

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**MARVIN H. MASON, INC.** :  
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, 1982 :  
through November 30, 1985. :

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DECISION  
DTA NOS. 808776  
& 808777

In the Matter of the Petition :  
of :  
**MARVIN H. MASON** :  
**OFFICER OF MARVIN H. MASON, INC.** :  
for Revision of a Determination or for Refund :  
of Sales and Use Taxes under Articles 28 and 29 :  
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Petitioners Marvin H. Mason, Inc. and Marvin H. Mason, Officer of Marvin H. Mason, Inc., 4775 Sheridan Drive, Williamsville, New York 14221, each filed an exception to the determination of the Administrative Law Judge issued on October 8, 1992. Petitioners appeared by Phillips, Lytle, Hitchcock, Blaine & Huber (James W. Smyton, David J. McNamara and Martha L. Salzman, Esqs., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

Petitioners filed a brief in support of their exceptions and a letter brief in reply to the Division of Taxation's letter brief in opposition. Petitioners' request for oral argument was denied. Petitioners' letter brief was received on March 1, 1993, which date began the six-month period to issue this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

***ISSUES***

I. Whether the Division of Taxation correctly determined that sales and use taxes were due from Marvin H. Mason, Inc.

II. Whether petitioner Marvin H. Mason was a person required to collect sales and use taxes on behalf of Marvin H. Mason, Inc. within the meaning and intent of Tax Law §§ 1131(1) and 1133(a) for the period at issue.

***FINDINGS OF FACT***

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

On the basis of a field audit, the Division of Taxation ("Division") issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated February 28, 1989, to petitioner Marvin H. Mason, Inc. which assessed sales and use taxes for the period December 1, 1982 through November 30, 1985. The notice assessed sales and use taxes in the amount of \$11,067.24, plus penalty of \$2,822.80 and interest of \$8,643.34, for a total amount due of \$22,533.38. The Division also issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated February 28, 1989, to petitioner Marvin H. Mason, officer of Marvin H. Mason, Inc., which assessed the same amount of tax, penalty and interest as was assessed against the corporation. The latter notice explained that petitioner was being held personally liable as a responsible officer of Marvin H. Mason, Inc.

The field audit report in this matter shows that during the audit petitioners were asked to verify that the corporation was a registered vendor for sales tax and that the corporation filed sales and use tax returns. The Division did not receive the requested verification for the audit period. The Division's workpapers also show that the assessment of sales and use taxes was based on the gross sales reported by the corporation on its income tax returns for the years 1983 through 1985.

In 1960, petitioner Marvin H. Mason was admitted to practice law. Since his admission to the bar, he has practiced exclusively in the area of workers' compensation law.

During the period in issue, Mr. Mason was a partner in the law firm of Phillips, Lytle, Hitchcock, Blaine & Huber in Buffalo, New York. In this position, he was in charge of the workers' compensation department which, during the period in issue, consisted of eight attorneys who specialized in workers' compensation defense. Mr. Mason's duties included managing the workers' compensation practice, billing clients, work assignments and handling hearings.

Mr. Mason's law firm required him to have 1,700 to 1,800 billable hours a year. In addition to meeting the firm's requirement for billable hours, Mr. Mason was also responsible for billing and dealing with clients. This required more than the 1,800 billable hours required by the law firm.

In 1979, Mr. Mason purchased real estate in the Town of Pendleton, which is approximately 20 miles from Buffalo, New York. The real estate included a main building with a hardware store and two buildings which were adjacent to the hardware store.

At the time he purchased the building that housed the hardware store, it was contemplated that Mrs. Mason would run the business. Mr. Mason did not intend to manage the hardware store because his workers' compensation practice required all of his time. At the time he purchased the property, Mr. Mason was usually in his office by 7:00 A.M. and generally did not return home until 8:00 P.M.

Upon the advice of Mr. Mason's attorney, the hardware store was separately incorporated from the balance of the real estate under the name of Marvin H. Mason, Inc. Mr. Mason's attorney also recommended that Mr. Mason should elect to have the corporation taxed under subchapter S of the Internal Revenue Code. Mr. Mason became the president of the corporation and its sole shareholder. Mr. Mason's attorney felt that all of the shares of stock should be held by Mr. Mason because Mrs. Mason's health was uncertain. Mrs. Mason was also appointed to a corporate office, although it was not known at the time of the hearing what office she held.

After Mr. Mason purchased the hardware store, Mrs. Mason took charge of the business which operated under the name of Pendleton Hardware. Mrs. Mason was at the store on a daily basis and managed whatever had to be done.

In late 1981, the operation of the hardware store was taken over by a former employee of the business. The former employee ran the business for about a year and then stopped. At the time he stopped operating the business, money was due Mr. Mason on a note and for rent.

When the former employee left, Mrs. Mason expressed a desire to resume operating the hardware store. In the discussion which followed, Mr. Mason stated that he felt it was in Mrs. Mason's best interests not to go back into the business. Furthermore, he did not have time to devote to the business. Mrs. Mason's wishes prevailed and, in late 1982, she resumed operating the store. She continued to operate the store until late 1985.

Mr. Mason felt that Mrs. Mason was qualified to manage the hardware store because of her training as a bookkeeper and her prior history of managing the books of a Western Auto store. She had also worked as a bookkeeper for a medium-sized manufacturing company.

During the period in issue, Mr. Mason believed that sales taxes were being paid. This belief was based on the fact that Mrs. Mason was an experienced bookkeeper who would have been familiar with sales taxes from the prior period when she operated the hardware store. In addition, Mr. Mason reasoned that Mrs. Mason would have been acquainted with sales tax requirements from a previous position in which she was responsible for the books of the Western Auto store.

Mr. Mason first learned that there was a problem involving sales tax in June 1988 when he received notice of an audit. The notice was received approximately 2½ years after Mrs. Mason ceased operating the business and approximately 8 months after Mrs. Mason passed away.

When Mr. Mason learned that there was an issue with respect to whether sales tax had been paid, he located certain files which contained copies of letters from his wife to the Department of Taxation and Finance. The letter pertaining to the year 1983 stated as follows:

"January 30, 1984

State of New York  
Finance and Taxation  
Sales Tax Division  
Albany N=Y= [sic] 12201

Subject: Sales Tax 1983  
MHM Inc., creditor for Penton Hardware, bankrupt

Gross Sales for year 1983	\$64,128
tax exempt	4,298
Net taxable sales	58,830
Sales tax on above	4,188

Dorothy A. Mason

encl: chk"

Although the amounts differ, the remaining letters reported sales for the years 1984 and 1985 in the same format as the letter for the year 1983. However, the letter which reported sales for the year 1985 also stated that "this is a final report - business sold December 20, 1985." These letters reinforced Mr. Mason's belief that sales tax had been paid. After locating the letters, Mr. Mason attempted, without success, to obtain copies of the checks referred to in the letters.

The hardware store maintained records which were stored in plastic bags and then placed in boxes. The boxes were stored on rafters in a garage which was adjacent to the hardware store. Later, the records were apparently thrown out while Mr. Mason's son and his friends were cleaning the garage in preparation for a new tenant.

Mrs. Mason shared Mr. Mason's understanding that he would not have any involvement in the operation of the business. Mr. Mason never worked at the hardware store and, although he was a signatory of the corporation's checking account, he did not have any recollection of drafting checks to pay any of the business's creditors.

The bookkeeping for the business was performed by Mrs. Mason at an office in the store. Mr. Mason did not keep the books for the business nor did he ever review the books of the business.

Only Mrs. Mason hired and fired employees. In addition, Mrs. Mason held herself out as the owner of the business and made the decision as to which bills to pay. It was Mrs. Mason's practice to pay larger bills by money order or certified check.

Mr. Mason never attended trade shows or conventions for hardware dealers. However, Mrs. Mason did go to these types of events.

Mr. Mason never received a dividend or any compensation from the business. Moreover, he always paid for the merchandise which he took from the hardware store.

When the corporation began, it took out a small loan. It is Mr. Mason's recollection that he and his wife signed for the loan. On occasion, Mr. Mason loaned money to the corporation. When this occurred, he took back a note. A portion of these loans were repaid.

At the hearing, Mr. Mason stated that he assumed that the corporation filed Federal income tax returns and that either he or his wife would have signed the returns. Also, during the period in issue, Mr. Mason and his wife filed joint personal income tax returns.

During the audit period, the corporation did not pay rent for the use of the business premises.

At the hearing, the Division introduced into evidence an affidavit from a Ms. Barbara Zell. The affidavit stated, in relevant part, that she is employed by the Division and that her duties include the maintenance of the Division's records of registrations for all business taxes including sales tax vendors. The affidavit continues that the affiant conducted a search of the Division's records using the name Marvin H. Mason, Inc. and EIN 16-1127059 to determine whether the corporation was a sales tax vendor. According to Ms. Zell, the search of the Division's records shows that Marvin H. Mason, Inc. has never been registered as a sales tax vendor with the State of New York. The only information which Ms. Zell found on this corporation was a "dummy"

account which was created by the Division on its computer system on November 30, 1988 in order to track the assessments at issue herein.

***OPINION***

The Administrative Law Judge found that: (1) the letters submitted by petitioners were not sufficient to establish that the tax was paid; (2) no evidence was presented to show that the letters were ever mailed; and (3) it was mere speculation to assert that checks or money orders were enclosed with the letters.

Further, the Administrative Law Judge found meritless petitioners' argument, that the Division's workpapers and Mrs. Zell's affidavit be given little weight. The Administrative Law Judge stated that petitioners could have issued a subpoena to secure the auditor's testimony and could have requested a continuance to secure Mrs. Zell's attendance.

With regard to the issue of whether Mr. Mason was a person required to collect sales tax, the Administrative Law Judge applied the principles set forth in Matter of LaPenna (Tax Appeals Tribunal, March 14, 1991) and found that Mr. Mason was responsible for the taxes in issue. The Administrative Law Judge stated that this was not a case where Mr. Mason was precluded from exercising his authority, but one where Mr. Mason chose not to exercise such authority.

On exception, petitioners continue to assert that the tax was paid. Petitioners argue that it is reasonable to conclude that money orders were enclosed with the letters sent to the Division, as it was Mrs. Mason's custom to pay larger bills with money orders. Petitioners further argue that if the money orders were not enclosed, surely this would have triggered some type of investigation or audit.

Petitioners also continue to assert that while the audit report and workpapers and Mrs. Zell's affidavit indicate that the corporation was not registered as a sales tax vendor and did not file sales tax returns, these documents do not prove that the tax was not paid. Moreover, petitioners argue, the failure to have the auditor or Mrs. Zell present at the hearing prevented petitioners' representative from having an opportunity to cross-examine them in an attempt to

determine if the money orders could have been deposited in another account or somehow miscredited.

Further, petitioners continue to argue that Mr. Mason was not a person required to collect sales tax pursuant to Tax Law § 1133(a). Petitioners state that Mr. Mason: (1) neither had nor exercised the authority to hire and fire employees; (2) did not derive substantial income from the corporation; (3) believed he was made president of the corporation but that the duties of the president would not include preparing and filing sales tax returns; (4) had no day-to-day responsibility over the corporation's financial affairs; (5) did not believe he had the authority to write corporate checks and did not do so although he did have such authority; and (6) did not prepare the corporation's sales tax forms and returns. In view of the above, petitioners argue that Mr. Mason, although president of the corporation, was not under a duty to act for the corporation and should not be held personally liable for the corporation's sales tax.

Finally, petitioners argue that Mr. Mason's position was similar to that of the petitioner in Matter of Constantino (Tax Appeals Tribunal, September 27, 1990 [where petitioner lacked the power to exercise tax collection responsibilities on behalf of the corporation]). Petitioners argue that Mr. Mason did not simply choose not to act for the corporation; he was prevented from doing so by Mrs. Mason.

In response, the Division asks that the Administrative Law Judge's determination be affirmed in all respects. The Division argues that petitioners have speculated on what was meant by the notations on Exhibits "1", "2" and "3" and are guessing as to what the description of the corporate president's duties might have been.

The Division further argues that no proof has been submitted to show that Mrs. Mason prevented Mr. Mason from acting with respect to the corporation, as was the case in Constantino. The Division states that Mr. Mason was not prevented from acting for the corporation but merely chose not to act.

In their reply brief, petitioners assert that they are not speculating but have taken a reasonable and common sense approach to what the notations meant and what the duties of the



president of a corporation would be. Petitioners further argue that the Division has ignored the record with respect to whether Mrs. Mason prevented Mr. Mason from acting with respect to the corporation.

After reviewing the allegations presented to us on exception and the record before us, we find no basis for modifying the Administrative Law Judge's determination in any respect. The Administrative Law Judge adequately dealt with the issues presented to us on exception in his determination. 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 exceptions of Marvin H. Mason, Inc. and Marvin H. Mason, Officer of Marvin H. Mason, Inc. are denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of Marvin H. Mason, Inc. and Marvin H. Mason, Officer of Marvin H. Mason, Inc. are denied; and
4. The notices of determination and demand for payment of sales and use taxes due, dated February 28, 1989, are sustained.

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