period or on or before the prescribed date for filing the document, or that the reply brief was sent via certified mail with the USPS on the prescribed date. Rather, petitioner argues that the reply brief was transmitted on June 17, 2022 “through a third-party provider.” Petitioner presented no evidence of a USPS date for registered or certified mailing and did not provide a receipt postmarked by a USPS postal employee. Instead, the evidence presented by petitioner shows that rather than placing the reply brief in the custody of the USPS on June 17, 2022 to be mailed by United States certified mail, petitioner’s representative transmitted the document to a third-party provider, “OnlineCertifiedMail.com.” While the receipt from “Online Certified Mail Website<production@letterstream.com>” shows that petitioner’s representative was charged by the third-party provider on June 17, 2022, it does not show what date the reply brief was transmitted from the third-party provider to the USPS for actual mailing. By using a third-party provider instead of mailing the reply brief directly with the USPS, petitioner assumes the risk that the provider will transmit the document to the USPS within the prescribed time. In this case, the USPS certified tracking results for the tracking number appearing on the cover page of the reply brief show that the document was not accepted by the USPS until June 21, 2022, a date beyond the required filing date. As such, petitioner’s reply brief is untimely and will not be considered herein.

B. Tax Law former § 1133 (a) provides, in part, that:

“every person required to collect any tax imposed by this article [Article 28] shall be personally liable for the tax imposed, collected or required to be collected under this article. . . .” (Tax Law former § 1133 [a], effective May 29, 2002 through April 11, 2018).

Tax Law § 1131 (1), in turn, defines “persons required to collect tax” and a “person required to collect any tax imposed by this article [Article 28]” to include, among others:

“any officer, director or employee of a corporation or of a dissolved corporation, any employee of a partnership, any employee or manager of a limited liability company, or any employee of an individual proprietorship who as such officer, director, employee or manager is under a duty to act for such corporation, partnership, limited liability company or individual proprietorship in complying with any requirement of this article, or has so acted; *and any member of a partnership or limited liability company*” (emphasis added).

During the period at issue, the Tax Law contained no factors to qualify or limit the liability imposed upon members of partnerships or limited liability companies and imposed per se liability upon such members (*see Matter of Santo*, Tax Appeals Tribunal, December 23, 2009 [“Petitioner was a member of a limited liability company and, as with members of a partnership, such members are subject to per se liability for the taxes due from the limited liability company. . . . Since Tax Law § 1131 (1) imposes strict liability upon members of a partnership or limited liability company, all that is required to be shown by the Division for liability to obtain is the person’s status as a member”]; *see also Matter of Bartolomei*, Tax Appeals Tribunal, April 3, 1997). Clearly, Tax Law § 1131 (1) provides that any member of a partnership or any member of a limited liability company is a “person required to collect any tax imposed by this article” and, as provided in Tax Law § 1133 (a), a member of a limited liability company “shall be personally liable for the tax imposed, collected or required to be collected under this article.” Accordingly, if petitioner was a member of the LLC during the audit period, he would be personally liable for the sales tax required to be collected and remitted to the state.

C. Petitioner bears the burden of proof to overcome the presumed correctness of the Division’s assessment (*Matter of Mera v Tax Appeals Trib.*, 204 AD2d 818 [3d Dept 1994];

Matter of Blodnick v State Tax Commn., 124 AD2d 437 [3d Dept 1986]) and has not met his burden of proof here to show that he was not a person required to collect and remit tax for US Suites Mgmt. Upon review of the record, it is clear that petitioner was a member of US Suites Mgmt. during the period at issue. Petitioner admitted he was a partner of US Suite Mgmt., albeit attempting to qualify the role as a “limited partner.”¹ Petitioner admitted that he signed the consents to extensions of time dated October 6, 2014 and February 17, 2015, and the power of attorney form on behalf of US Suites Mgmt. Petitioner signed the consents to extensions of time as “Managing Partner” and the power of attorney as “Managing Member” of US Suites Mgmt. While petitioner claims that he did not sign the other documents introduced into the record by the Division, namely the check dated October 27, 2011, the IPA, authorization agreement for automatic payment deductions, and the responsible person questionnaire, his testimony lacks credibility, given that his testimony that he was not a member of US Suites Mgmt. is directly contradicted by his admissions that he signed the consents and power of attorney form as managing partner and managing member, respectively, of the LLC. Additionally, given the remarkable similarity in the signatures, it was incumbent upon petitioner to produce evidence beyond his self-serving testimony that he did not sign the documents, which he failed to provide. Moreover, even if he did not sign the other documents, there is no question

¹ Tax Law § 1133 (a) was amended, effective April 12, 2018, to provide that if a limited partner of a limited partnership or member of a limited liability company applies to the Division for relief and demonstrates to the satisfaction of the Commissioner that such limited partner's or member's ownership interest and the percentage of the distributive share of the profits and losses of such limited partnership or limited liability company are each less than fifty percent, and such limited partner or member was not under a duty to act for such limited partnership or limited liability company in complying with any requirement of article 28, that the limited partner's or member's liability will be limited to reflect such limited partner's or member's ownership interest of distributive share of the profits and losses of such limited partnership or limited liability company, whichever is higher. The relief provided for in the amendment was not in effect during the period at issue, and as noted above, Tax Law § 1131 (1), as in effect for the period at issue, imposed strict liability upon members of a partnership or limited liability company. As such, even as a “limited partner,” petitioner is strictly liable for the sales tax liability of U.S. Suites Mgmt.

that he signed the consents and power of attorney as a managing partner and member of the LLC, which provided a rational basis for the Division to assess petitioner as a responsible person for the period at issue. Petitioner has failed to meet his burden of proving that he was not a member of US Suites Mgmt. Accordingly, for the period at issue, petitioner is personally liable for the taxes imposed upon US Suites Mgmt. by virtue of his status as a member of the LLC.

D. In addition, regardless of whether petitioner was a member of the LLC, individual liability is not limited to owners or officers, directors, employees and members of a business. Aside from the strict liability imposed on a member of an LLC or partnership, whether an individual is personally liable for tax under Tax Law § 1131 (1) is determined upon the particular facts of each case (*Matter of Cohen v State Tax Commn.*, 128 AD2d 1022 [3d Dept 1987]; *Matter of Hall*, Tax Appeals Tribunal, March 22, 1990, *confirmed* 176 AD2d 1006 [3d Dept 1991]; *Matter of Martin*, Tax Appeals Tribunal, July 20, 1989, *confirmed* 162 AD2d 890 [3d Dept 1990]; *Matter of Autex Corp.*, Tax Appeals Tribunal, November 23, 1988). The pivotal question is whether the individual had or could have had sufficient authority and control over the affairs of the corporation (*see Matter of Ianniello*, Tax Appeals Tribunal, November 25, 1992, *confirmed* 209 AD2d 740 [3d Dept 1994]). Factors to be considered include the individual's status as an officer, the individual's knowledge of and control over the financial affairs of the corporation, the authority to write checks on behalf of the corporation, responsibility for maintaining the corporate books, authority to hire and fire employees, and the individual's economic interest in the corporation (*see Matter of Kieran*, Tax Appeals Tribunal, November 13, 2014; *Matter of Ianniello*; *Matter of Constantino*, Tax Appeals Tribunal, September 27, 1990; *Matter of Cohen* at 1023). As noted by the Tribunal:

“The factual determination demands a consideration of all the surrounding circumstances and involves more than the matching of the traditional indicia of responsibility to an officer’s surface acts. Indeed, a person’s officer status can be offset by the circumstances, such as where the officer’s actions were done under the supervision and control of persons later convicted on criminal racketeering charges Further, the lack of an official title in a corporation should not shield an individual from responsibility where that individual in fact controls the corporation” (*Matter of Ianniello*).

Thus, regardless of whether petitioner was a member or an officer or employee of the LLC, he could still be found liable for the sales tax assessed against it (*see Matter of Kieran* [“holding of corporate office is one such factor, but is not determinative”]). In *Matter of Ianniello*, petitioners, who were neither officers, directors nor employees of the company against which tax was assessed, were determined to be personally liable.

In this case the evidence in the record clearly establishes that petitioner had or could have had sufficient authority and control over the affairs of US Suites Mgmt. so as to be an individual personally liable for tax under Tax Law § 1131 (1). Petitioner admits that he signed the consents and power of attorney on behalf of US Suites Mgmt. and the documents establish that he held himself out as a member and managing partner of the LLC. Petitioner had the authority to sign checks for US Suites Mgmt., was authorized to make payments on behalf of US Suite Mgmt., and had the authority to hire and fire employees. Although petitioner contends that his authority to act on behalf of US Suites Mgmt. was granted by Aura, he does not dispute that he was given such authority and has not presented any evidence to show that his authority was limited. As such, petitioner has failed to meet his burden of proving that he was not a responsible person for US Suites Mgmt. for the period at issue.

E. The petition of Ben-Zion Suky is denied, and the notice of estimated determination, dated October 18, 2016, is sustained.

DATED: Albany, New York
December 15, 2022

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE