

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petitions	:	
of	:	
<b>CONSTANCE LaPENNA and FRANK LaPENNA,</b>	:	DECISION
<b>OFFICERS OF LaPENNA ELECTRIC CONTRACTORS, INC.</b>	:	
for Revision of Determinations or for Refunds of Sales and Use	:	
Taxes under Articles 28 and 29 of the Tax Law for the Period	:	
June 1, 1983 through May 31, 1984.	:	

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The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on November 30, 1989 with respect to the petitions of Constance LaPenna and Frank LaPenna, officers of LaPenna Electric Contractors, Inc., 18 Sunrise Drive, Middletown, New York 10940 for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1983 through May 31, 1984 (File Nos. 802497 and 802498). Petitioner appeared by Bull, Morreale, Judelson & Clancy (John M. Clancy, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Irwin A. Levy, Esq., of counsel).

Petitioners and the Division both filed briefs. Oral argument was heard on September 26, 1990.

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

***ISSUE***

Whether petitioners were persons required to collect sales and use taxes on behalf of LaPenna Electric Contractors, Inc. within the meaning and intent of Tax Law §§ 1131(1) and 1133(a) for the period at issue herein.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

LaPenna Electric Contractors, Inc. (hereinafter "the corporation") operated an electrical contracting business at 14 Rondack Road, Middletown, New York 10940. The corporation began business in November 1976 and filed for bankruptcy in 1984.

On June 14 and 17, 1985, the Division of Taxation issued two notices of determination and demands for payment of sales and use taxes due to petitioner Constance LaPenna spanning, together, the period June 1, 1983 through May 31, 1984 and assessing a sales tax liability in the aggregate amount of \$7,322.64, plus penalty (Tax Law § 1145[a][1]) and interest. On June 17, 1985, the Division of Taxation issued two additional notices of determination and demands for payment of sales and use taxes due spanning the same period and assessing the same amounts as above, against petitioner Frank LaPenna. All notices indicated that the amount of tax due was owed by the corporation and that the petitioners were being assessed as persons required to collect and remit taxes on behalf of the corporation because they were officers of such corporation.

The amount of tax due for the quarters ended August 31, 1983 and November 30, 1983 was based upon the sales tax returns as filed by the corporation without full payment of the tax reported to be due thereon. The amount of tax due for the quarters ended February 29, 1984 and May 31, 1984 was based upon the average taxable sales as reported on previous returns filed, as no sales tax returns had been filed for these periods.

Subsequent to the issuance of the notices of determination, the corporation late filed sales tax returns for the quarters ended February 29, 1984 and May 31, 1984. The tax shown due was not remitted with the sales tax returns. At a Tax Appeals Bureau conference, the total tax due was reduced to reflect the amounts shown on the filed sales tax returns. The amount now in issue is as follows:

<u>Quarter Ended</u>	<u>Tax</u>
August 31, 1983	\$ 251.65
November 30, 1983	1,875.79
February 29, 1984	910.06
May 31, 1984	<u>1,585.84</u>
TOTAL	<u><u>\$4,623.34</u></u>

Constance LaPenna was the president and a shareholder of the corporation during the period in issue. Her name, title, social security number and address appear on the Certificate of Sales Tax Registration form filed by the corporation with the Division of Taxation. On March 15, 1984, Constance LaPenna signed, as president, a New York State Application for Three-Month Extension for Filing Tax Report, Form CT-5, for the corporation for the year 1983. Her husband, Frank LaPenna, was the vice-president, secretary and a shareholder of the corporation during the period in issue. His name, title, social security number and address also appear on the Certificate of Sales Tax Registration form filed by the corporation with the Division of Taxation. On May 3, 1983, Frank LaPenna signed, as vice-president, the corporation's Corporation Franchise Tax Report, Form CT-3, for the year 1981.

Mr. and Mrs. LaPenna became involved in the corporation at the behest of their son, James LaPenna. As a card carrying member of an electrical contractors union, James LaPenna was precluded from owning or operating an electrical contracting business. He therefore requested that his parents be the officers and shareholders of record of the corporation and that their home address be used as the address of the business. Prior to the corporation, Mr. and Mrs. LaPenna never had any involvement with an electrical contracting business. Mrs. LaPenna was a sales clerk in a department store before her retirement in 1966. Mr. LaPenna was a cook in a training school for boys before his retirement in 1978.

During the years at issue, neither petitioner had any duties or responsibilities with regard to the operation of the corporation. They had no authority to hire or fire employees or to negotiate contracts. They signed tax returns only at the request of their son, but did not participate in their

preparation. They never signed checks or other corporate documents. Mr. and Mrs. LaPenna were unaware of the income, payroll, books and records and bank statements of the corporation. They never participated in discussions or meetings concerning the operation of the business or which creditors to pay. Mr. and Mrs. LaPenna did not receive any earnings or dividends from the corporation during its existence. The visits made by petitioners to the business premises, located in the dining room of the home of James LaPenna and his wife Mary Jo LaPenna, were for personal, not business, reasons.

During the period in issue, James LaPenna operated the business. In addition, he drafted checks, negotiated and executed contracts and decided which creditors were to be paid. Along with his wife, Mary Jo LaPenna, he signed the sales tax returns filed for the period in issue. The corporation had one office employee, a secretary/bookkeeper, who answered the telephone, ordered supplies, handled the payroll and made entries into the monthly ledger. The secretary/bookkeeper was hired by and reported to James LaPenna.

### ***OPINION***

In his determination below, the Administrative Law Judge concluded that petitioners were not persons required to collect tax on behalf of the corporation. The Administrative Law Judge reasoned that although petitioners apparently had the authority to sign tax returns, they did so only at the direction and request of their son. Furthermore, the Administrative Law Judge found that petitioners were not responsible for maintaining the corporate books or for the management of the corporation, did not have the authority to hire or fire employees, did not have any responsibility or involvement with the financial affairs of the corporation, nor did they receive any benefits from the corporation's profits throughout its existence. Lastly, the Administrative Law Judge found it significant that petitioners were not engaged in the preparation and filing of the corporation's sales and use tax returns and did not draft checks on behalf of the corporation.

In its exception, the Division argues that petitioners are responsible persons for the collection of sales tax. The Division asserts that Matter of Blodnick v. New York State Tax

Commn. (124 AD2d 437, 507 NYS2d 536) is controlling in this case. The Division contends that "if the assessing party is given information such as corporate position, stock ownerships, signing of returns, then the assessing party is not improperly assessing Petitioners" (Division's exception).

The Division states that since petitioner Constance LaPenna was president of the corporation and owned 100% of the stock,<sup>1</sup> had signed form CT-5 as an officer of the corporation for the year 1983 and petitioner Frank LaPenna was vice-president of the corporation and had signed form CT-3 as an officer of the corporation for the year 1981, the Division was correct in assessing petitioners.

In response, petitioners seek to distinguish Matter of Blodnick v. New York State Tax Commn. (supra) from the instant case. Petitioners submit that there are significant factual differences between Blodnick which clearly support the determination of the Administrative Law Judge. Petitioners argue that in Blodnick the petitioners therein failed to disclose the parties who were responsible for collecting the taxes at issue. In the instant case, petitioners pointed to the fact that James and Mary Jo LaPenna operated and managed the corporation. Moreover, James and Mary Jo LaPenna signed and filed the sales and use tax returns for the periods at issue, not petitioners.

We reverse the determination of the Administrative Law Judge.

Section 1133(a) of the Tax Law imposes upon any person required to collect tax imposed by Article 28, personal liability for the tax imposed, collected or required to be collected. Section 1131(1) of the Tax Law defines persons required to collect tax to include, among others, corporate officers and employees who are under a duty to act for such corporation in complying with the requirements of Article 28.

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<sup>1</sup>Although the Division states in its exception that Constance LaPenna owned 100% of the stock of the corporation, the record indicates that both Frank and Constance LaPenna were shareholders of the corporation.

We agree with the Administrative Law Judge that Matter of Autex Corp. (Tax Appeals Tribunal, November 23, 1988) offers a useful summary of the factors which are considered in determining whether an individual is responsible for the sales and use taxes due from a corporation. Such factors include:

"[T]he authorization to hire or fire employees, the derivation of substantial income from the corporation or stock ownership (Matter of Blodnick v. State Tax Commn., 124 AD2d 437, 507 NYS2d 536); the individual's possible shared status as an officer, director or stockholder (Matter of Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564, 565); the individual's day-to-day responsibilities, involvement with, knowledge of and control over the financial affairs and management of the corporation, the duties and functions as outlined in the certificate of incorporation and the bylaws, the preparation and filing of sales tax forms and returns (Vogel v. New York State Dept. of Taxation & Fin., 98 Misc 2d 222, 413 NYS2d 862, 865); and the payment, including the authorization to write checks on behalf of the corporation, of other creditors other than the State of New York and the United States (Chevlowe v. Koerner, 95 Misc 2d 388, 407 NYS2d 427, 429). Within closely held corporations, 'an officer's knowledge of the corporate affairs and his benefits received from corporate profits [are] extremely important considerations' (Vogel v. New York State Dept. of Taxation & Fin., supra, 413 NYS2d 862, 865)" (Matter of Autex Corp., supra).

Since both sides rely on Matter of Blodnick v. New York State Tax Commn. (supra) in arguing their positions, we begin our analysis with a brief overview of Blodnick. In Blodnick, there were two petitioners, Janice Blodnick and Myrna Kanter, who were found to be liable under sections 1131(1) and 1133(a) of the Tax Law as responsible officers. The two petitioners were the only officers and shareholders of the corporation. However, the petitioners' husbands, in fact, were in charge of the corporation and its affairs. Upon their husbands' requests, the petitioners signed the sale agreement and the other corporate documents whereby they became shareholders and officers. Their husbands hired two managers who were responsible for the day-to-day operations of the corporation which also included supervising the employees of the corporation. The husbands of the petitioners also hired a bookkeeper who was in charge of all

the financial affairs of the corporation (Matter of Blodnick, State Tax Commn., May 21, 1985, confirmed 124 AD2d 437, 507 NYS2d 536).

The facts in Blodnick are very similar to the facts in the present case involving petitioners Frank and Constance LaPenna. Petitioners clearly were the only officers and shareholders of the corporation. Petitioners' son, James LaPenna, hired the one employee of the corporation, the secretary/bookkeeper. James LaPenna was in charge of the day-to-day operations of the corporation. Furthermore, petitioners both were listed as responsible officers on the Certificate of Sales Tax Registration forms on file with the Department.

Petitioners continually assert that they were not in charge of the corporation and never performed any duties, outside of signing tax returns, with respect to the corporation. However, as stated in Blodnick, "the fact that petitioners did not in fact exercise their responsibilities is irrelevant" (Matter of Blodnick v. New York State Tax Commn., supra, 507 NYS2d 536, 538). We conclude that petitioners are responsible persons within the meaning and intent of section 1131(1) of the Tax Law because as the only shareholders and officers of the corporation they clearly had actual authority over the corporation. The fact that petitioners failed to exercise such authority is, in our view, irrelevant to the question of their liability.

Petitioners assert that a major distinction can be made between the present case and Blodnick based on the fact that in Blodnick the court stated that:

"Given petitioners' positions as the sole officers and shareholders of the corporation, together with the fact that they were unable to relate who, if not they, was responsible for collection of taxes, [the State Tax Commission's] finding that petitioners were the correct parties for assessment of taxes was neither arbitrary nor capricious" (Matter of Blodnick v. New York State Tax Commn., supra, 507 NYS2d 536, 538 [emphasis added]).

Unlike the petitioners in Blodnick who failed to testify that it was their respective husbands who were responsible for payment of the taxes, petitioners argue that they have contended all along that their son, James LaPenna, was the one who was responsible. Moreover, petitioners go so far as to argue that the Third Department in Blodnick applied a two prong test to determine officer

liability. The first prong is whether a person is an officer and shareholder of the corporation, while the second prong is the inability or the unwillingness to identify who, if not they, was responsible for the collection of the tax (Oral Arg. Tr., p. 24). We do not interpret the court's comments as an endorsement of a two prong test that must be met in order to impose liability under section 1133(a) of the Tax Law.

Petitioners are clearly trying to establish that it is their son who is the responsible officer in this case. However, it is important to note that more than one person can be held liable as a responsible officer (see, Matter of Blodnick v. New York State Tax Commn., *supra*, 507 NYS2d 536 [where both the petitioners were held liable]). Therefore, merely pointing to one individual and alleging such individual is a responsible officer does not necessarily establish that the other individuals are not responsible officers as well.

Further, petitioners have not demonstrated that they were precluded from exercising their authority by the acts of their son, James LaPenna (*cf.*, Matter of Constantino, Tax Appeals Tribunal, September 27, 1990 [where we concluded that a minority shareholder did not simply fail to act, but was prevented from acting by the power of another in the corporation]). Instead, petitioners have established only that they declined to exercise any responsibility over the corporation.

Petitioners assert that it is significant that neither Constance LaPenna nor Frank LaPenna signed the sales tax returns during the period in question. Furthermore, petitioners argue that since James and Mary Jo LaPenna signed all the returns for the period in question, the Division was put on notice that it was James and Mary Jo LaPenna who were responsible officers, and not petitioners (Oral Arg. Tr., pp. 15-17). We disagree.

Whether or not the Division was put on notice as to whom was responsible for signing the sales tax returns for the period in question is irrelevant in determining whether petitioners were responsible officers within the meaning and intent of the Tax Law. The fact that petitioners did



not sign the returns is insufficient to establish that they were not responsible officers, given their status as the only shareholders and officers of the corporation.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted;
2. The determination of the Administrative Law Judge is reversed;
3. The petitions of Constance LaPenna and Frank LaPenna, as officers of LaPenna Electric Contractors, Inc., are dismissed; and
4. The Notices of Determination and Demands for Payment of Sales and Use Taxes Due, dated June 14 and 17, 1985, are sustained.

DATED: Troy, New York  
March 14, 1991

/s/John P. Dugan

John P. Dugan  
President

/s/Francis R. Koenig

Francis R. Koenig  
Commissioner

/s/Maria T. Jones

Maria T. Jones  
Commissioner