

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ROBERT S. ABRAMS, OFFICER OF FINGER LAKES FARM STORES, INC.	:	DECISION DTA No. 807926
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, 1985 through November 30, 1986.	:	

Petitioner Robert S. Abrams, officer of Finger Lakes Farm Stores, Inc., P.O. Box 446, Fultonville, New York 12072, filed an exception to the determination of the Administrative Law Judge issued on August 13, 1992 with respect to his 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, 1985 through November 30, 1986. Petitioner appeared by James C. Hayes, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation submitted a letter indicating that it would rely on its brief dated February 5, 1992 previously filed with the Division of Tax Appeals. Oral argument, requested by petitioner, was denied.

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

ISSUE

Whether the Division of Taxation properly assessed petitioner as a person responsible to collect tax on behalf of Finger Lakes Farm Stores, Inc. pursuant to Tax Law §§ 1131(1) and 1133(a).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "10" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

On April 12, 1988, the Division of Taxation issued to petitioner, Robert S. Abrams, two notices of determination and demands for payment of sales and use taxes due. Each notice asserted petitioner's liability "individually and as officer of Finger Lakes Farm Store, Inc. trading as Hi-Health Dairy Store" and each assessed tax, penalty and interest for the period September 1, 1985 through November 30, 1986. One of the notices bore identification number 073281539S1 and assessed \$17,901.81 in tax due, plus penalty and interest. The other notice bore identification number 073281539S2 and assessed \$13,192.12, plus penalty and interest.

By Conciliation Order dated December 22, 1989, the assessment set forth in the notice bearing an identification number ending "S1" was reduced to \$15,805.08, plus penalty and interest. The Conciliation Order sustained the notice bearing an identification number ending "S2."

The assessments herein constitute sales taxes reported but not paid by the corporate entity, Finger Lakes Farm Stores, Inc.

Finger Lakes Farm Stores, Inc. operated two convenience-type stores under the name "Hi-Health Dairy Store." One store was located at 200 Franklin Street, Watkins Glen, New York, and the other store was located at 114 East Main Street, Odessa, New York.

Petitioner was concededly president of Finger Lakes Farm Stores, Inc. until January 1, 1984. Petitioner's involvement in the corporation's activities as president before January 1, 1984 is evidenced by the following:

- (a) Petitioner signed certificates of registration as a vendor for sales and use tax purposes for both the Watkins Glen and Odessa stores (see below).

(b) Petitioner signed a lease dated September 16, 1981 by which the corporation leased premises for the Odessa, New York store.

(c) Petitioner signed an application, dated October 27, 1981, together with certain other documents submitted to the State Liquor Authority for a license to sell beer at the Odessa, New York store.

(d) Petitioner also signed certain documents dated June 10, 1983 submitted to the State Liquor Authority in connection with the corporation's renewal of its license to sell beer.

It should be noted that petitioner controlled another corporation, "Glen & Mohawk Milk Association, Inc."¹ It appears from the record that, although Finger Lakes Farm Stores, Inc. operated both Hi-Health Dairy Stores, the license to sell beer for the Watkins Glen store was held in the name of Glen & Mohawk Milk Association, Inc. The record contains no explanation for this situation.

Scant evidence was presented regarding the day-to-day operations of the corporation. In a document submitted to the State Liquor Authority as part of its licensing application, the corporation stated that it intended to hire a manager to manage the Odessa, New York store. This document, dated October 27, 1981, was signed by petitioner as president. Additionally, petitioner's sole witness, the attorney for petitioner and Finger Lakes Farm Stores, Inc., testified that petitioner never ran the stores on a day-to-day basis, and that such operations were delegated for a period of time to petitioner's son, David Abrams, and later to an entity which operated convenience stores. The source of this witness's knowledge of the stores' operations is not set forth in the record.

The record does not contain sufficient information from which to conclude how the corporation's sales tax returns were prepared.

¹Petitioner's signature as president of Glen & Mohawk Milk Association, Inc. appears on various license applications, license renewals and license surrender documents filed with the State Liquor Authority which were entered into the record.

Petitioner and his wife, Marilyn Abrams, were the sole shareholders and directors of the corporation. They continued to hold such positions throughout the audit period.

We modify finding of fact "10" of the Administrative Law Judge's determination to read as follows:

At hearing, petitioner presented a letter dated December 31, 1983 whereby petitioner purportedly resigned as president and treasurer of the corporation effective January 1, 1984. Said letter was maintained in the corporation's minute books. Petitioner also presented a copy of the minutes of a special meeting of the board of the corporation dated January 3, 1984 whereby Kenneth Miner was elected president and treasurer of the corporation. Mr. Miner was described by petitioner's sole witness at the hearing as the corporation's bookkeeper. The record, however, is void of any corporate papers or tax returns bearing the signature of Mr. Miner in his capacity as president or treasurer.²

Petitioner also signed as president of Finger Lakes Farm Stores, Inc. a State Liquor Authority license renewal application dated June 1, 1986 and a State Liquor Authority certification dated June 13, 1986. Additionally, petitioner signed a petition for surrender of the corporation's beer license dated December 1, 1986 and a State Liquor Authority certification for a refund dated December 29, 1986.

Petitioner did not personally appear at the hearing herein.

A certificate of registration for sales and use tax purposes was filed on behalf of the Hi-Health Dairy Store located in Watkins Glen, New York in 1978. Petitioner was listed thereon as the sole "owner(s) and/or principal officers." Petitioner's signature appears on the certificate under the title "president."

A certificate of registration dated October 22, 1981 was filed on behalf of the Odessa, New York Hi-Health Dairy Store. This certificate was signed by petitioner, as president, and listed petitioner as president and the sole "owner(s) and/or principal officers."

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We modified finding of fact "10" of the Administrative Law Judge's determination by adding the last sentence to more accurately reflect the record.

The Odessa and Watkins Glen Hi-Health Dairy Stores each had separate sales tax identification numbers and each filed separate sales tax returns. The Watkins Glen store filed under identification number 07-3281539S1 and the Odessa store filed under 07-3281539S2.³

For each of the stores, the sales tax returns for the five sales tax periods comprising the period at issue were entered into the record. The signature of David Abrams appeared on each store's returns for three of the periods. The returns were unsigned for two of the periods. David Abrams signed as general manager for one of the periods and as president for two of the periods.

OPINION

In the determination below, the Administrative Law Judge held that resolution of the instant matter turns upon an evaluation of the evidence in light of petitioner's burden of proof (see, 20 NYCRR 3000.10 [d][4]). The Administrative Law Judge also held that the Division of Taxation (hereinafter the "Division") presented documentation which revealed petitioner's signature as president of Finger Lakes Farm Stores, Inc. on numerous documents filed with the State Liquor Authority before, during and after the period at issue and, additionally, the record shows that petitioner was one of two directors and shareholders of the corporation during the period at issue.

The Administrative Law Judge further held that: 1) the letter of resignation and corporate minutes presented by petitioner were unsworn documentation of a self-serving nature which failed to prove petitioner's resignation as president due to the fact that petitioner's signature, as president, appears on documents dated within the period at issue; 2) there is no evidence that petitioner ever relinquished his status as a director of the corporation and such status is sufficient to expose petitioner to liability under Tax Law § 1131(1); 3) the fact that the corporate minutes state that Kenneth Miner, an individual described in the record as the corporation's bookkeeper, was elected president indicates that, even if petitioner resigned, he likely gave up little, if any, authority; and 4) it appears that neither petitioner nor the corporation

³These identification numbers are also set forth on the notices of determination herein (see, above).

ever notified the State Liquor Authority of petitioner's purported resignation as required pursuant to Alcoholic Beverage Control Law § 99-d.2 and that this, too, weighs against the legitimacy of petitioner's claim of resignation.

The Administrative Law Judge rejected, as unsubstantiated, petitioner's contention that he had no day-to-day management responsibilities in the corporation, as well as his questioning of the authenticity of signatures on various documents. With respect to these signatures, the Administrative Law Judge noted that the evidence presented to challenge them was the testimony of the corporation's attorney, who is not a handwriting expert. The Administrative Law Judge pointed out that what was notably lacking was the testimony of such an expert and of petitioner himself.

Finally, the Administrative Law Judge sustained the notices of determination dated April 12, 1988, as adjusted by the Conciliation Order dated December 22, 1989.

On exception, petitioner alleges that he has met his burden of proof by showing that he was not a corporate officer during the applicable period in question. Petitioner argues that: 1) he resigned, effective January 1, 1984, as president and treasurer (officer) of the corporation in question, Finger Lakes Farm Stores, Inc.; 2) effective January 1, 1984, Mr. Kenneth Miner was elected president and treasurer of the corporation taking over and filling the offices vacated by petitioner; and 3) he was not involved in the day-to-day operation and/or management of the corporation, Finger Lakes Farm Stores, Inc. Petitioner also argues that the proof at bar shows he was engaged with the development and marketing of his plastic vial operation during the period in question and that he is not individually responsible for payment of the taxes or any deficiency on behalf of Finger Lakes Farm Stores, Inc. during the period of September 1, 1985 through November 30, 1986.

The Division, while not filing a brief, instead relies on the brief filed below and respectfully requests that the determination below be, in all respects, sustained.

We affirm the determination of the Administrative Law Judge.

While it is the position of petitioner that the proof at bar shows that he was not involved with the day-to-day operation of Finger Lakes Farm Stores, Inc. at any time during the period in question and, conversely, that he was engaged with the development and marketing of his plastic vial operation, support for the latter position is lacking. The only reference to the plastic vial operation in the record was the testimony of the attorney/accountant for petitioner who stated that during the period in question, "I think that at the time, if my memory is correct, he was involved with the start-up of a new business manufacturing plastic vials" (Tr., p. 37). When asked the name of that corporation, the answer was, "Capital Vials I think" (Tr., p. 37). Further testimony was that the general nature of the product was, "[i]t's a blown, molded plastic leak-proof vial that he's developed" and when asked, "[i]s the material produced by Capital Vials Corporation currently in the process of going into a worldwide market, sir," answered, "[y]es" (Tr., p. 37).

Nowhere in the record is there any documentation such as corporate minutes of meetings, press releases concerning the marketing referred to above or even a brochure or pamphlet relating to the product in question.

We find no basis in the record before us for modifying the determination of the Administrative Law Judge in any respect. Therefore, we affirm the determination of the Administrative Law Judge for the reasons stated in said determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner Robert S. Abrams, officer of Finger Lakes Farm Stores, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Robert S. Abrams, officer of Finger Lakes Farm Stores, Inc. is denied; and

4. The notices of determination and demand for payment of sales and use taxes due dated April 12, 1988, as adjusted by the Conciliation Order dated December 22, 1989, are sustained.

DATED: Troy, New York
March 18, 1993

/s/John P. Dugan
John P. Dugan
President

/s/Maria T. Jones
Maria T. Jones
Commissioner