

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

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| In the Matter of the Petition | : | |
| of | : | |
| ROBERT MAST (DEC'D) | : | DECISION |
| OFFICER OF SHORE CHRYSLER PLYMOUTH, INC. | : | DTA No. 807342 |
| | : | |
| 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 June 1, 1982 | : | |
| through August 31, 1982. | : | |

Petitioner, estate of Robert Mast, c/o Patricia Mastantuono, Executrix, 436 Oceanpoint Avenue, Cedarhurst, New York 11516, filed an exception to the determination of the Administrative Law Judge issued on September 3, 1992. Petitioner appeared by Jesse I. Levine, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Michael C. Gitter, Esq., of counsel).

Petitioner submitted a brief in support of its exception. The Division of Taxation filed a letter in opposition. Petitioner was granted an extension to file a reply brief until March 8, 1993, which date began the six-month period for the issuance of this decision. No reply brief was submitted.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether the three-year statute of limitations of section 1147(b) of the Tax Law applies to a Notice of Determination issued to a responsible officer for the taxes not remitted by the corporation with its return.

FINDINGS OF FACT

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

The Division of Taxation ("Division") issued to Robert Mast a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated April 19, 1988, assessing sales and use taxes due for the period June 1, 1982 through August 31, 1982 of \$35,210.17 plus penalty and interest.

The Division was advised of the death of Mr. Mast by letter dated April 29, 1988. A petition was filed on behalf of Robert Mast (dec'd) (hereinafter "petitioner") on September 18, 1989.

Petitioner was an officer of Shore Chrysler Plymouth, Inc. ("Shore"). Petitioner filed a long-form, part-quarterly sales and use tax return on behalf of Shore for the period June 1, 1982 through June 30, 1982, reporting tax due of \$20,210.17 and remitting payment in the amount of \$5,210.17, leaving a balance due of \$15,000.00. This return was dated August 20, 1982 and received by the Division on August 24, 1982.

Petitioner also filed a long-form, part-quarterly sales and use tax return on behalf of Shore for the period July 1, 1982 through July 31, 1982, dated August 20, 1982, reporting no sales and no tax due. Shore did not file a quarterly return for the period June 1, 1982 through August 31, 1982.

There is one fact disputed by the parties, i.e., when Shore ceased doing business. The Division claims, on the basis of a letter to the Division from Chrysler Motors, dated March 25, 1988, that Shore stopped doing business on August 19, 1982. As pertinent here, that letter states:

"Listed below is the information you requested regarding the subject dealership:

* * *

"4. Effective Date of Termination:
"a. August 19, 1982."

Petitioner's representative provided two documents to support his claim that Shore ceased doing business in June 1982.

(a) The first document is a Notice of Delinquency, issued to Shore by the Division's Wage Reporting Bureau. It is dated January 25, 1983 and states that the Division had not received

quarterly reports of wages paid to employees for the period July 1, 1982 through September 30, 1982. On the back of this form, petitioner provided the following statement:

"Shore Chrysler Plymouth, Inc. ceased operations as of June 18, 1982. All employees were dismissed at this time. Wage and tax forms WRS-2 were filed for all wages paid to this time. A copy of this report is enclosed."

This statement bears petitioner's signature and is dated January 27, 1983.

(b) The report of wages referred to in the above statement indicates that it is a "FINAL" return. The date of discontinuance of business in New York is shown as June 18, 1982.

In or about March 1988, the Division estimated tax due from Shore for the period June 1, 1982 through August 31, 1982. A dummy sales tax return was prepared showing gross sales and services of \$2,208,606.00, taxable sales and services of \$553,186.00, and tax of \$40,420.39. The total amount remitted on monthly returns, in the amount of \$5,210.17, was subtracted from the tax to calculate an amount due of \$35,210.17. The following statement appears on the return: "Dummy return made to pick up unapplied part-quarterly returns. Figures for August were estimated." (Emphasis added.)

Quarterly gross and taxable sales shown on the dummy return equal two times the amount reported by Shore on the return filed for June 1982.

The Division issued a conciliation order dated June 23, 1989, reducing the tax due to \$15,000.00 plus penalty and interest. The Conferee's report contains the following statements:

"The requester who passed away on July 14, 1987, was assessed as a responsible officer of Shore Chrysler Plymouth, Inc. The requester was assessed for failure of the corporation to file and pay the tax due for the August 31, 1982 quarter. The corporation was a monthly filer and filed a monthly return for June, 1982 with tax due amounting to \$20,210.17 with a partial payment of \$5,210.17. The corporation failed to file the quarterly return for the August 31, 1982 period. The requester's representative argued that the statute for assessing had expired because the assessment was issued more than three years from the monthly return.

* * *

"The tax is revised to \$15,000.00 and the penalty and statutory interest is sustained because the statute has been kept open as a result of the corporation not filing the quarterly return."

OPINION

The Administrative Law Judge determined that the filing of monthly returns for June and July in the quarterly period ending August 31, 1982 triggered the statute of limitations to assess additional tax for these months even though petitioner did not file the quarterly return required by section 1136(a)(i) of the Tax Law, which would have served as the monthly return for August 1982 and the reconciliation for the entire quarter. On the other hand, the Administrative Law Judge found that the failure to file the quarterly return allowed the Division to issue an assessment for additional tax for the month of August 1982, after the expiration of three years. The Administrative Law Judge also concluded that the conciliation conferee cancelled the assessment for the month of August 1983 and, therefore, the amount remaining in dispute was the \$15,000.00 not remitted with the June 1982 return. The Administrative Law Judge found that section 1138(a)(1)(B) of the Tax Law, as added by Chapter 65 of the Laws of 1985, authorized the Division to issue a Notice of Determination to petitioner for this tax and that Matter of Parsons v. State Tax Commn. (34 NY2d 190, 356 NYS2d 593) and Matter of Hall v. New York State Tax Commn. (108 AD2d 488, 489 NYS2d 787) were not determinative with respect to the authority of the Division to proceed administratively against responsible officers of a corporation after April 17, 1985 (the effective date of section 1138(a)(1)(B) of the Tax Law). Relying on Matter of Cadalso v. State of New York & New York State Tax Commn. (Sup Ct, Albany County, Dec. 27, 1978, Casey, J.), the Administrative Law Judge concluded that the three-year statute of limitations provided by section 1147(b) of the Tax Law did not apply to notices of determination issued to corporate officers for the tax reported, but not paid, by the corporation. Finally, the Administrative Law Judge concluded that the Division's delay in issuing the Notice to petitioner did not form the basis for a claim of estoppel.

On exception, petitioner argues that the three-year statute of limitations contained in section 1147(b) of the Tax Law began to run for the month of June 1982 on August 20, 1982, the date that petitioner filed the tax return for that month. Citing Matter of Hall v. New York State Tax Commn. (*supra*), petitioner states that in the absence of any claim of fraud, there cannot be

any assessment of sales and use taxes for the period ending June 1982. Petitioner also contends, relying on Matter of Parsons v. State Tax Commn. (*supra*), that the Division cannot issue a Notice of Determination against an officer of a corporation. Lastly, petitioner asserts that the Division is estopped from issuing the Notice of Determination because the Division delayed six years in doing so.

In response, the Division states that "[t]he statute of limitations did not commence to run because of the failure of the corporation to file the required quarterly return required by Tax Law section 1136(a)(1). The filing of two part quarterly returns is not sufficient to obviate the need for the filing of the quarterly return" (Division's brief, p. 1). The Division also states that it disagrees with the Administrative Law Judge's conclusion that the corporation ceased doing business as of June 18, 1982 and asserts that the correct finding is that the corporation discontinued business on August 19, 1982.

Preliminarily, we note that the Division did not raise these points in an exception, but only in its brief in opposition to petitioner's exception. This brief was received on December 21, 1992, well after the 30-day period to file exceptions to the Administrative Law Judge's determination issued on September 3, 1992. Accordingly, the Division has not required us to review these issues by filing a timely exception and we decline to exercise our discretion to consider them (*see*, Matter of Auriemma, Tax Appeals Tribunal, September 17, 1992; Matter of Klein's Bailey Foods, Tax Appeals Tribunal, August 4, 1988). Therefore, we begin our analysis with the premises that the portion of the assessment remaining in issue was due with the June 1982 return and that the filing of this return commenced the statute of limitations for this month.

Section 1147(b) of the Tax Law provides, in part:

"except in the case of a willfully false or fraudulent return with intent to evade the tax no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return; provided, however, that where no return has been filed as provided by law, the tax may be assessed at any time."

In Matter of Hall v. New York State Tax Commn. (*supra*), the Appellate Division, Third Department, held that when the Division issued a Notice of Determination to an individual,

asserting that the individual was liable for the taxes not remitted by a corporation with its return, the Division made an assessment.¹ The Court in Hall also concluded that section 1147(b) of the Tax Law required that such an assessment be made within three years from the date of the filing of the return. The Court articulated this rule and found the assessments for certain periods untimely even though the Court ultimately concluded that Matter of Parsons v. State Tax Commn. (*supra*) was still dispositive, notwithstanding statutory amendments, and that the Division did not have authority to proceed administratively, i.e., to issue notices of determination to an individual for the taxes not remitted by the corporation with its return. Although Chapter 65 of the Laws of 1985 reversed the latter holding of Hall by adding section 1138(a)(3)(B) of the Tax Law, which authorizes the issuance of a Notice of Determination to a responsible officer for the taxes of a corporation, we see nothing in the amendments made by Chapter 65, nor elsewhere, that overrules the statute of limitations holding of Hall. Therefore, we conclude that the Notice of Determination issued to petitioner was not timely to assess the taxes due for the month of June 1982.²

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Robert Mast (Dec'd), Officer of Shore Chrysler Plymouth, Inc. is granted;
2. The determination of the Administrative Law Judge is reversed;
3. The petition of Robert Mast (Dec'd), Officer of Shore Chrysler Plymouth, Inc. is granted; and

¹The Court in the text of its statute of limitations discussion does not explicitly state that it is dealing with returns where the tax was reported but not paid, rather than inadequate or insufficient returns; however, in a footnote to this discussion, the Court refers to 20 NYCRR 535.6 and states that the Division should have issued Notice and Demands for those periods where no assessment was possible (Matter of Hall v. New York State Tax Commn., *supra*, 489 NYS2d 787, 789, fn. 2). The regulation at 20 NYCRR 535.6 enumerates the instances where a notice and demand would be issued by the Division as: "when a return is filed but the amount of tax shown to be due is not paid with the filing of the return, a return showing an amount of tax due is filed late, or a return contains one or more mathematical errors" (former 20 NYCRR 535.6). Because only the first possibility is relevant in Hall, this footnote indicates that the Court was discussing the application of the statute of limitations to responsible officer assessments for taxes reported, but not paid, by the corporation.

²This result is in accord with the Division's current regulation, 20 NYCRR 535.3 (amended effective April 1, 1992), which does not list responsible officer assessments as an exception to the three-year statute of limitations.

4. The Notice of Determination dated April 19, 1988, as modified by the Conciliation Order, is cancelled.

DATED: Troy, New York
July 29, 1993

/s/John P. Dugan

John P. Dugan
President

/s/Francis R. Koenig

Francis R. Koenig
Commissioner

/s/Maria T. Jones

Maria T. Jones
Commissioner