

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| SANDRA MARTINEZ | : | DETERMINATION |
| | : | DTA NO. 820610 |
| 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, 2003 through | : | |
| February 29, 2004. | : | |

Petitioner, Sandra Martinez, 240 Saint Johns Street, Central Islip, New York 11722, 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, 2003 through February 29, 2004.

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on April 18, 2006, at 10:30 A.M., with all briefs to be submitted by June 19, 2006, which date commenced the six-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Mark F. Volk, Esq. (Michael Hall, Esq., of counsel).

ISSUE

Whether petitioner was a person responsible for collecting and remitting sales taxes on behalf of Jason's Warehouse Ltd. for the period September 1, 2003 through February 29, 2004.¹

¹ The petition challenged assessments for the periods June 1, 2003 through February 29, 2004. However, prior to the commencement of the hearing the parties stipulated that assessment numbered L-024302852-6, for the period June 1, 2003 through August 31, 2003, was paid in full and is no longer in issue.

FINDINGS OF FACT

1. Jason's Warehouse Ltd. ("Jason's") is a furniture store located on Sunrise Highway in Copiague, New York. It sells items such as bedding, couches, dining tables, buffets and end tables.

2. Jason's filed a New York State sales tax return for the period September 1, 2003 through November 30, 2003 which reported that tax was due in the amount of \$13,643.79 less tax credits of \$150.00 for an amount due of \$13,493.79. Jason's also filed a New York State sales tax return for the period December 1, 2003 through February 29, 2004. The later return reported that tax was due in the amount of \$12,659.19 less tax credits of \$150.00 for an amount due of \$12,509.19. The return for the period ended November 30, 2003 was signed by Pedro Martinez, Jr. as treasurer. The return for the subsequent period was signed by Pedro Martinez as president.

3. Payments were not remitted with the foregoing returns, and as a result, assessments were issued to Jason's. Jason's did not pay the assessments, whereupon a tax compliance agent was assigned to the matter.

4. The tax compliance agent went to Jason's and spoke to petitioner. During this meeting, petitioner explained to the tax compliance agent that she was there because her father and brother were unavailable. Petitioner's father, Pedro Martinez, had surgery for a brain tumor the year before. Further, he was not at the store at the time of their meeting because he was recovering from open heart surgery. In addition, Mr. Martinez was planning to have another surgery in order to treat throat cancer. Petitioner's brother was not at the store because he also underwent open heart surgery.

5. In the course of investigating whether to issue assessments to particular individuals as responsible officers of Jason's, the tax compliance agent examined the Division's imaging system. The imaging system is a database which contains copies of returns, checks and correspondence which taxpayers send to the Division. Through an examination of the imaging system and documents provided by petitioner, the tax compliance agent located, among other things: a check signed by petitioner which accompanied a withholding and unemployment insurance return, a group of checks signed by petitioner which were payable to either "New York State Sales Tax" or the Commissioner of Taxation and Finance, bank account signature cards authorizing petitioner to sign checks, a Statement of Financial Condition and Other Information signed by petitioner's father showing that petitioner had the title of corporate secretary,² an Authorization Agreement for Automatic Payments, dated October 19, 2004, which was signed by Pedro Martinez as president and petitioner as secretary and a power of attorney form signed by Pedro Martinez, Jr., as treasurer, which authorized petitioner to represent Jason's for the period ended August 31, 2002.³

6. When the tax compliance agent spoke to petitioner, petitioner did not indicate that she needed to speak to someone before a payment could be remitted. The only time that this was mentioned was when petitioner was waiting for her accountant to prepare a tax return and she did not know how much sales tax she could remit until she knew the amount of sales tax that was going to be due.

² The Division asks for financial disclosure to determine if there are other assets and also to determine who the responsible persons are. On this form, Pedro Martinez, Jr. is listed as treasurer and petitioner is listed as secretary.

³ The tax compliance agent asked petitioner for the power of attorney because, at the time, she did not think that petitioner was operating the business. Petitioner was not asked for a power of attorney for later periods because the tax compliance agent did not think it was necessary.

7. The absence of anyone, other than petitioner, managing the store led the tax compliance agent to conclude that petitioner was in charge. During the initial visits and telephone conversations, the tax compliance agent did not speak to anyone except petitioner. The opinion that petitioner was in charge was reinforced by a review of the documents signed by petitioner and by petitioner's asking for a payment plan to satisfy Jason's tax debt.

8. The Division issued two notices of determination to petitioner, dated July 26, 2004, as a responsible officer or person of Jason's. The first notice, assessment number L-024302851-7, assessed sales and use tax for the period September 1, 2003 through November 30, 2003 in the amount of \$13,643.79, plus interest in the amount of \$1,189.66 and penalty in the amount of \$2,319.38, for a balance due of \$17,152.83. The second notice, assessment # L-024302850-8, assessed tax for the period December 1, 2003 through February 29, 2004 in the amount of \$12,659.19, plus interest in the amount of \$636.90 and penalty in the amount of \$1,772.27, for a balance due of \$15,068.36.

9. The original payment plan was executed in August or September of 2003. Approximately nine months later the payment plan fell into default. At this time, the tax compliance agent returned to Jason's and met petitioner's father, Mr. Martinez.

10. Petitioner's father always made the decision as to who was to be paid and how they were to be paid. During the periods when he was unable to be at the store, petitioner's father made frequent telephone calls to find out what was happening at the store and to give directions. The only reason that petitioner was in a position to speak to the tax compliance agent was because her father was ill. If petitioner's father had been at the store, she would not have been permitted to discuss anything with the tax compliance agent.

11. Petitioner believed that by signing the corporate banking resolutions as secretary she was signing as a person in a clerical position and not as a corporate officer. This is the reason petitioner felt that she did not have the authority to sign the tax forms and would tell her father that he would have to sign them.

12. During the period that petitioner had a power of attorney, she was in communication with her father and he made the decisions as to what was to be done regarding the store. Everything that petitioner did was pursuant to a directive from her father including the signing of the documents which are in the record.

13. Petitioner does not have any ownership interest in Jason's.

CONCLUSIONS OF LAW

A. Tax Law § 1133(a) imposes personal liability for taxes required to be collected under Articles 28 and 29 of the Tax Law upon a person required to collect such tax. A person required to collect such tax is defined as “any officer, director or employee of a corporation . . . who as such officer, director, employee or manager . . . is under a duty to act for such corporation . . . in complying with any requirement of [article 28]” (Tax Law § 1131[1]).

B. The determination that an individual is a responsible person depends upon the particular facts of each case (*Stacy v. State*, 82 Misc 2d 181, 183, 368 NYS2d 448, 451; *Matter of Autex Corp.*, Tax Appeals Tribunal, November 23, 1988). The relevant factors to consider when determining whether a person has such a duty to act for the corporation include, *inter alia*, authorization to sign the corporate tax return, responsibility for management or maintenance of the corporate books, authorization to hire and fire employees and derivation of substantial income from the corporation or stock ownership (*Matter of Blodnick v. State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536, *appeal dismissed* 69 NYS2d 822, 513 NYS2d 1027; *Matter of*

Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564; *Matter of Rosenblatt v. State Tax Commn.*, 114 AD2d 127, 498 NYS2d 529, *revd in part on dissenting opn below* 68 NY2d 775, 506 NYS2d 675).

The Division's regulations define a person under a duty to act on behalf of a corporation as follows:

[g]enerally, a person who is authorized to sign a corporation's tax returns or who is responsible for maintaining the corporate books, or who is responsible for the corporation's management, is under a duty to act. (20 NYCRR 526.11[b][2].)

C. Here, petitioner held the title of corporate secretary and had the authority to sign checks. However, the holding of corporate office is not in itself a sufficient basis upon which to impose personal liability for sales tax found owing by a corporation (*Matter of Blodnick v. State Tax Commn.*, *supra*; *Matter of Vogel v. New York State Dept. of Taxation & Fin.*, 98 Misc 2d 222, 413 NYS2d 862, 865). Petitioner has credibly testified that, despite his absence, petitioner's father never relinquished control of the store. Through frequent telephone calls, petitioner's father was able to stay informed as to the store's activities and direct what should be done. Petitioner did not have any independent authority over the financial affairs of the corporation and only performed tasks at the direction of her father. Petitioner did not sign tax returns and signed checks or other financial instruments only when authorized by her father. Under these circumstances, petitioner was not an officer or employee under a duty to act for the corporation.

D. The petition of Sandra Martinez is granted and the notices of determination dated July 26, 2004 are cancelled.

DATED: Troy, New York
December 14, 2006

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE