

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of
PRAKASH T. MELWANI : DETERMINATION
for Revision of a Determination or for Refund of Sales : DTA NO. 818490
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Period June 1, 1996 through May 31, 1999.
:

Petitioner, Prakash T. Melwani, 350 Third Avenue, Suite 365, New York, New York 10011, filed a petition 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, 1996 through May 31, 1999.

A small claims hearing was held before Timothy J. Alston, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on April 2, 2002 at 1:15 P.M. and continued to conclusion at the same location on May 7, 2002 at 12:30 P.M., which date began the three-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (John Adrian).

ISSUES

I. Whether petitioner is liable for the sales and use taxes due from Soups & Breads, Inc. as a person responsible for the collection and payment of sales tax pursuant to Tax Law §§ 1131 and 1133.

II. Whether the audit method employed by the Division of Taxation in its audit of Soups & Breads, Inc. was reasonable or whether petitioner has shown error in either the audit method or result.

FINDINGS OF FACT

1. On May 30, 2000, following an audit, the Division of Taxation (“Division”) issued to petitioner, Prakash T. Melwani, a Notice of Determination which assessed \$42,586.93 in additional sales and use taxes due, plus penalty and interest, for the period June 1, 1996 through May 31, 1999. The notice informed petitioner that the Division had determined that he was a corporate officer or a person responsible for the collection and payment of sales and use taxes due from Soups & Breads, Inc. and therefore personally liable for the sales and use taxes due from that corporation.

2. Soups & Breads, Inc. operated a take-out restaurant called “Soup Nutsy” located at 148 East 46th Street, New York, New York. As might be expected from its name, the restaurant sold a variety of soups.

3. Soups & Breads, Inc. was started by Kumar Hathiramani and Surinder Aggarwal. Some time after its inception, another corporation, Soup Nutsy, Inc. was formed. Soups & Breads, Inc. became a wholly-owned subsidiary of Soup Nutsy, Inc. Petitioner was approached by Hathiramani and Aggarwal prior to the time Soup Nutsy, Inc. was formed. Petitioner became president and a nine percent shareholder of Soup Nutsy, Inc. in consideration of his handling of the promotion of the business and public relations. As part of his efforts on behalf of the enterprise, he developed the name “Soup Nutsy,” which was inspired by an episode of the “Seinfeld” television series featuring a soup vendor called “The Soup Nazi.” The restaurant then began operating as “Soup Nutsy.” Petitioner also developed the logo for the restaurant which depicted a cartoonish, snarling chef. He also handled the media for the business. Additionally, petitioner was involved in the corporation’s efforts to attract investors in an effort to develop a national chain of restaurants.

4. Soup Nutsy, Inc. was successful in attracting outside investors and plans were made to take the corporation public. Subsequently, the group taking Soup Nutsy, Inc. public asked petitioner to resign as president and petitioner did so, effective September 1998.

5. Soups & Breads, Inc. operated the restaurant at 148 East 46th Street. It filed sales tax returns and withholding tax returns. The restaurant was managed by Surinder Aggarwal who was responsible for its day-to-day operations.

6. Petitioner had no involvement in the day-to-day operations of the restaurant, Soups & Breads, Inc., or Soup Nutsy, Inc. He did not work in the restaurant; he did not hire or fire employees; he did not hire the accountant; he did not pay creditors; he did not pay taxes; he did not prepare tax returns; he was not paid a salary. He was not a shareholder of Soups & Breads, Inc.

7. Petitioner signed a 1997 Federal income tax return (Form 1120) on behalf of Soup Nutsy, Inc. as its president. As part of that return, petitioner signed a Form 1122 as president of Soups & Breads, Inc. consenting to its inclusion in the consolidated return of its parent Soup Nutsy, Inc. Petitioner also signed a 1996 Federal corporation income tax return for Soups & Breads, Inc. as its president.

8. The record in this matter contains copies of the six sales tax returns filed by Soups & Breads, Inc. for the period December 1, 1997 through May 31, 1999, and a copy of Soups & Breads, Inc.'s 1996 General Business Corporation MTA Surcharge Return (Form CT-3M/4M). These sales tax returns purport to bear the signature of petitioner as president. The corporation tax return purports to bear petitioner's signature as secretary. At hearing petitioner denied that he signed these returns. Upon my comparison of the signatures on these returns with admittedly genuine samples of petitioner's signature in the record, such as the petition, letters signed by

petitioner, and the 1997 Form 1120, I find that the signature on the six sales tax returns and the Form CT-3M/4M differs significantly from the genuine samples of petitioner's signature. Specifically, the "P" in petitioner's first name is formed with two strokes on the sales tax returns and the corporation tax return while on the genuine signatures it is formed with one stroke. Additionally, the "M" in petitioner's last name is angular and sharp-peaked on the sales tax returns and the corporation tax return, but is rounded on the genuine signatures. Also, petitioner's actual signatures contain a mark or marks consisting of two dots or a short dash below the signature. The sales tax returns and the corporation tax return contain no such marks. Additionally, Mr. Hathiramani observed Mr. Aggarwal signing Mr. Melwani's name on one of the sales tax returns. Accordingly, I find that the signatures appearing on the six sales tax returns of Soups & Nuts, Inc. for the period December 1, 1997 through May 31, 1999 and the 1996 Form CT-3M/4M are not that of petitioner.

9. During the course of the audit, the Division's auditor spoke to the restaurant's manager, Surinder Aggarwal, also known as "Roy," who indicated to the auditor, incorrectly, that he was not the owner. Mr. Aggarwal referred the auditor to the corporation's accountant, Norman Fishbein. Although he signed powers of attorney dated October 6, 1998 and April 5, 1999 appointing Mr. Fishbein as the corporation's representative, petitioner did not hire and in fact never met Mr. Fishbein. He was induced to sign the powers of attorney by Mr. Aggarwal.

10. On audit, in response to the Division's request, the corporation's representative advised that it did not maintain, and therefore did not produce, sales records for the audit period. The Division therefore resorted to an indirect audit method to determine the corporation's sales tax liability. Among the records produced by the corporation on audit were bank records. The Division determined to use a method whereby net bank deposits (i.e., total bank deposits less

investments and loans) would constitute audited taxable sales. The Division examined the corporation's bank deposits in detail for the period December 1, 1997 through February 28, 1998. The corporation's bank statements indicated total deposits for this period of \$196,590.98. The corporation's representative provided documentation to establish that investments and loans totaling \$61,587.62 were included in this total deposits amount. The Division thus determined \$135,003.36 in total gross sales for the period. Next, the Division subtracted \$4,966.00, the amount of sales tax reported by the corporation during the period, to reach audited gross/taxable sales during the December 1, 1997 through February 28, 1998 period of \$130,037.36. The corporation reported \$60,640.00 in taxable sales during this period. The Division then divided the difference between audited taxable sales and reported taxable sales (\$69,397.36) by audited taxable sales which resulted in a margin of error of 53.37 percent. The Division applied the margin of error to the corporation's reported taxable sales for the entire audit period. This calculation resulted in audited taxable sales for the entire audit period of \$1,205,271.79 and ultimately, after allowing for sales tax reported, additional sales tax due of \$42,586.92.

11. Also during the audit, the Division performed a one-day observation test at the restaurant on February 10, 1999. The Division extrapolated the total sales observed during the test to estimate sales for the quarter December 1, 1998 through February 28, 1999 and compared such estimated sales to reported sales for same quarter in the prior year (12/1/97-2/28/98). This test yielded an error rate of -0.41 percent. The Division did not use the observation test in its calculation of tax due.

CONCLUSIONS OF LAW

A. Tax Law § 1133(a) imposes upon any person required to collect the tax imposed by Article 28 of the Tax Law personal liability for the tax imposed, collected or required to be

collected. A person required to collect tax is defined to include, among others, corporate officers and employees who are under a duty to act for such corporation in complying with the requirements of Article 28 (Tax Law § 1131[1]).

B. Whether an individual is under a duty to act for a corporation with regard to its tax collection responsibilities such that the individual would be personally liable for the taxes not collected or paid depends on the particular facts (*Cohen v. State Tax Commn.*, 128 AD2d 1022, 513 NYS2d 564; *Vogel v. New York State Dept. Of Taxation & Finance.*, 98 Misc 2d 222, 413 NYS2d 862). The question to be resolved in any 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 (*Matter of Constantino*, Tax Appeals Tribunal, September 27, 1990).

C. The relevant factors to consider when determining whether a person has a duty to act for the corporation include authorization to sign tax returns, responsibility for management or maintenance of corporate books, authorization to hire and fire employees and derivation of substantial income from the corporation or stock ownership (see, 20 NYCRR 526.11[b][2]). Other indicia include whether the person was generally permitted to manage the corporation (20 NYCRR 526.11[b][2]), the individual's status as an officer, director or shareholder (*Cohen v. State Tax Commn., supra*), the authorization to write checks on behalf of the corporation (*Chevlowe v. Koerner*, 95 Misc 2d 388, 407 NYS2d 427), and the individual's knowledge of and control over the financial affairs of the corporation (*Vogel v. New York State Dept. Of Taxation & Finance, supra*).

D. Petitioner has established that he was not a person required to collect tax on behalf of Soups & Breads, Inc. and that he was not under a duty to act for Soups & Breads, Inc. in

collecting and remitting the sales and use taxes due. Specifically, as noted in Finding of Fact “6,” petitioner was not involved in the day-to day-operations of the restaurant. He did not work in the restaurant; he did not hire or fire employees; he did not hire the accountant; he did not pay creditors; he did not pay taxes; he did not prepare tax returns; he was not paid a salary. The restaurant was managed by Mr. Aggarwal, one of the individuals who started the business. Petitioner’s role in the enterprise was limited to public relations on behalf of Soups & Breads, Inc.’s parent. In exchange for his expertise in this area, he received a small percentage of Soup Nutsy stock and the title of president. Although president of the corporate parent and possibly the nominal president of Soups & Breads, Inc. (*see*, Finding of Fact “7”), the holding of corporate office does not automatically impose tax liability upon an office holder (*Chevlowe v. Koerner, supra*). Additionally, the record shows that petitioner signed certain Federal corporate income and New York corporation tax returns, and powers of attorney. However, such facts and the holding of corporate office are outweighed by his lack of control over the operations and finances of the business. Significantly, the record shows that petitioner did not sign the six sales tax returns in the record which purportedly contained his signature. That petitioner did not sign these sales tax returns indicates that he was not involved in the preparation and filing of the returns. Accordingly, I conclude that petitioner did not have and could not have had sufficient authority and control over the affairs of Soups & Breads, Inc. to be considered a responsible officer (*see, Matter of Constantino, supra*).

E. In light of Conclusion of Law “D”, Issue II is moot.

F. The petition of Prakash T. Melwani is granted and the Notice of Determination dated May 30, 2000 is canceled.

DATED: Troy, New York
August 1, 2002

/s/ Timothy J. Alston
PRESIDING OFFICER