STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
LAWRENCE FELDMAN, OFFICER OF T. I. CONSTRUCTION CORPORATION	:	DECISION DTA NO. 816158
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, 1988 through February 28, 1993.	:	

Petitioner Lawrence Feldman, Officer of T. I. Construction Corporation, 269 Grand Central Parkway, Penthouse A, Floral Park, New York 11005, filed an exception to the determination of the Administrative Law Judge issued on January 11, 2001. Petitioner appeared by Robert Plautz, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Robert A. Maslyn, Esq., of counsel).

Petitioner filed a brief in support of his exception, the Division of Taxation filed a brief in opposition and petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on December 12, 2001 in New York, New York.

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

ISSUE

Whether petitioner was a person required to collect and remit sales and use taxes on behalf of T. I. Construction Corporation who failed to do so and thus is personally liable for such unpaid taxes, plus penalty and interest.

FINDINGS OF FACT

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

In August 1993, the Division of Taxation ("Division") commenced a sales tax field audit of the operations of T. I. Construction Corporation ("T. I."). T. I., a domestic corporation with offices at 2001 Marcus Avenue, Lake Success, New York, was formed to perform construction work at two office buildings located, respectively, at 2001 Marcus Avenue, Lake Success, New York and 98 Cutter Mill Road, Great Neck, New York. These two buildings were managed by a company known as Jennie Management, Inc., and were owned, respectively, by Triad I Associates and Atrium Associates, limited partnerships controlled by petitioner's father, Edward Feldman, and Irving Feldman. Petitioner owned ten percent of the shares of T. I., as did Michael Zerner and Stanley Grey, while petitioner's father, Edward Feldman, owned T. I.'s remaining shares. Petitioner was also an officer of T. I., as were the other three shareholders, although the particular offices held by each are not specified in the record. T. I. was not registered as a vendor for sales tax purposes, had not obtained a Certificate of Authority, and did not file any sales tax returns.

The Division's audit commenced with the auditor's issuance of an audit appointment letter and request for books and records dated August 12, 1993 stating, "all books and records

pertaining to your Sales Tax liability for the period [6/1/90 through 8/31/93] are to be available on the [9/9/93] appointment date. This would include journals, ledgers, sales invoices, purchase invoices, cash register tapes, federal income tax returns, and exemption certificates." This letter also noted that additional information might be required during the course of the audit.

No response to the audit appointment letter was received from or on behalf of T. I. In turn, a second letter, dated December 7, 1993, was issued to T. I. This second letter set an audit appointment date for December 27, 1993 and provided, in relevant part, as follows:

> Due to the lack of cooperation and the information that you have not registered or filed returns for the Sales Taxes, your audit is being updated to include the period 6/1/88 - 11/30/93.
>
> Information on file indicates that returns should have been filed and taxes collected and reported to the Sales Tax Department. If the information required by law is not submitted to us, the law enables us to issue assessments based upon the information available to us.

T. I. did not respond to the second audit appointment letter or furnish any records or other information to the auditor. Thus, the auditor resorted to third-party information and estimation techniques in his determination of T. I.'s sales tax liability. In this regard, the auditor had obtained information from audits of Hunter Real Estate Management Corporation and Hunter Construction Company, each of which was owned by other members of the Feldman family and each of which had provided requested records during their audits. The auditor assumed that these entities were engaged in the same or similar business as T. I. In addition, the auditor obtained two annual sales tax returns filed by Jennie Management Company reporting gross annual sales of $7,272,441.00.

The auditor assumed that because T. I. performed construction work as needed by Jennie Management Company on the two buildings managed by Jennie for Atrium and Triad I, and that

because T. I. did not file any sales tax returns, its gross annual sales were equal to Jennie Management Company's gross annual sales. Accordingly, the auditor divided Jennie Management Company's annual sales by four to arrive at average quarterly sales of $1,818,110.30 for Jennie Management Company and, by extension, for T. I. In turn, the auditor divided the sales tax due per quarter from Hunter Construction Company as determined on audit of Hunter Construction Company ($8,500.44) by T. I.'s average quarterly sales ($1,818,110.30) to arrive at an error rate of .00468 in sales tax due per quarter. The auditor applied such error rate to T. I.'s gross sales per quarter to calculate sales tax due from T. I. for the period June 1, 1988 through February 28, 1993 in the amount of $172,527.71. The auditor also imposed interest and penalty, including omnibus penalty, because T. I. was engaged in business without obtaining a Certificate of Authority and because T. I. had issued resale certificates notwithstanding that it was not registered as a vendor for sales tax purposes. The audit work papers include a number of invoices showing purchases of carpeting by T. I. and also include a resale certificate issued by T. I. with respect to the vendor who sold such carpeting. The invoices do not reflect the payment of sales tax on the carpeting purchased.

On July 21, 1997 the Division issued to petitioner, Lawrence Feldman, a Notice of Determination assessing sales tax due for the period June 1, 1988 through February 28, 1993 in the amount of $172,527.71, plus penalty and interest. This notice states that petitioner was assessed as a person required to collect and remit sales and use taxes on behalf of T. I. who is responsible for the unpaid sales tax owed by T. I. as determined upon audit. Petitioner timely challenged the notice by filing a petition with the Division of Tax Appeals.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge found that T. I. did not respond to either of the two requests for records by the Division and that the Division was, therefore, justified in resorting to external indices to estimate the sales and use taxes due for the audit period. The Administrative Law Judge held that petitioner's bare assertions and failure to offer any relevant documentation or other credible evidence were not sufficient to defeat the audit, its results or the imposition of liability against petitioner for tax, penalty or interest. Petitioner's submission of court orders indicating the appointment of receivers for two buildings on which T. I. worked had no probative value with respect to the issues of T. I.'s alleged bankruptcy, its cessation of business, or its preclusion from work by the receivers.

With respect to the issue of personal responsibility for the tax, penalty and interest found due, the Administrative Law Judge noted that petitioner admitted to being a ten percent shareholder in T. I. and holding corporate office. Although he maintained he was not responsible for the collection and payment of tax on behalf of the corporation, he provided no evidence in support of his assertion. Since the record contained no evidence that he lacked authority to act on behalf of the corporation or that he was prevented from so acting, the Administrative Law Judge upheld the imposition of personal liability.

ARGUMENTS ON EXCEPTION

Petitioner has raised several issues on this exception. He argues that the audit methodology was irrational; that he was not a responsible officer of T. I. within the meaning of Tax Law §§ 1131 and 1133; that T. I. was out of business when the receiverships were filed and it should not be responsible for any post-filing liability; that the Division did not make an

adequate request for books and records; that the Administrative Law Judge abused his discretion in not admitting affidavits from petitioner after the hearing; that this case should be remanded to the Administrative Law Judge for further proceedings to complete the record; and that penalties should be abated.

The Division counters that the Administrative Law Judge completely and correctly decided all the issues in this matter and the determination should be affirmed. The Division noted that it sent T. I. two requests for books and records, both of which were ignored. With no records produced, the Division claims it was authorized to perform an indirect audit utilizing external indices and such other information that it could find pertinent to the business operations of T. I.

The Division believes its audit methodology was reasonable given the lack of books and records and T. I.'s failure to cooperate with the audit. The Division notes that, in all the cases cited by petitioner, it was provided with some modicum of evidence, which was not the case here.

With respect to the issue of personal responsibility for taxes, the Division echoes the rationale of the Administrative Law Judge, i.e., petitioner admitted to being a ten percent shareholder and officer but failed to supply any evidence supporting his assertion that he should not be held liable, including participation in the operations of another business. Without any proof to the contrary, the Division asserts that petitioner was a person responsible for the collection and payment of the sales and use taxes due from T. I.

The Division argues that petitioner was given a fair opportunity to submit affidavits and other documentation after the hearing, but only submitted two court orders. Based on petitioner's

hearing and post-hearing opportunity to submit documentation, the Division argues that remanding this matter is an inappropriate remedy. Further, given T. I.'s failure to register and obtain a certificate of authority, failure to file returns and failure to collect and pay over the taxes due, the penalties imposed were proper and should be upheld.

OPINION

Upon consideration of the full record in this matter and the arguments raised by petitioner on exception, all but one of which were considered by the Administrative Law Judge and disposed of below, we find that the Administrative Law Judge completely and correctly decided each of the issues before him and affirm for the reasons set forth therein.

On exception, petitioner has asked the Tribunal to remand this matter to the Administrative Law Judge in order that more evidence could be introduced to explain the audit methodology, particularly the use of Hunter Construction as an external index. In addition, petitioner believes that the Administrative Law Judge denied petitioner his right to a full hearing by not adjourning the case so that petitioner could better prepare. Petitioner believes a new hearing will afford him an opportunity to better cross-examine the auditor and explain himself and his circumstances more clearly. Petitioner notes the "weakness in the Division's case" (Petitioner's brief in support, p. 33) as a prime reason for remand as well as his *pro se* status, a fact which he believes should have earned him leniency from the Administrative Law Judge. Petitioner, using the determination as a road map through his losing effort below, cites specific evidence he would introduce to change the outcome. We reject this proposition.

> [A]lthough the Tax Law and our regulations permit us to remand cases to the Administrative Law Judge for "additional proceedings" (Tax Law § 2006[7]; 20 NYCRR 3000.11[e][2]), remanding this case would not be appropriate under the

> circumstances . . . (***Matter of Great Eastern Printing Co.***, Tax Appeals Tribunal, February 20, 1992).

We have held that remanding a case to an Administrative Law Judge for further fact finding is only appropriate in

> *special circumstances* (***see***, ***Matter of Capital District Better TV***, Tax Appeals Tribunal, September 5, 1991 [matter remanded out of concern that certain statements of the Administrative Law Judge off the record may have dissuaded petitioners from introducing specific evidence]; ***Matter of Jencon, Inc.***, Tax Appeals Tribunal, December 20, 1990 [matter remanded because the petitioner was not given an opportunity below to present evidence on either the jurisdictional issue or the merits of the case]; ***Matter of Platias***, Tax Appeals Tribunal, December 6, 1990 [matter remanded in order to determine if the Division's policy of accepting certain mailing evidence as proof of timely filing was applied to the petitioners prior to hearing]; ***Matter of Karolight, Ltd.***, Tax Appeals Tribunal, February 8, 1990 [matter remanded to obtain evidence necessary to establish the Tribunal's jurisdiction over the case]) (***Matter of Great Eastern Printing Co.***, ***supra***, emphasis added).

We do not find such special circumstances present in this matter, only a failure of proof by petitioner and a desire for a second bite of the apple. Petitioner had numerous opportunities to come forward with the information he now seeks to introduce at another hearing. T. I. chose not to respond to the Division's multiple requests for books and records. Petitioner chose not to be represented and not to bring any books or records to the hearing and was otherwise unprepared to attack the audit or defend himself at the hearing. In addition, the Administrative Law Judge afforded him two opportunities after the hearing to submit anything he wished and, other than the two orders mentioned above, he chose not to do so. He now argues that he was not afforded a fair opportunity to address issues with respect to the audit, its underpinnings and conclusions, and wants to try again.

The Administrative Law Judge specifically told the parties at the end of the hearing on February 15, 2000 that he would allow petitioner until March 15, 2000 to submit any documents, including affidavits, he wished, and an additional 30 days for the Division to comment on such submissions, but that "the record is not to be reopened after Mr. Maslyn's comments . . ." (Hearing Tr., p. 115). In fact, petitioner was afforded even more time, until April 15, 2000, for his submissions, and only submitted the two receivership orders. Subsequently, petitioner requested more time to submit affidavits, but said request was properly denied since the record had finally closed.

As we said in ***Matter of Schoonover*** (Tax Appeals Tribunal, August 15, 1991):

> In order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing.

The Administrative Law Judge properly denied any additional submissions and we will not disturb his decision. Essentially, petitioner is requesting an opportunity to submit additional evidence after the close of the record and such request is denied for the reasons set forth above.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Lawrence Feldman, Officer of T. I. Construction Corporation, is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Lawrence Feldman, Officer of T. I. Construction Corporation, is denied; and

4. The Notice of Determination, dated July 21, 1997, is sustained.

DATED: Troy, New York
May 23, 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