

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions :

of :

GLORIA TAFEEN :
OFFICER OF AL JOSEPHSON :
WINES & LIQUORS, INC. :

for Revision of Determinations or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period March 1, 1990 :
through May 31, 1993. :

DECISION
DTA NOS. 814204,
815637, 815387 AND
815388

In the Matter of the Petitions :

of :

AL JOSEPHSON :
WINES & LIQUORS, INC. :

for Revision of Determinations or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period March 1, 1993 :
through November 30, 1993. :

Petitioner Gloria Tafeen, officer of Al Josephson Wines & Liquors, Inc., 1337 Broadway, Hewlett, New York 11667-2123 and petitioner Al Josephson Wines & Liquors, Inc., c/o Patrick M. Wall, Esq., 55 Ogden Avenue, White Plains, New York 10605, filed an exception to the determination of the Administrative Law Judge issued on June 1, 2000. Petitioners appeared by Patrick M. Wall, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Cynthia E. McDonough, Esq., of counsel).

Petitioners filed a brief in support of their exception and the Division of Taxation filed a brief in opposition. Petitioners filed a reply brief. Oral argument, at petitioners' request, was heard on October 10, 2001.

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

ISSUES

I. Whether certain notices of determination issued by the Division of Taxation assessing sales tax against Al Josephson Wines & Liquors, Inc. should be sustained.

II. Whether petitioner Gloria Tafeen should be held personally liable for payment of sales tax determined to be owed by the corporate petitioner Al Josephson Wines & Liquors, Inc.

FINDINGS OF FACT

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

During the period 1963 until the mid-1970s, petitioner Gloria Tafeen's late husband, Charles Tafeen, possessed a liquor license and operated a retail liquor store known as Al Josephson Wines and Liquors, Inc. ("Josephson") located at Humboldt Street, Brooklyn, New York. Mrs. Tafeen's involvement with Josephson during this period consisted of working at the store during the busy Christmas holiday season when she operated the cash register and also affixed pricing labels to the bottles of liquor and wine.

Charles Tafeen died on September 27, 1978. Shortly thereafter, Mrs. Tafeen received a telephone call from one Theodore Polon. Mrs. Tafeen was aware that her late husband had been involved in negotiations with Mr. Polon and with another liquor store owner regarding the

Josephson store, but was unaware of the details of such negotiations. Mr. Polon offered a business proposition under which Mrs. Tafeen would be appointed “administratrix” of her husband’s liquor license (presumably administratrix of his estate including his liquor license), and that Mr. Polon would then pay Mrs. Tafeen \$25,000.00 per year to use her license to operate a liquor store.¹ Mrs. Tafeen was to sign all checks and other documents required for the operation of the business. She questioned Mr. Polon as to whether such an arrangement was legal and was assured by him that it was, that he had similar arrangements with a number of other stores, and that his attorney had worked out all of the details.

Mrs. Tafeen agreed to the arrangement proposed by Mr. Polon noting that “it sounded good. It was a source of income.” In 1979, Josephson commenced operation of a retail liquor store in premises located at 246 Ashland Place, Brooklyn, New York. These premises had been the location of a liquor store formerly operated by Mr. Polon until his liquor license was revoked.

Mrs. Tafeen initially believed she would be working some hours each week at the store. However, such did not turn out to be the case. She did not have a key to the store premises, did not physically perform any work at the store, was not included on the store’s health insurance plan, and had to pay for any purchases she made at the store. She did not hire or fire any of the store’s employees, did not order any of the store’s stock of inventory, and did not review any of the store’s bank accounts or other records. She did not know who supplied the store with

¹ Mrs. Tafeen stated in testimony at hearing that \$25,000.00 was her salary amount. Such amount also appears in a May 4, 1998 affidavit made by Mrs. Tafeen, but is then lined out and replaced with the handwritten figure \$35,000.00 along with the initials “GT” (presumably Gloria Tafeen).

merchandise until after the period in issue when she was named in legal proceedings initiated by two liquor distributors seeking to recover on unpaid bills.

Mrs. Tafeen's role in Josephson's operations from 1979 until the early 1990s involved coming to the store premises once or twice monthly, when called by Mr. Polon or one of Josephson's employees or its accountants, in order to sign various documents. These documents included checks, as well as various other documents to be submitted to various agencies including the Department of Taxation and Finance and the State Liquor Authority. Mrs. Tafeen signed batches of checks in blank, but never filled in the amounts or payees thereof. The other documents she may have signed, including sales tax returns, corporate tax returns, and withholding tax returns were prepared by other persons including Josephson's accountants, and Mrs. Tafeen did not read such documents prior to signing them. At one point Mrs. Tafeen opened a bank account for the store at a bank office located near her home. However, it appears that deposits to Josephson's bank accounts were made at branch locations near Josephson's premises in downtown Brooklyn. Mrs. Tafeen did not make any bank deposits for Josephson and bank statements were sent to the store rather than to her home.

In the early 1990s, Mr. Polon advised Mrs. Tafeen that he needed the store manager, one Nick Rosenthal, to be able to sign checks on the Josephson account. In response, Mrs. Tafeen accompanied Mr. Rosenthal to a bank where she signed an application and a corporate resolution to open a bank account for Josephson, giving Mr. Rosenthal signatory authority thereon. Thereafter, Mrs. Tafeen did not sign any checks on the Josephson accounts. Periodically, from the inception of Mrs. Tafeen's arrangement with Mr. Polon until Josephson closed, she signed

liquor license renewal applications and represented herself to the State Liquor Authority as the owner and president of Josephson.

Mrs. Tafeen acknowledged that because the liquor license was in her name and she was the sole officer (president) and stockholder of Josephson, she would have to sign various documents. She never asked to review any of the documents she signed, and did not ask to see Josephson's bank statements or other records. She did not read the State Liquor Authority license application renewals she signed, and did not consider terminating her license for the store. In the same vein, she never considered refusing to allow Nick Rosenthal signatory authority on the Josephson account described above.

During the course of proceedings herein, Mrs. Tafeen reviewed the signature of her name as appearing on many of the documents described, including various tax returns and checks drawn on the three Josephson bank accounts. She acknowledged that some of the signatures were hers, but disavowed many others, and indicated that someone else apparently signed her name in many instances, specifically during the years in issue. She was not aware of this practice at the time of the store's operation. Mrs. Tafeen signed whatever documents at whatever times as requested until 1989 or 1990, but she stopped going to the store location in 1989 or 1990 and did not sign documents thereafter. Mrs. Tafeen never asked to see any of Josephson's records at any time, and never considered refusing to sign a document or refusing a request by Mr. Polon or other store employee to do something.

Mrs. Tafeen became aware near the beginning of her arrangement with Mr. Polon that he had previously been involved in difficulties with the State Liquor Authority, had lost his liquor license and could not have his name appear as the owner of the building in which Josephson

operated. Mrs. Tafeen later learned that the building was owned by Ashland Corner Corporation, an entity whose principal, one Arlene Richman, had been involved in a long-term personal relationship with Mr. Polon. Mrs. Tafeen was “uneasy” with Mr. Polon but gave no specific reason why, and noted that “he had a file that thick” with the State Liquor Authority and could not obtain a liquor license in his own name. However, she stated that she had “no reason to know until this tax thing that he had done anything criminal.”

As described, Mrs. Tafeen was to be paid a “salary” of \$25,000.00 per year for allowing Mr. Polon to use her liquor license. She was paid this salary during the initial years of her arrangement with Mr. Polon, but the payments from Mr. Polon gradually dropped off in the late 1980s to about \$200.00 per month in a “good month.”

By a letter dated December 8, 1993, the Division of Taxation (“Division”) advised Josephson that an audit was to be commenced on December 16, 1993. The initial audit period spanned March 1, 1990 through February 28, 1993, and was expanded thereafter to include the period March 1, 1993 through May 31, 1994. The Division requested records of Josephson’s operations, including sales invoices and purchase invoices. However, the Division was informed that no records were available. In turn, the Division canvassed various liquor suppliers by letter to obtain information on sales made to Josephson during the audit period.

The auditors summarized the purchases by Josephson as reported by the various suppliers. The auditors then applied a standard Dun and Bradstreet industry markup percentage of approximately 25 percent against such purchases to calculate total sales for the first two sales tax quarterly periods covered by the audit (3/1/90 through 8/31/90). For the remaining quarterly periods covered by the audit, the auditors computed a markup by reference to Josephson’s 1991

and 1992 Federal corporation income tax returns (specifically by dividing gross profits by cost of goods sold as reported on such returns), and applied the resulting markup percentage ranging from 84 percent to 92 percent to purchases per suppliers to arrive at total sales. No nontaxable sales had been reported by Josephson, and the auditors accordingly considered all sales to be taxable. As a means of confirming the purchase amounts reported by Josephson's suppliers the auditors obtained, under subpoena, information from Josephson's banks as to deposits made during the period under audit. Among other things, the auditors concluded that sales as reported per Josephson's tax returns were based on deposits into one of Josephson's three accounts.

Sales tax was computed on total audited sales as calculated above. After reducing such sales tax amount by the amount of sales tax remitted with Josephson's sales tax returns, the Division assessed the balance of tax due, via notices of determination issued to Josephson and to Mrs. Tafeen as set forth hereinafter:

NOTICES ISSUED TO JOSEPHSON

<u>NOTICE NUMBER</u>	<u>DATE ISSUED</u>	<u>PERIOD</u>	<u>TAX AMOUNT</u>
L-012078397-1	05/28/96	03/01/93 - 05/31/93	\$58,519.00
L-012550528-9	08/19/96	06/01/93 - 08/31/93	\$38,360.00
L-012841960-5	11/04/96	09/01/93 - 11/30/93	\$33,782.00

NOTICES ISSUED TO GLORIA TAFEEN

<u>NOTICE NUMBER</u>	<u>DATE ISSUED</u>	<u>PERIOD</u>	<u>TAX AMOUNT</u>
L-007951479-8	09/23/93	03/01/90 - 08/31/90	\$19,462.24
L-012138262-6	06/07/96	03/01/93 - 05/31/93	\$58,519.00

The dollar amounts (“tax amount”) set forth above are exclusive of penalty and interest, which were also assessed as due. Specifically, the Division assessed penalties for civil fraud (Tax Law § 1145[a][2]), negligence (Tax Law § 1145[a][1][i]), and omnibus penalties (Tax Law § 1145[a][1][vi]). However, the Division opted not to pursue the civil fraud penalties and advised petitioners that only the negligence and omnibus penalties were at issue.

With regard to Notice No. L-007951479, the Division’s answer (Ex. C) describes at paragraph “9” the steps taken in calculating the tax assessed (\$19,462.24) for the period 3/1/90 - 8/31/90. Specifically, Josephson’s total purchases for the year 1991 were divided by 13 quarterly periods to arrive at average quarterly purchases. The audit markup percentage was applied to the resulting average quarterly purchases to compute audited gross sales per quarter, with tax due computed thereon. However, paragraph “13” of the Division’s answer states the “the Division hereby asserts a greater deficiency . . . for notice number L-007951479, because of mathematical errors in the computation described in paragraph 9 above.” Specifically, the Division asserts that the total purchases for 1991 should have been divided by the 4 quarters in a year to arrive at average quarterly purchases rather than by 13 quarters as was done. Under this computation using a smaller denominator of four quarterly periods, average quarterly purchases and, in turn, audited gross sales are greater. Thus, a higher tax liability of \$56,039.11 results for the period 3/1/90 through 8/31/90, to wit, an increase of \$36,576.87 over the amount assessed per the notice of determination. The Division provided no further information or argument on this “assertion of a greater deficiency.”

In or about February 1985, Mrs. Tafeen began working for Manhattan Feather and Down, an importing business owned by a close friend with whom she also had a personal relationship.

This work included about three months of travel to Europe and to the West Coast, especially during the Christmas holiday season, and she was helpful in this business because she spoke some French and German. When her employer and friend began to experience difficulties as the result of Alzheimer's disease, she gradually came to take care of all of his personal business, such as his telephone bill and banking and insurance matters. It does not appear that she actually became significantly involved in operating the business of Manhattan Feather and Down.

In May 1994, Mrs. Tafeen went back to Josephson's premises to retrieve her license after hearing that the business was closing. She found workers in the process of dismantling the store. It was at this point that she first became aware of the Division's claim that sales taxes were unpaid. Mr. Polon offered to pay Mrs. Tafeen \$200.00 per week from a new liquor store he was opening if she agreed to "keep her mouth shut" regarding what she knew about Josephson.

In 1997, Mrs. Tafeen and others including Mr. Polon, were named as defendants in two suits brought by two liquor distributors for recovery of unpaid bills. Mrs. Tafeen, by deposition in such lawsuits, averred essentially the same position as she puts forth herein, to wit, that she was not involved in and had no knowledge concerning the manner in which Josephson was being operated by Mr. Polon. In turn, the actions against Mrs. Tafeen were ultimately discontinued by stipulation of the parties.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

Initially, the Administrative Law Judge noted that no arguments had been raised by petitioners concerning the audit method employed by the Division or the resulting dollar amounts of tax determined to be due as set forth above. Accordingly, these matters were not in dispute. The Administrative Law Judge sustained the dollar amounts determined to be due in the

notices of determination issued to Josephson and to Mrs. Tafeen, as officer. However, while not contesting the dollar amounts or method of audit, petitioner, Gloria Tafeen, argued that she should not be held personally liable for the unpaid sales tax in question. Mrs. Tafeen claimed that she was duped by Mr. Polon into believing that the arrangement under which Josephson operated was legal. She also asserted that she was not involved in running the operation of Josephson other than that her name and license were used. Accordingly, in Mrs. Tafeen's view, the Division should pursue Mr. Polon for the unpaid tax. The issue of her liability for the notices issued against her was the issue to be resolved by the Administrative Law Judge.²

With regard to sales and use taxes, the Administrative Law Judge pointed out, Tax Law § 1133(a) states that: "every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article."

Tax Law former § 1131(1), in turn, defined "persons required to collect tax" and a "person required to collect any tax imposed by this article [Article 28]" to include any officer or employee of a corporation who, as such officer or employee, is "under a duty to act for such corporation in complying with any requirement of [Article 28]."

The mere holding of corporate office does not, per se, impose sales tax liability upon an officeholder. Rather, whether a person is an officer or employee liable for tax must be determined based upon the particular facts of each case (*citing, Matter of Cohen v. State Tax*

²In a footnote, the Administrative Law Judge stated: "The Division's 'assertion of a greater deficiency' via its answer to a petition, as detailed in Finding of Fact '14,' is rejected. Article 28 makes no provision for the assertion of a greater deficiency based upon mathematical errors in audit calculations (*compare* Tax Law § 689[e][3], which specifically speaks to the assertion of a greater deficiency in income tax and provides that the burden of proof with respect to any such increase must be borne by the Division). While there is no apparent bar to the Division's issuance of more than one notice of determination assessing additional tax for a given period (*see, Matter of Adirondack Steel Casting Co. v. New York State Tax Commn*, 121 AD2d 834, 504 NYS2d 265), there is no evidence or claim that in this case the Division ever issued, within the appropriate period of limitations, such an additional notice of determination."

Commn., 128 AD2d 1022, 513 NYS2d 564).³ The Administrative Law Judge noted that among the factors to be considered is whether the person was authorized to sign the corporate tax return, was responsible for managing or maintaining the corporate books or was permitted to generally manage the corporation.⁴ The Administrative Law Judge quoted language from *Matter of Constantino* (Tax Appeals Tribunal, September 27, 1990), where the Tax Appeals Tribunal stated:

[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 the 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 interest in the corporation [*citations omitted, emphasis added*].

Mrs. Tafeen argued that she was deceived by Mr. Polon into allowing him to use her liquor license, and that she had nothing to do with the daily operations of Josephson's business and exercised no authority over such operations. In order to prevail in this matter, the Administrative Law Judge pointed out, petitioner was required to establish by clear and convincing evidence that notwithstanding her status as the sole shareholder and president of

³Also citing *Stacy v. State* (82 Misc 2d 181, 368 NYS2d 448); *Chevlowe v. Koerner* (95 Misc 2d 388, 407 NYS2d 427); *Matter of Hall* (Tax Appeals Tribunal, March 22, 1990, *confirmed Matter of Hall v. Tax Appeals Tribunal*, 176 AD2d 1006, 574 NYS2d 862); *Matter of Martin* (Tax Appeals Tribunal, July 20, 1989, *confirmed Matter of Martin v. Commissioner of Taxation & Fin.*, 162 AD2d 890, 558 NYS2d 239); *Matter of Autex Corp.* (Tax Appeals Tribunal, November 23, 1988).

⁴20 NYCRR 526.11(b)(2).

Josephson and holder of its liquor license, by virtue of which she had actual authority over Josephson's operation, *she was thwarted by others* in carrying out her corporate duties *through no fault of her own* (***citing Matter of Goodfriend***, Tax Appeals Tribunal, January 15, 1998). Upon review of the entire record, the Administrative Law Judge concluded that petitioner, Gloria Tafeen, had not met this standard and was properly held liable for the sales tax obligations of Josephson.

As a starting point, the Administrative Law Judge found that Mrs. Tafeen received the benefit of Josephson's profits, in the form of payment of her "salary" for at least a number of years, for simply allowing Mr. Polon to use her license. In so doing, she participated in misleading the State Liquor Authority into believing that she was involved in the operation of Josephson's business. While claiming that she knew nothing about Josephson's daily operations the fact remained that Mrs. Tafeen, as owner, sole shareholder, and holder of the liquor license, was under an obligation to assure that tax was remitted, and she should have made inquiries as to tax compliance. Mrs. Tafeen, however, chose not to inquire and simply to abdicate her responsibilities. The Administrative Law Judge found no evidence in the record of any restrictions on Mrs. Tafeen's ability or authority to inspect the corporate books and records. Rather, she simply never asked to do so. In fact, there is no evidence that Mrs. Tafeen ever made any inquiry beyond her initial question to Mr. Polon, a person she came to realize had problems with the State Liquor Authority, concerning whether the Josephson arrangement was legal.

Mrs. Tafeen argued that because she was uninvolved and had no knowledge of Josephson's operations or, specifically, of its tax problems, she should simply be absolved of liability and pointed to others in the corporation who should be held responsible. The

Administrative Law Judge noted, however, that even if Mr. Polon was held responsible, that fact would not excuse petitioner from responsibility, since liability with respect to sales taxes is joint and several (*citing Matter of Phillips*, Tax Appeals Tribunal, May 11, 1995; Tax Law § 1133[a]).

The Administrative Law Judge pointed out that while Mrs. Tafeen *chose* to be uninvolved in Josephson's daily operations, and chose not to inquire about its ongoing business operations, the fact remained that she had actual, if unexercised, authority over the affairs of Josephson. The Administrative Law Judge found no evidence that she was in any manner restricted, limited or precluded from overseeing Josephson's affairs and assuring that taxes were being remitted, other than as a direct result of the manner in which she chose to be uninvolved in the business. The Administrative Law Judge found no evidence that Mrs. Tafeen was under any physical or legal impediment to inquiring or acting on behalf of the corporation; nor did the Administrative Law Judge find any evidence that Mrs. Tafeen was being deliberately misled, lied to or thwarted in the face of any inquiries or other efforts to assure compliance with Josephson's tax obligations. Simply put, the Administrative Law Judge found that the record did not support a conclusion that Mrs. Tafeen did not have or could not have exercised sufficient authority and control over corporate affairs to assure that sales tax was collected and remitted (*citing Matter of Goodfriend, supra; see, Matter of Shah*, Tax Appeals Tribunal, February 25, 1999). In fact, the Administrative Law Judge found that Mrs. Tafeen never inquired and, instead, simply allowed continued operation of the business in the hope that she would receive payment of her "salary" based on allowing the use of her liquor license. The Administrative Law Judge concluded that Mrs. Tafeen's total delegation to Mr. Polon, in light of her continued filings with the State

Liquor Authority and her knowledge of Mr. Polon's prior problems with the State Liquor Authority, was not a reasonable delegation of her responsibilities. Accordingly, the Administrative Law Judge concluded that Mrs. Tafeen was liable for Josephson's sales tax obligations, including the negligence and omnibus penalties imposed with regard to Josephson's nonpayment of sales taxes for the quarterly periods in issue.

ARGUMENTS ON EXCEPTION

On exception, petitioners raise the same arguments as were raised below. Since we have summarized the arguments made to the Administrative Law Judge above, we will not repeat them here.

OPINION

After a thorough review of the evidence and the arguments made thereon, we find that the Administrative Law Judge has completely and correctly addressed each of the issues raised by the parties. Petitioners have raised nothing on exception that would justify our modifying the determination of the Administrative Law Judge in any respect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Gloria Tafeen, officer of Al Josephson Wines & Liquors, Inc. and Al Josephson Wines & Liquors, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petitions of Gloria Tafeen, officer of Al Josephson Wines & Liquors, Inc. and Al Josephson Wines & Liquors, Inc are denied; and

4. The five notices of determination issued on May 28, 1996, August 19, 1996, November 4, 1996, September 23, 1993 and June 7, 1996 are sustained.

DATED: Troy, New York
January 3, 2002

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.

Joseph W. Pinto, Jr.
Commissioner