

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

CHARLES H. GEIGER :

DECISION
DTA NO. 816598

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, 1994 through January 7, 1997. :

Petitioner Charles H. Geiger, c/o Barr & Rosenbaum, LLP, 664 Chestnut Ridge Road, P. O. Box 664, Spring Valley, New York 10977, filed an exception to the determination of the Administrative Law Judge issued on February 17, 2000. Petitioner appeared by Barr & Rosenbaum, LLP (Elizabeth A. Haas, Esq., of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (Andrew S. Haber, Esq., of counsel).

Petitioner filed a brief in support of his exception and the Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on September 14, 2000 in New York, New York.

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

ISSUE

Whether the Division of Taxation, having failed to file a timely proof of claim in the Chapter 11 bankruptcy proceedings of Geiger Lumber & Supply Co., Inc., is estopped from

asserting sales and use taxes against petitioner, the acknowledged responsible officer of the corporation.

FINDINGS OF FACT

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

Geiger Lumber & Supply Co., Inc. (“Geiger Lumber”) is a wholesale and retail vendor of lumber and building supplies. Petitioner, Charles H. Geiger, is the president and a director of Geiger Lumber. He owns approximately 86% of the issued and outstanding stock of Geiger Lumber.

On or about April 3, 1996, the Division of Taxation (“Division”) commenced a field audit of Geiger Lumber's books and records pertaining to its sales and use tax liability for the period March 1, 1993 through February 29, 1996. During the course of the audit, the period covered was expanded three times and, ultimately, the audit covered the period March 1, 1993 through January 7, 1997.

During the course of the audit, two consents were executed extending the period of limitation for assessment of sales and use taxes. Both consents were executed by petitioner as president of Geiger Lumber.¹ The first consent extended the period of limitation for assessment of taxes against Geiger Lumber for the period March 1, 1993 through November 30, 1993 to December 20, 1996. The second consent extended the period of limitation for assessment of

¹ The first consent was executed by petitioner on April 22, 1996 and the second consent was executed by petitioner on October 30, 1996.

taxes against Geiger Lumber for the period March 1, 1993 through May 31, 1994 to June 20, 1997.

On November 21, 1996, Geiger Lumber filed a petition for relief pursuant to Chapter 11, Title 11 of the United States Code (the “Bankruptcy Code”), with the Bankruptcy Court for the Southern District of New York.

Geiger Lumber listed the Division as a creditor in its schedules filed with the Bankruptcy Court. The amount of the debt listed was \$145,000.00. Geiger Lumber indicated on its schedule that the \$145,000.00 debt was disputed.

Geiger Lumber ceased doing business on January 7, 1997.

A review of the auditor's work papers indicates that her audit of Geiger Lumber was broken down into two parts: the first, a pre-bankruptcy petition audit covering the period March 1, 1993 through November 21, 1996 and the second, a bankruptcy administrative expense audit covering the period November 22, 1996 through January 7, 1997.²

As a result of the pre-petition audit, the Division issued to Geiger Lumber a Statement of Proposed Audit Adjustment, dated March 13, 1997, asserting sales and use taxes due for the period March 1, 1993 through November 21, 1996 in the amount of \$98,818.84, plus interest of \$5,295.51, for a total amount due of \$104,114.35 (“pre-petition statement”).

As a result of the administrative expense audit, the Division issued to Geiger Lumber a Statement of Proposed Audit Adjustment, dated March 13, 1997, asserting sales and use taxes

² The period November 22, 1996 through January 7, 1997 covers the time span in which Geiger Lumber continued to operate the business as debtor-in-possession.

due for the period November 22, 1996 through January 7, 1997 in the amount of \$4,069.30, plus interest of \$57.88, for a total amount due of \$4,127.18 (“administrative expense statement”).

On March 14, 1997, Geiger Lumber consented to the fixing of the tax by the execution of the pre-petition statement by Charles Geiger, as president of Geiger Lumber.

On the same date, Geiger Lumber consented to the fixing of the tax by the execution of the administrative expense statement by Charles Geiger, as president of Geiger Lumber.

On April 18, 1997, the Division issued a Notice of Determination (Notice No. L-013407366-9) to petitioner for sales and use taxes due for the period March 1, 1994 through November 21, 1996 in the amount of \$95,965.90, plus interest of \$5,063.01, for a total amount due of \$101,028.91.

On the same date, the Division issued a Notice of Determination (Notice No. L-013407367-8) to petitioner for sales and use taxes due for the period November 22, 1996 through January 7, 1997 in the amount of \$4,069.30, plus interest of \$87.49, for a total amount due of \$4,156.79.

Both notices were issued to petitioner as an officer or responsible person of Geiger Lumber for taxes determined to be due in accordance with sections 1138(a), 1131(1) and 1133 of the Tax Law.

Federal Rule of Bankruptcy Procedure 3003 (“Rule 3003”) is applicable to Geiger Lumber's Chapter 11 case. Rule 3003 states that a creditor whose debt is scheduled as disputed must file a proof of claim for the liability alleged to be owed in order to share in distribution. Rule 3003 also provides that the Bankruptcy Court shall establish the time in which proofs of

claim must be filed. The Division was required to file a proof of claim in the Chapter 11 proceeding of Geiger Lumber pursuant to Rule 3003.

On November 24, 1997, the Hon. Adlai S. Hardin, Jr., United States Bankruptcy Judge, entered an Order in the Geiger Lumber Chapter 11 case fixing December 31, 1997 (“bar date”) as the last date for the filing of pre-petition and Chapter 11 administrative expense claims (the “bar order”).

On November 26, 1997, the Division was served with a copy of the notice and the bar order.

On November 26, 1997, the Office of the Attorney General for the State of New York was also served with a copy of the notice and the bar order.

The Division did not file any proofs of claim prior to the expiration of the bar date.

On June 1, 1998, approximately six months after the bar date, the Division filed an unsecured, priority proof of claim³ in the Geiger Lumber Chapter 11 case in the amount of \$173,685.45.

On June 1, 1998, the Division filed an administrative expense claim⁴ in the Geiger Lumber Chapter 11 case in the amount of \$364,685.74. This, too, was filed approximately six months after the bar date.

³ The priority proof of claim was docketed as Claim No. 91. A notice asserting sales and use taxes due for the audit period March 1, 1993 through November 21, 1996 was listed as one of the debts in the priority proof of claim.

⁴ The administrative proof of claim was docketed as Claim No. 90. The notice asserting sales and use taxes due for the audit period November 22, 1996 through January 7, 1997 was listed as one of the debts in the administrative proof of claim.

The Attorney General filed a Notice of Appearance in the Chapter 11 case on September 10, 1998.

It is contemplated that the assets of Geiger Lumber will be distributed pursuant to a liquidating Chapter 11 plan but that there will be insufficient assets to pay all creditors in full.

The Division will not share in the distribution of Geiger Lumber's assets in the Chapter 11 proceeding because it did not file a proof of claim prior to the bar date.

On July 10, 1997, petitioner filed two requests for a conciliation conference, one for the pre-petition assessment (Notice No. L013407366) and the second for the administrative expense assessment (Notice No. L013407367). After a conciliation conference, the conferee issued a Conciliation Order (CMS No. 162501) dated April 10, 1998 sustaining the statutory notices.

A timely petition challenging the two notices of determination issued to petitioner, as well as the Conciliation Order sustaining the statutory notices, was filed with the Division of Tax Appeals. In his petition, petitioner asserts that, because the Division failed to file timely proofs of claim in the corporation's bankruptcy proceeding, the Division cannot hold him responsible as an officer of Geiger Lumber for that corporation's sales and use tax liabilities.

On June 2, 1999, a stipulation was executed by Geiger Lumber's representative and the Division's representative in which the parties agreed that both the administrative and the priority proofs of claim are expunged. The stipulation also stated that it "is without prejudice to the New York State Department of Taxation and Finance to assert any claim against the Debtor if the Chapter 11 proceeding is dismissed or subsequently converted to a Chapter 7 proceeding."

On June 8, 1999, an Order was entered by U.S. Bankruptcy Court Judge Hardin expunging the proofs of claim filed by the Division.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that, generally, the doctrine of estoppel cannot be invoked against the State or its governmental units unless such exceptional facts exist as would require its application in order to avoid manifest injustice. This rule is particularly applicable with respect to a taxing authority.

The Administrative Law Judge found that petitioner was not relying upon any act or misrepresentation committed by the Division to support his estoppel claim. Rather, he contended that because his case represents a truly unusual fact situation the Division should be estopped from enforcing its rights against him. Petitioner based his estoppel claim on the Division's failure to file a timely proof of claim in Geiger Lumber's bankruptcy proceeding, notwithstanding that the Division had adequate knowledge of the bankruptcy proceeding. Petitioner argued that the negligence of the Division in failing to protect its claim is such an extraordinary unusual circumstance that it rises to a level of manifest injustice to him which warrants the cancellation of the notices of determination.

The Administrative Law Judge rejected petitioner's claim that he would suffer a manifest injustice if the Division was allowed to pursue its claim against him. The Administrative Law Judge noted that while the Division had a right to file a proof of claim in the corporation's bankruptcy proceeding, it had no duty or obligation to do so. The Administrative Law Judge restated the well-established principle that the liabilities of a corporation and its officers are separate and independent, and the Division has the discretion to pursue its claim against any responsible party without being obliged to pursue all of such parties or estopped by its failure to pursue any particular party (*citing Matter of Yellin v. New York State Tax Commn.*, 81 AD2d

196, 440 NYS2d 382; ***Matter of Kadish***, Tax Appeals Tribunal, November 15, 1990). The Administrative Law Judge found that neither the corporation's bankruptcy nor the Division's failure to file timely proofs of claim in the bankruptcy proceeding altered the fact that, as an admitted responsible officer of the corporation for the period in issue, petitioner was personally liable for the tax owed by the corporation. The Administrative Law Judge, having found no facts to support a finding of manifest injustice, concluded that the doctrine of estoppel could not be applied against the Division under these facts.

Petitioner also argued that the facts in his case are analogous to those present in ***Matter of Levy*** (State Tax Commn., August 24, 1976), a decision in which the former State Tax Commission canceled the assessments issued to Stewart M. Levy as a responsible officer of a corporation which had filed a voluntary petition in a Chapter 7 bankruptcy.

The Administrative Law Judge pointed out that State Tax Commission decisions are not binding precedent, but are entitled to respectful consideration (*citing, inter alia, Matter of McDonnell Douglas Corp.*, Tax Appeals Tribunal, January 8, 1998). Moreover, she found petitioner's reliance on ***Matter of Levy*** (*supra*) misplaced. The issue in ***Levy*** was whether Mr. Levy was a person required to collect sales tax and was personally liable for the taxes due from the corporation. In this case, Mr. Geiger conceded that he is a person required to collect sales tax and was personally liable for the taxes due from the corporation. In ***Levy***, the former State Tax Commission found that after June 10, 1966, the date on which the corporation filed its bankruptcy petition, Mr. Levy no longer had any duty to act on behalf of the corporation. The Tax Commission's decision, the Administrative Law Judge noted, was based upon the fact that the bankruptcy trustee had control of the corporation's assets when the returns for the periods in

issue were due. In contrast, the Administrative Law Judge pointed out, the tax due in the instant matter was for returns for periods prior to the filing of Geiger Lumber's Chapter 11 bankruptcy petition or for the period in which the corporation was a debtor-in-possession in which petitioner managed the corporation's affairs.

The Administrative Law Judge concluded that since there was no basis for invoking the doctrine of estoppel in this case and there was no dispute that petitioner was a responsible officer who was personally liable for the tax due from Geiger Lumber, the assessments issued for the period March 1, 1994 through January 7, 1997 were sustained.

ARGUMENTS ON EXCEPTION

Petitioner makes the same arguments as were raised before the Administrative Law Judge.

Petitioner concedes that he is a person required to collect sales tax and is personally liable for the tax assessments of the corporation (Tax Law § 1131[1]; § 1133[a]). However, he argues that the Division should be estopped from assessing him for the tax liability of Geiger Lumber. He bases his estoppel claim on the fact that despite knowing of Geiger Lumber's bankruptcy petition, the Division failed to timely file a proof of claim in the corporation's bankruptcy proceeding.

Petitioner also continues to argue that the facts show that: he fully cooperated with the audit; the corporate liabilities were fixed long before the bar date; and because of its own negligence, the Division will not share in any distributions from the corporation's Chapter 11 bankruptcy proceeding. He claims that this is an unusual fact situation which warrants the cancellation of the notices of determination to prevent manifest injustice to him.

The Division asserts that petitioner has failed to show that the Division engaged in any misrepresentation that would support an estoppel claim or that he meets any of the three elements required to be entitled to estoppel. The Division argues that it owed no legal duty or obligation to petitioner to file a proof of claim in the corporation's bankruptcy proceeding. The Division contends that petitioner's argument ignores the fact that an officer's liability is separate and distinct from the corporate liability. In any event, the Division asserts, the record does not support a finding of manifest injustice as it does not establish that petitioner is not responsible for the payment of the taxes.

The Division points out that, although the Division failed to file a timely proof of claim, petitioner or the corporation, as debtor, could have filed a proof of claim on behalf of the Division. The Division points out that this was not done.

OPINION

A creditor, in this case, the Division, may file a proof of claim in a bankruptcy proceeding (11 USC § 501[a]). If a creditor does not file a timely proof of claim, an entity who is also liable to the creditor with the debtor, may file such proof of claim (11 USC § 501[b]). Finally, if a creditor does not timely file a proof of its claim, the debtor or the trustee may file such a proof of claim on behalf of the creditor (11 USC § 501[c]).

The Division did not file a timely proof of claim. Petitioner, a person who was also liable for the taxes due from the debtor-corporation, did not file a proof of claim on behalf of the creditor-Division (11 USC § 501[b]). While the Division had a *right* to file a proof of claim to protect its interest in sharing in the bankrupt corporation's estate, petitioner has pointed to no law imposing a duty on the Division to make such a filing.

Nevertheless, petitioner urges that the Division should be estopped from collecting sales tax against him for amounts owed by the corporation, because the Division's failure to timely file a proof of claim represents an extraordinarily unusual situation resulting in manifest injustice to petitioner.

The doctrine of estoppel, while it may be invoked against a government agency, is done so sparingly (*see, Matter of Wolfram v. Abbey*, 55 AD2d 700, 388 NYS2d 952; *Matter of Sheppard-Pollack, Inc. v. Tully*, 64 AD2d 296, 409 NYS2d 847), especially when the governmental agency involved is charged with the administration of taxes (*Matter of Turner Constr. Co. v. State Tax Commn.*, 57 AD2d 201, 394 NYS2d 78; *see also, Matter of Moog, Inc. v. Tully*, 105 AD2d 982, 482 NYS2d 138). Estoppel may be invoked against such an agency based only on exceptional circumstances (*Schuster v. Commissioner*, 312 F2d 311, 62-2 USTC ¶ 12,121). The doctrine applies to positive acts as well as omissions when there was a demonstrated duty to act (*Boeckmann & Assocs. v. Board of Educ., Hempstead*, 207 AD2d 773, 616 NYS2d 395).

We have embraced a three-part test to determine applicability of the doctrine to specific cases (*see, Matter of Consolidated Rail Corp.*, Tax Appeals Tribunal, August 24, 1995, *confirmed Matter of Consolidated Rail Corp. v. Tax Appeals Tribunal*, 231 AD2d 140, 660 NYS2d 459, *appeal dismissed* 91 NY2d 848, 667 NYS2d 683). First, it must be determined whether the Division made a representation to petitioner or neglected to do an act, which it had a legal duty to perform. Second, we must decide whether the taxpayer reasonably relied upon the Division's representation or omission and, lastly, whether such reliance was to the detriment of the taxpayer (*see, Matter of West Valley Nuclear Servs. Co.*, Tax Appeals Tribunal,

November 13, 1998, *confirmed Matter of West Valley Nuclear Servs. Co. v. Tax Appeals Tribunal*, 264 AD2d 101, 706 NYS2d 259, *lv denied* 95 NY2d 760, 714 NYS2d 710; *Matter of Maximilian Fur Co.*, Tax Appeals Tribunal, August 9, 1990; *Matter of Harry's Exxon Serv. Sta.*, Tax Appeals Tribunal, December 6, 1988).

In this case, there is no evidence that the Division made any representations to petitioner. While there are no representations, petitioner claims the Division's omission in failing to file a proof of claim was so unusual and extraordinary that petitioner suffered a detriment thereby. Here again, there is absolutely no evidence to show that there is anything unusual about the Division's failing to file a timely proof of claim. Even if it were unusual, however, petitioner has pointed to no legal authority which would impose a duty upon the Division to file a proof of claim (*Boeckmann & Assocs. v. Board of Educ., Hempstead, supra*).

There being no representations by the Division in evidence that the Division failed to perform an act which it was under a duty to perform, there could be no action by petitioner constituting "reasonable reliance" and no basis for invoking the doctrine of estoppel (*Matter of Rashbaum v. Tax Appeals Tribunal*, 229 AD2d 723, 645 NYS2d 175).

The determination of the Administrative Law Judge is affirmed. We agree with the Administrative Law Judge that *Matter of Levy (supra)* is distinguishable for the reasons stated in her determination. There being no new legal arguments presented on this appeal, we can find no basis to modify the determination of the Administrative Law Judge in any respect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Charles H. Geiger is denied;
2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Charles H. Geiger is denied; and
4. The notices of determination dated April 18, 1997 are sustained.

DATED: Troy, New York
March 8, 2001

/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