

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JODI ALBANESE : DETERMINATION
for Revision of a Determination or for Refund of Sales : DTA NO. 821813
and Use Taxes under Articles 28 and 29 of the Tax Law :
for the Period June 1, 2003 through February 28, 2006. :

Petitioner, Jodi Albanese, 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 28, 2006.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on March 4, 2008 at 10:30 A.M., with all briefs to be submitted by June 3, 2008, which date commenced the six-month period for the issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Daniel Smirlock, Esq. (Jennifer A. Murphy, Esq., of counsel).

ISSUES

I. Whether the audit method employed by the Division of Taxation was reasonable or whether petitioner has shown error in either the audit method or result.

II. Whether petitioner was a person responsible for the collection and payment of sales and use taxes on behalf of Floorever Carpet and Floor Coverings, Ltd., pursuant to Tax Law §§ 1131(1) and 1133(a).

FINDINGS OF FACT

1. On November 6, 2006, following an audit, the Division of Taxation (Division) issued to petitioner, Jodi Albanese, a Notice of Determination which asserted \$37,746.55 in additional sales and use tax due, plus interest, for the period June 1, 2003 through February 28, 2006.

2. The notice advised petitioner that the Division had determined that she was a corporate officer or a person responsible for the collection and payment of sales and use taxes due from Floorever Carpet and Floor Coverings, Ltd., and therefore personally liable for the sales and use taxes due from that corporation.

3. Floorever Carpet and Floor Coverings, Ltd. (the corporation), was a retailer, wholesaler and installer of carpeting and other flooring materials in Lynbrook, New York.

4. On January 6, 2003, the Division sent a letter to the corporation scheduling an appointment to commence a sales and use tax field audit of the corporation's business for the period March 1, 2000 through November 30, 2002. The Division subsequently sent several similar audit appointment letters which gradually expanded the audit period to May 31, 2005. Each of the Division's letters requested that all of the corporation's books and records pertaining to its sales and use tax liability for the audit period be available for review. Among the records specifically requested were the general ledger, cash receipts journal, federal income tax returns, purchase invoices, sales invoices, guest checks, cash register tapes, bank statements, financial statements and exemption documents.

5. In response to the Division's requests, the corporation produced bank statements and some capital improvement certificates. The corporation did not produce any source documentation of sales, such as invoices or cash register tapes, or any purchase invoices.

6. The Division concluded that the records produced by the corporation in response to its requests were inadequate for the purpose of verifying its tax liability and therefore proceeded to estimate the corporation's taxable sales during the audit period using a test period method. Specifically, the Division reviewed in detail the corporation's bank deposits for the period March 1, 2002 through May 31, 2002. All deposits substantiated as nonsales and all deposits attributable to substantiated nontaxable sales were subtracted from the total deposits for the test period. The balance remaining was divided by one plus the sales tax rate to reach audited taxable sales. As calculated in this manner, and after subtracting taxable sales reported, the Division determined \$64,733.00 in additional taxable sales for the test period and \$5,502.37 in additional tax due on such sales.

7. The Division then developed an error rate by dividing sales tax due on the additional test period taxable sales by total test period bank deposits and multiplying the result by the prevailing sales tax rate. The Division then applied the error rate to the corporation's total bank deposits for each of the sales tax periods at issue and thereby determined \$89,259.03 in additional tax due on sales for the period March 1, 2000 through February 28, 2006. The Division used bank deposits for projection purposes because it had no other index of the corporation's sales activity which was available throughout the audit period.

8. Some of the corporation's exempt sales were for capital improvements. The Division therefore audited the corporation's purchases subject to use tax, again using the test period of March 1, 2002 through May 31, 2002. In its review of the capital improvement certificates provided with respect to the test period, the Division determined capital improvement sales of \$31,372.00 or 20.21 percent of total test period bank deposits of \$155,228.00. The Division estimated a cost ratio of 45 percent for capital improvement sales. This was less than the cost

ratios of 58.54 percent, 58.58 percent, and 63.76 percent as indicated by the corporation's federal income tax returns for the years 2000 through 2002. The Division's estimate was based on a presumption that capital improvement sales have a lower cost ratio than retail sales because the corporation's capital improvement sales included charges for installation while its retail sales did not. The Division then developed an error rate for the corporation's capital improvement purchases by multiplying quarterly bank deposits by 20.21 percent to reach capital improvement sales per quarter; multiplying the result by the 45 percent cost ratio to reach purchases subject to use tax; and finally multiplying this result by the prevailing sales tax rate to reach tax due on purchases. In this manner the Division determined tax due on purchases subject to use tax of \$19,452.56 for the period March 1, 2000 through February 28, 2006.

9. The Division also determined \$330.00 in additional tax due on fixed asset purchases during the period June 1, 2001 through August 31, 2001.

10. In total, then, the Division's audit determined \$109,041.59 in additional tax due from the corporation for the period March 1, 2000 through February 28, 2006.

11. The November 6, 2006 Notice of Determination issued to petitioner is based on the audit of the corporation. The notice issued to petitioner covers a shorter assessment period because the period of limitations for assessment for earlier periods had expired with respect to petitioner.

12. Petitioner was president and sole shareholder of the corporation from its inception through the period at issue. She signed the corporation's Application for Registration as a Sales Tax Vendor filed with the Division in December 1999. She was authorized to sign checks and did sign checks for the corporation throughout the audit period. A North Fork Bank Corporate

Resolution dated October 13, 2006 shows petitioner as the only person authorized to sign checks for the corporation.

13. Petitioner signed corporate checks for sales taxes. The record shows that petitioner signed such checks dated February 19, 2003, September 20, 2004, December 20, 2004, March 21, 2005, June 19, 2005, and September 18, 2005.

14. Petitioner signed sales tax returns for the corporation. The record contains petitioner's signature on corporate sales tax returns for the sales tax periods ended November 30, 2003, February 28, 2005, and May 31, 2005.

15. Petitioner also signed corporate franchise and federal income tax returns. The record shows that petitioner signed the corporation's 2002 New York S Corporation Franchise Tax Return, the corporation's 2002 U.S. Income Tax Return for an S Corporation, the corporation's 2005 New York S Corporation Franchise Tax Return Short Form, and the corporation's 2005 U.S. Income Tax Return for an S Corporation. All such franchise tax and corporate income tax returns indicate that petitioner was president and sole shareholder of the corporation.

16. Petitioner also signed Power of Attorney forms dated February 20, 2003, September 20, 2004, September 12, 2005, and July 20, 2006, appointing various representatives to represent the corporation during the course of the audit.

17. Petitioner reported income and loss from the corporation on her personal income tax returns.

18. Petitioner's mother, Mary Jo Albanese, was also involved in the operation of the corporation. The record shows that Mary Jo Albanese signed corporate sales tax returns for the periods ended February 29, 2004, May 31, 2004, November 30, 2004, November 30, 2005, and

February 28, 2006. Mary Jo Albanese also signed two corporate checks for sales taxes, each dated June 2, 2004.

CONCLUSIONS OF LAW

A. Tax Law § 1138(a)(1) provides, in relevant part, that if a sales tax return was not filed, “or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined [by the Division of Taxation] from such information as may be available. If necessary, the tax may be estimated on the basis of external indices” (Tax Law § 1138[a][1].)

B. The Division may estimate tax liability pursuant to Tax Law § 1138(a)(1) only where a taxpayer’s records are inadequate. Tax Law § 1135(a)(1) requires persons required to collect sales tax to maintain records sufficient to verify all transactions, in a manner suitable to determine the correct amount of tax due. Records are insufficient where it is “virtually impossible [for the Division of Taxation] to verify taxable sales receipts and conduct a complete audit” (*Matter of Chartair, Inc. v. State Tax Commn.*, 65 AD2d 44, 46, 411 NYS2d 41, 43 [1978]).

C. To determine the adequacy of a taxpayer's records, the Division must first request and thoroughly examine the taxpayer’s books and records for the entire period of the proposed assessment (*Matter of Adamides v. Chu*, 134 AD2d 776, 521 NYS2d 826 [1987], *lv denied* 71 NY2d 806, 530 NYS2d 109 [1988]).

D. Here, the Division made several clear and unequivocal requests for the corporation’s books and records for the period March 1, 2000 through May 31, 2005 (*see* Finding of Fact 4). In response to these requests the corporation produced only bank statements and some capital improvement certificates. The corporation did not produce any source documentation of sales, such as invoices or cash register tapes, or any purchase invoices. There is no question that the

records produced were inadequate for the purpose of verifying the corporation's sales and use tax liability and the Division thus properly resorted to the use of an estimate audit method for the March 1, 2000 through May 31, 2005 period.

E. As petitioner correctly notes, the Division made no request for records from the corporation for the period June 1, 2005 through February 28, 2006. The Division thus could make no determination as to the adequacy of the corporation's records for that period and, accordingly, its estimate of the corporation's sales tax liability for this period was improper (*Matter of Adamides v. Chu*). The Division's assessment against petitioner with respect to the period June 1, 2005 through February 28, 2006 therefore must be cancelled.

F. With respect to the March 1, 2000 through May 31, 2005 audit period, the Division, in estimating the corporation's tax liability, was required to select a method reasonably calculated to reflect the tax due (*see e.g. Matter of ADGN, Inc.*, Tax Appeals Tribunal, February 2, 1997). It is well established that exactness in the audit result is not required, for any imprecision arises from the taxpayer's failure to maintain adequate books and records as required under the Tax Law and thus is properly borne by the taxpayer (*see Matter of Chronos Enterprises*, Tax Appeals Tribunal, December 13, 2007).

G. The test period is well established as an acceptable audit method (*see e.g. Matter of Continental Arms Corp. v. State Tax Commn.*, 72 NY2d 976, 534 NYS2d 362 [1988]). Moreover, the use of bank deposits as the basis of estimating sales and use tax liability has been affirmed by the Tax Appeals Tribunal as a reasonable methodology (*Matter of D & V Liquors*, Tax Appeals Tribunal, March 10, 2005).

H. Since it is concluded that the audit method was reasonable, petitioner had the burden of proof to show, by clear and convincing evidence, that the result of the audit was unreasonably

inaccurate or that the amount of tax assessed was erroneous (*see Matter of Your Own Choice, Inc.*, Tax Appeals Tribunal, February 20, 2003). Petitioner failed to meet this burden as she offered no evidence to refute the audit results. Rather, petitioner offered a general complaint regarding the use of a test period audit method. This complaint is without merit because, as noted above, the use of a test period audit was reasonable under the circumstances. Petitioner also complained that the 2002 test period is outside the June 1, 2003 through February 28, 2006 assessment period covered by the subject Notice of Determination. This complaint, too, is without merit, for it overlooks the fact that the notice at issue was derived from the audit of the corporation. Obviously, the test period falls within the audit period for the corporation. The notice issued to petitioner covers a shorter period than the corporate assessment because the period of limitations for assessment for earlier periods had expired with respect to petitioner (*see* Finding of Fact 11).

I. Turning to the responsible officer issue, 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 includes “any officer, director, or employee of a corporation . . . who as such officer, director [or] employee . . . is under a duty to act for such corporation . . . in complying with any requirement of [Article 28] . . .” (Tax Law § 1131[1]).

J. Whether an individual is under a duty to act for a corporation with regard to its tax collection responsibilities such that the individual would have personal liability for the taxes not collected or paid depends on the particular facts of the case (*see Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022, 513 NYS2d 564 [1987]). The ultimate question to be resolved in any responsible officer 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).

K. Specific factors to consider when determining responsible officer status under Article 28 are the authorization to hire and fire employees (*Matter of Blodnick v. New York State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536 [1986], *lv dismissed* 69 NY2d 822, 513 NYS2d 1027 [1987]); the individual's day-to-day responsibilities, involvement with, knowledge of and control over the financial affairs and management of the corporation (*Matter of Vogel v. New York State Dept. of Taxation & Fin.*, 98 Misc 2d 222, 413 NYS2d 862 [1979]; *Matter of Stern*, Tax Appeals Tribunal, September 1, 1988); the duties and functions of the officers and directors as outlined in the certificate of incorporation, corporate bylaws and minutes of corporate meetings, and the preparation and filing of sales tax forms and returns (*Matter of Vogel v. New York State Dept. of Taxation & Fin.*); the individual's economic interest in the corporation and whether he had authority to sign tax returns for the corporation (*Matter of Martin v. Commissioner of Taxation & Fin.*, 162 AD2d 890, 558 NYS2d 239 [1990]); the payment, including the authorization to write checks on behalf of the corporation, of creditors other than the State of New York and the United States (*Matter of Chevlowe v. Koerner*, 95 Misc 2d 388, 407 NYS2d 427 [1978]). Another factor is the individual's simultaneous status as an officer, director and shareholder (*Matter of Cohen v. State Tax Commn.*); and in a closely-held corporation, as in the present matter, the individual's knowledge of the affairs of the firm and the firm's profits (*Matter of Vogel v. New York State Dept. of Taxation & Fin.*; *Matter of Blodnick v. New York State Tax Commn.*).

L. The record in the instant matter, considered in light of the factors discussed above, shows that petitioner was a responsible officer of the corporation during the period remaining at

issue. Specifically, petitioner was president and sole shareholder of the corporation. She had check-signing authority and signed checks in payment of sales taxes. She signed sales tax returns and other documents for the corporation and she had a financial interest in the corporation. These objective facts outweigh petitioner's uncorroborated testimony¹ that she had little involvement in the corporation and that she merely assisted her mother, Mary Jo Albanese, who actually ran the business. Further, while the record shows that Mary Jo Albanese was also involved in the business, such involvement does not preclude a finding that petitioner was a responsible person under Tax Law §§ 1131(1) and 1133(a), for a corporation can have more than one responsible officer (*see Matter of Pais*, Tax Appeals Tribunal, July 18, 1991).

M. Petitioner also contended that she was incarcerated for two weeks in July of 2005 and four weeks in 2006. Since this determination has cancelled the assessment against petitioner from June 1, 2005 through February 28, 2006 (*see* Conclusion of Law E), the question of her incarceration, even if accepted as fact, is not relevant to whether she was a responsible officer during the June 1, 2003 through May 31, 2005 period remaining at issue.

N. The petition of Jodi Albanese is granted to the extent indicated in Conclusion of Law E and is in all other respects denied. The Division of Taxation is directed to modify the Notice of

¹ With her post-hearing letter brief, petitioner submitted a copy of a letter dated March 29, 2007 from Gregory A. Crasto, CPA. The letter states that, to the best of Mr. Crasto's knowledge, Mary Jo Albanese was president of the corporation during 2002 through 2004 and that petitioner was acting on Mary Jo's behalf during those periods. Since this letter was submitted after the record was closed, it has not been received in evidence (*see Matter of Jalayer*, Tax Appeals Tribunal, May 15, 2008). Even if it were to be received in evidence, considering that the letter is unsworn, that the basis of Mr. Crasto's knowledge is not in the record and that Mr. Crasto has not been subject to cross examination, the letter would properly be accorded little evidentiary weight.

Determination dated November 6, 2006 in accordance with Conclusion of Law E and as modified,
the notice is sustained.

DATED: Troy, New York
November 6, 2008

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE