

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
RICHARD E. SASLAW : DETERMINATION
 : DTA NO. 830808
for Revision of Determinations or for Refund of Sales :
and Use Taxes under Articles 28 and 29 of the Tax :
Law for the Period September 1, 2019 through :
February 29, 2020. :
:

Petitioner, Richard E. Saslaw, filed a petition for revision of determinations or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the period September 1, 2019 through February 29, 2020.

A formal hearing by videoconference was held on October 3, 2023, before Jessica DiFiore, Administrative Law Judge, with all briefs to be submitted by January 27, 2024, which date began the six-month period for issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Melanie Spaulding, Esq., of counsel). This matter was reassigned to Jennifer L. Baldwin, Administrative Law Judge, pursuant to the authority of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.15 [f]).

After reviewing the entire record in this matter, Jennifer L. Baldwin, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner was personally liable for the sales and use taxes due on behalf of X Astoria, LLC, as a person required to collect and pay such taxes under Tax Law §§ 1131 (1) and 1133 (a), for the period September 1, 2019 through February 29, 2020.

FINDINGS OF FACT

The Division of Taxation (Division) submitted nine proposed findings of fact.¹ The Division's proposed findings of fact are supported by the record and have been substantially incorporated herein.

1. On May 11, 2021, the Division issued to petitioner, Richard E. Saslaw, the following notices of determination (notices):

Notice Number	Tax Period Ended	Tax Asserted	Interest	Penalty
L-053263235	11/30/19	\$2,851.63	\$636.13	\$741.32
L-053263234	02/29/20	\$8,937.13	\$1,716.58	\$2,134.51

Each of the notices states that sales tax was asserted against petitioner as an officer/responsible person of X Astoria, LLC (Astoria) in accordance with Tax Law §§ 1138 (a), 1131 (1), and 1133 for the periods September 1, 2019 through November 30, 2019 and December 1, 2019 through February 29, 2020 (collectively, the periods at issue). The notice for the period September 1, 2019 through November 30, 2019 indicates that Astoria timely filed form quarterly recap for monthly filers ST-810, New York State and local sales and use tax web filed return (form ST-810), and reported \$14,525.54 of tax due but remitted only \$11,673.91 of the tax reported as due. The notice for the period December 1, 2019 through February 29, 2020

¹ While it is unclear whether the Division intended to submit proposed findings of fact in accordance with the Rules of Practice and Procedure of the Tax Appeals Tribunal and the State Administrative Procedure Act (SAPA), given that the Division numbered each fact in its brief, such facts will nevertheless be treated as proposed findings of fact and ruled on as required by SAPA § 307 (1).

indicates that Astoria timely filed form ST-810 and reported \$8,937.13 of tax due but did not remit any of the tax reported as due.²

2. During the periods at issue (and prior thereto), Astoria was known as Ample Hills Astoria, LLC.

3. Astoria is a former ice cream shop that, along with other shops owned by Ample Hills Holdings, Inc. (Ample Hills), encountered financial difficulties that culminated in Ample Hills filing for bankruptcy in March 2020.

4. The Division issued the notices to petitioner as a responsible person of Astoria based on its review of documents that were submitted to the Division on behalf of Astoria. The Division reviewed an electronically filed form IT-204, New York State partnership return, for the year beginning January 19, 2018 and ending December 31, 2018 (2018 return). The 2018 return was dated March 2, 2019 by the preparer of the return and listed petitioner's name under "[s]ignature of the general partner." The Division reviewed an online services business account creation form for Astoria. This form indicates that it was submitted by petitioner on May 2, 2018. The Division also reviewed forms DTF-17, application to register for a sales tax certificate of authority, and DTF-17-ATT, schedule of business locations for a consolidated filer, both of which list petitioner's name under "[s]ignature of responsible person." Section K of form DTF-17 identifies petitioner as a responsible person of the company, with a business title of manager, whose primary duties include check signing authority and authority over business

² The petition and the answer in this matter also reference a notice of estimated determination, notice number L-053263232, for the period June 1, 2020 through August 31, 2020 and a notice of determination, notice number L-053263233, for the period March 1, 2020 through May 31, 2020 that were also issued to petitioner on May 11, 2021. The Division, however, asserted in its answer that both notices "were resolved and no balance is due on either assessment." At hearing, the Division reiterated this statement, to which petitioner did not object. It appears, as of September 16, 2021, these notices were resolved as they were not included in petitioner's consolidated statement of tax liabilities on such date. Accordingly, this determination will only address the notices referenced in the table above.

decisions, and who will be involved in operating the business on a daily basis, in deciding which financial obligations are paid and in personnel activity such as hiring or firing employees.

Section K also indicates that petitioner's "[o]wnership percentage" is zero.

5. The Division also reviewed a form DTF-95, business tax account update, signed by petitioner as "former" Director of Finance and dated July 30, 2021. This form appears to remove petitioner as a responsible person of Astoria effective June 1, 2018. The form also indicates that petitioner has no ownership interest in Astoria.

6. Finally, the Division reviewed numerous electronically submitted sales tax returns, including: forms quarterly ST-100, New York State and local quarterly sales and use tax returns, submitted on September 19, 2018, December 19, 2018, March 19, 2019, June 20, 2019, and September 20, 2019; forms part-quarterly ST-809, New York State and local sales and use tax return for part-quarterly (monthly) filers, submitted on October 21, 2019, November 20, 2019, January 21, 2020, and February 20, 2020; and forms ST-810 for the period September 1, 2019 through November 30, 2019 and submitted on December 19, 2019 and for the period December 1, 2019 through February 29, 2020 and submitted on March 20, 2020.

7. Petitioner requested a conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of the notices. By conciliation order dismissing request, dated October 8, 2021, BCMS dismissed petitioner's request as late filed.³

8. Petitioner timely filed a petition in protest of the conciliation order dismissing request on December 16, 2021. In the petition, petitioner alleges that he is not personally liable for any of the taxes due.

³ The conciliation order dismissing request does not include the notices that, as noted, were "resolved."

9. The Division filed an answer to the petition on March 9, 2022. In its answer, the Division asserted that petitioner “did not timely exercise its appeal right, that the liability at issue is therefore fixed and final, and that the Division of Tax Appeals therefore lacks jurisdiction to consider the merits of the petition.”

10. The Division’s auditor, Siby George, testified at the hearing that the documents noted in findings of fact 4, 5 and 6 led him to assess petitioner as a responsible person for Astoria. Mr. George also admitted that a responsible person can cease to be a responsible person as the business develops.

11. Petitioner testified that Astoria was in serious financial distress and that on or about January 1, 2019, Ample Hills stopped approving all payments and instructed petitioner to stop all auto payments and cutting of checks. As of February 2019, Astoria had only three employees, including himself, Nelly Gasoyan and Devinci Bruno. He explained that he was not allowed to distribute any checks or money, or pay any parties in any way, and that those functions were under the control of the board of directors, owners, and managing member, Brian Smith.

12. Petitioner explained that he signed form DTF-17, application to register for a sales tax certificate of authority, while the owners were away “to keep the process of Astoria opening on time” and that he was told to list Astoria as “manager-managed” when in fact it was “member-managed” by Mr. Smith. Petitioner explained that he was instructed to sign the form as manager-managed by Mr. Smith “so that when it came time to sign at the end, [he] could sign as manager and it would not hold up the application process.”

13. Petitioner testified that “[i]t has been noted, I have signed many tax documents and tax returns and had check signing privileges at the time. At the time these taxes were due, none of that was true and none of that existed.”

14. Petitioner also testified that he “was not responsible for preparing tax returns, filing them or initiating the payment of sales taxes during [his] entire tenure at Ample Hills.” He explained that sales tax returns were prepared by Astoria’s accounting firm and the release of payments for taxes was controlled first by the chief operating officer and then by Mr. Smith.

15. Petitioner remained the Director of Finance during his time at Astoria, and during the company’s financially distressed times, his duties included “[f]inancial operations, reporting of financial activity, budgeting, [and] closing the books” but that “the functions allowed underneath that title of director of finance changed dramatically over that period.” Petitioner also explained that he still may have had check signing authority, because that had not changed at Astoria’s bank, but that such authority was “impractical” and “of no authority because [he] was unable to use it.”

16. At no time did petitioner have an ownership interest in Astoria.

17. Ms. Gasoyan, Senior Accounting Manager at Astoria, confirmed petitioner’s statements that he was not authorized to distribute checks or payments during the time of the Ample Hills’ financial distress, and that any such payments had to be authorized by Mr. Smith.

18. Mr. Bruno, a staff accountant at Astoria, reiterated Ms. Gasoyan’s and petitioner’s statements that there was no authority to issue checks during the company’s distressed period. He explained that the checks piled up on a desk until they were authorized to send the checks out, which did not happen, but that such authorization would only come from Mr. Smith.

19. Dan Scouler was appointed Chief Restructuring Officer of Ample Hills in February 2020. Mr. Scouler had been involved with financially troubled companies for almost 50 years and hundreds of situations like that of Ample Hills. Mr. Scouler confirmed that petitioner “had no authority whatsoever to issue any checks” from February 2020 until the company filed for

bankruptcy in March 2020 and that such decisions were made by himself, Mr. Smith and “what became debtor’s counsel.” When questioned about petitioner’s role at Astoria during Mr.

Scouler’s time at Ample Hills, Mr. Scouler stated:

“[w]ell, he was -- he was still the Director of Finance and he was -- he supplied, you know, necessary information to prepare for the [bankruptcy] filing. But as I said earlier and I -- I really want to emphasize, he -- he had no -- while I was involved, there is no way that Mr. Saslaw could have issued a check. That was totally controlled by me as [Chief Restructuring Officer], Brian Smith as the owner and of course, advised by debtor’s counsel.”

CONCLUSIONS OF LAW

A. Initially, BCMS dismissed petitioner’s protest of the notices on the basis that the protest was untimely (*see* finding of fact 7). Where the timeliness of a request for a conciliation conference is at issue, the initial inquiry is whether the Division has met its burden of demonstrating the fact and date of mailing of the notice to petitioner’s last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). In absence of proof of proper mailing, the Division can submit evidence of actual receipt of a notice and the date of such actual receipt, and thereby start the period within which a request for conference must be filed to be considered timely (*see e.g. Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011). In this case, the Division has offered neither proof of proper mailing nor proof of actual receipt of the notices prior to petitioner’s request for conciliation conference. Accordingly, petitioner’s protest of the notices is deemed timely, and the Division of Tax Appeals has jurisdiction to consider the merits of petitioner’s protest.

B. Tax Law § 1133 (a) provides, in part, that “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 [article 28].” Tax Law § 1131 (1) in turn defines a “person required to collect any tax imposed by [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 [article 28], or has so acted; and any member of a partnership or limited liability company.”

C. Whether a person is a responsible officer must be determined based on the particular facts of each case (*see Matter of Coppola v Tax Appeals Trib.*, 37 AD3d 901, 903 [3d Dept 2007]; *Matter of Hall*, Tax Appeals Tribunal, March 22, 1990, *confirmed* 176 AD2d 1006 [3d Dept 1991]). Factors outlined in the Division’s regulations include whether the person was authorized to sign the corporation’s tax returns, was responsible for maintaining the corporate books or was permitted to generally manage the corporation (*see* 20 NYCRR 526.11 [b] [2]).

The Tax Appeals Tribunal has stated that:

“[t]he question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and decisions of this Tribunal have identified a variety of factors as indicia of responsibility: the individual’s status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual’s knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; the individual’s economic interests in the corporation” (*Matter of Constantino*, Tax Appeals Tribunal, September 27, 1990 [citations omitted]).

In *Matter of Constantino*, the Tax Appeals Tribunal determined that the petitioner therein lacked the power to ensure that taxes were paid on behalf of the corporation.

D. Similarly, the Tax Appeals Tribunal has found exceptions to liability where an otherwise responsible person proved that he was precluded from acting on behalf of the corporation by the acts of another (*see Matter of Moschetto*, Tax Appeals Tribunal, March 17,

1994; *Matter of Turiansky*, Tax Appeals Tribunal, January 20, 1994). To prevail on such a defense, petitioner is required:

“to establish by clear and convincing evidence that he was not an officer having a duty to act on behalf of the corporation, i.e., that he lacked the necessary authority or he had the necessary authority, but he was thwarted by others in carrying out his corporate duties through no fault of his own” (*Matter of Goodfriend*, Tax Appeals Tribunal, January 15, 1998 [citations omitted]).

This exception is only available where a responsible person did not have or could not have exercised sufficient authority and control over corporate affairs to assure that sales tax was collected and remitted (*Matter of Goodfriend*; see also *Matter of Shah*, Tax Appeals Tribunal, February 25, 1999).

E. While the documents the Division relied on to determine petitioner’s responsible person status would seem to indicate that petitioner was in fact a responsible person, petitioner’s corroborated and unrefuted testimony establishes that petitioner lacked the necessary authority during the periods at issue to assure that sales tax was remitted on behalf of Astoria. Petitioner testified that on or about January 1, 2019, Ample Hills stopped approving all payments and instructed petitioner to stop all auto payments and cutting of checks. This testimony was corroborated by Astoria’s only other employees as of February 2019, Ms. Gasoyan and Mr. Bruno, who both confirmed that petitioner was not authorized to distribute checks or make payments during this time and that such authorization would only come from Mr. Smith. In addition, Mr. Scouler confirmed that petitioner “had no authority whatsoever to issue any checks” and that petitioner’s role at Astoria had been reduced to compiling the necessary financial information to prepare for Ample Hill’s bankruptcy filing. Whether petitioner was a responsible person before the periods at issue is beyond this determination but, as the unrefuted and thus credible testimony establishes, during the periods at issue, petitioner did not have

sufficient authority or control over its corporate affairs to assure that sales tax was remitted on behalf of Astoria (*see Matter of Goodfriend; Matter of Constantino*).

F. The petition of Richard E. Saslaw is granted, and the notices of determination, dated May 11, 2021, are cancelled.

DATED: Albany, New York
July 11, 2024

/s/ Jennifer L. Baldwin
ADMINISTRATIVE LAW JUDGE