

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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| In the Matter of the Petition | : | |
| of | : | |
| SUSAN SACHER | : | DECISION |
| | : | DTA NO. 824107 |
| for Revision of Determinations or for Refund of | : | |
| Sales and Use Taxes under Articles 28 and 29 of | : | |
| the Tax Law for the Periods September 1, 1998 | : | |
| through February 28, 1999 and September 1, 2001 | : | |
| through November 30, 2001. | : | |

Petitioner, Susan Sacher, filed an exception to the determination of the Administrative Law Judge issued on January 16, 2014. Petitioner appeared by Kestenbaum & Mark (Bernard S. Mark, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Anita K. Luckina, Esq., of counsel).

Petitioner filed a brief in support of her exception. The Division of Taxation filed a brief in opposition. Petitioner filed a brief in reply. Oral argument was heard in New York, New York on January 8, 2015, which date began the six-month period for the issuance of this decision.

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

ISSUE

Whether Susan Sacher was a person responsible for the collection and payment of sales and use taxes on behalf of BMW NY, Inc., within the meaning and intent of Tax Law § § 1131 (1) and 1133 (a).

FINDINGS OF FACT

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

1. BMW NY, Inc. (BMW NY), owned and operated BMW motorcycle franchises at 508 New York Avenue, Huntington, New York, and 401 Wall Street, New York, New York, during the period March 1, 1998 through February 28, 2006. Following the audit period, the corporation changed its name to Cybercycling Distributing, Inc., when the franchisor, BMW of North America, Inc., revoked the franchise agreement with BMW NY.

2. On December 10, 2003, the Division of Taxation (Division) sent a letter to the corporation stating that the business's sales and use tax records had been scheduled for a field audit for the period March 1, 1998 through November 30, 2000, and March 1, 2001 through November 30, 2003. The period December 1, 2000 through February 28, 2001 was not included in the audit because a sales tax return had been filed by the corporation for that sales tax quarter, thus rendering the quarter outside the statute of limitations for audit purposes. The letter stated that "[a]ll books and records pertaining to the sales and use tax liability, for the audit period, must be available on the appointment date." The appointment date indicated on the letter was January 7, 2004. A schedule of books and records to be produced was attached to the letter. The letter specifically requested, among other records, federal income tax returns, the general ledger, sales invoices, merchandise purchase invoices, cash register tapes and bank statements for the entire audit period. In response to the appointment letter, the corporation advised the auditor to contact its representative to commence the audit. At the initial meeting with the corporation's representative, no books and records were provided except a few pages from a "police book." A police book is required to be maintained by dealerships that sell used vehicles, and is a record of

all vehicles brought to the dealership's facilities for resale. It is a record used by the police to check for stolen vehicles. From the pages of the police book, the auditor was able to obtain the facility number of the dealership. The facility number is issued by the Department of Motor Vehicles (DMV) in conjunction with its issuance of retail certificate of sale forms (MV-50 books). The MV-50 book is the actual record of sales by a dealer. When a dealer sells a vehicle, a portion of the MV-50 provides a temporary certificate of registration to the purchaser. The name and address of the purchaser, as well as the purchase price of the vehicle, is contained on the MV-50.

3. On December 28, 2004, by letter to BMW NY's representative, the audit period was expanded to include the period December 1, 2003 through November 30, 2004. The Division again requested that the corporation produce all books and records relating to the expanded audit period and included a second records request list. The letter specifically requested, among other records, federal income tax returns, sales invoices, merchandise purchase invoices, bank statements and DMV forms MV-50 for the entire audit period. On March 24, 2006, by letter to BMW NY's representative, the audit period was expanded to include the period December 1, 2004 through February 28, 2006. The Division again requested that the corporation produce all books and records relating to the expanded audit period and included a third records request list. The letter specifically requested, among other records, federal income tax returns, New York State corporation tax returns, sales invoices, merchandise purchase invoices and bank statements for the entire audit period.

4. In addition to the pages of the police book, the corporation produced income statements for only some of the years at issue, some copies of late-filed income and sales tax returns and some warranty sales information. The Division concluded that the records produced

in response to its requests were inadequate for the purpose of verifying the corporation's tax liability with respect to sales. The Division determined that the lack of original source documents detailing the corporation's sales precluded the Division from tracing any transaction back to the initial sale or forward to the amount of sales reported. In the face of inadequate records, the auditor decided to employ an indirect audit method to calculate the amount of taxable sales.

5. Using the dealership's facility number, the auditor obtained from the DMV the certificate of sale forms relating to the dealership for a two-year period. These records were initially transcribed for a two-month test period and resulted in a tax discrepancy of approximately \$1 million when compared to tax reported by the corporation. The auditor decided to transcribe all of the MV-50 forms received. The transcription included the customer name and address, invoice date, invoice amount, jurisdiction, tax rate, tax paid, license plate number and additional tax due. The taxability of the transaction was based on the purchaser being a New York State resident and the amount of tax due was determined by each New York purchaser's address. The auditor employed the form MV-50s to compute an overall percentage of nontaxable sales (generally, out-of-state sales) of 14.70 percent. Audited gross sales were estimated using federal tax returns, New York State corporate tax returns and income statements provided by the corporation. Audited gross sales were reduced by warranty sales to determine motorcycle sales. The taxable ratio was applied to motorcycle sales to determine quarterly taxable sales. Reported taxable sales were subtracted from quarterly taxable sales to arrive at additional taxable sales of \$17,705,037.91 and additional tax due of \$1,484,390.28.

6. The corporation executed a series of consents extending the period of limitations for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law that collectively

extended the period in which to assess sales and use taxes due for the period March 1, 2000 through February 29, 2004 to March 20, 2007. Joel Sacher signed ten of the eleven consents as president of the corporation. The remaining consent was signed by the corporation's representative.

7. On November 8, 2006, the corporation executed a closing agreement for the periods March 1, 1998 through November 30, 2000, and March 1, 2001 through February 28, 2006, fixing the additional tax due at \$1,484,390.28, plus penalty and interest. The agreement was executed by Joel Sacher, as president, on behalf of the corporation.

8. Petitioner executed a series of consents extending the period of limitations for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law that collectively extended the period in which to assess sales and use taxes due for the period December 1, 2002 through February 29, 2004 to March 20, 2007.

9. On November 9, 2006, petitioner executed a closing agreement for the periods March 1, 1998 through August 31, 1998, March 1, 1999 through February 29, 2000 and December 1, 2002 through February 28, 2006, fixing the additional tax due at \$989,316.60, plus interest. Petitioner paid this amount to the Division. The agreement provides that petitioner is deemed to be a responsible person of BMW NY under Tax Law § 1131 (1), and pursuant to Tax Law § 1133 (a), is personally liable for the taxes due from the corporation.

10. On November 9, 2006, petitioner executed a separate agreement for the periods September 1, 1998 through February 28, 1999, and September 1, 2001 through November 30, 2001, in which petitioner agreed that payment for these periods would be received by the Division by July 31, 2009, and if payment was not received, the Division could determine petitioner's liability at that time.

11. On August 31, 2009, the Division issued a notice of determination (L-032448216-2) to petitioner as an officer or responsible person of the corporation, asserting sales and use taxes due for the period September 1, 1998 through February 28, 1999, in the amount \$109,952.24, plus penalty and interest. On the same date, the Division issued a second notice of determination (L-032448215-3) to petitioner as an officer or responsible person of the corporation, asserting sales and use taxes due for the period September 1, 2001 through November 30, 2001, in the amount \$76,673.83, plus penalty and interest.

12. Petitioner received wage and tax statements, form W-2, from BMW NY for the years 2002 and 2003. For each year, petitioner was paid a salary of \$35,464.00. According to Mr. Sacher, the wages were actually his wages paid to his wife to avoid creditors.

13. A corporate resolution of the corporation certified North Fork Bank as a depository of BMW NY. Withdrawals from the business account on behalf of the corporation were authorized to be made by either the president or secretary of the corporation. The resolution lists Joel Sacher as the corporation's president and secretary, and is dated June 27, 1996. A North Fork Bank signature card for a second business checking account of the corporation indicates petitioner, as vice-president, to be a signatory for the corporation. Petitioner, as secretary of BMW NY, appears as a signatory on a third business account, this one with Citibank. Joel Sacher, as president, is also listed as a signatory on the signature card. The account was opened on July 26, 1999 and contained an initial deposit of \$250.00. Petitioner and Joel Sacher were listed as signatories on a business checking account for the corporation with Citibank.

14. Due to extensive business losses and, as a result, a poor credit rating, Mr. Sacher, at the insistence of BMW of North America, needed petitioner's personal guaranty to obtain the BMW motorcycle franchise. In addition, BMW of North America required petitioner's signature

as an officer of BMW NY for the corporation's guaranty. On October 17, 1996, petitioner and Joel Sacher signed personal guaranties for the indebtedness of the corporation to BMW of North America. Petitioner, as secretary of the corporation, executed the corporation's guaranty for any indebtedness to BMW of North America. Petitioner was the sole responsible corporate officer to sign on behalf of BMW NY. Petitioner secured the necessary credit on behalf of her husband that was a requirement of BMW of North America to grant Mr. Sacher the motorcycle dealership. Without petitioner's guaranties, Mr. Sacher would have been unable to obtain the dealership. Petitioner was aware that by signing the franchise agreement and personal and corporate guaranties, she was responsible for the debts of BMW NY. A termination, release and settlement agreement between BMW NY and BMW of North America was executed on October 11, 2005 on behalf of the corporation by Joel Sacher, as president, and petitioner, as a principal of BMW NY.

15. Mr. Sacher oversaw the day-to-day operations of BMW NY's two dealerships. Each dealership had a general manager hired by Mr. Sacher. Mr. Sacher was responsible for preparing or supervising the preparation of sales tax returns; made significant business decisions; was responsible for maintaining and managing the business; and owned one hundred percent of the corporate voting stock. Mr. Sacher had the authority to manage the business with knowledge and control over the financial affairs of the business; pay or direct payments of liability; sign checks; act on behalf of the business; sign consents extending periods of limitation; sign the sales and use tax returns; hire and fire employees; negotiate loans; borrow money or guarantee business loans.

16. During the period at issue, and beginning in 1996, petitioner operated two businesses. Mrs. Sacher was a licensed insurance agent and did business under the corporate name Motortrans, Ltd. Petitioner started the business with the assistance of Mr. Sacher, having office

space in the BMW NY dealership in Huntington, New York. Customers of BMW NY were referred to petitioner for insurance on their motorcycles. In 1996, she began importing motor scooters into the United States from Italy. Mrs. Sacher incorporated under the name “Italjet, Inc.” As a wholesale business, Italjet, Inc., imported the motor scooters into the United States from Italy and signed up dealerships throughout the country to sell the scooters. To assist petitioner in the start-up of her business, BMW NY was the first dealership signed to sell the scooters and space was provided in the Manhattan location to display them. In addition, Italjet, Inc., had office space adjacent to the BMW NY dealership in Manhattan.

17. Petitioner had little or no involvement with the affairs of BMW NY. She did not sign the sales tax returns or pay the sales tax liability for the periods at issue.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge first addressed the audit issue raised below. He determined that the Division’s audit method was reasonable and that petitioner had not met her burden to show error in either the audit method or result. Petitioner does not contest this part of the Administrative Law Judge’s determination on exception.

Turning to the second issue below, and the sole issue on exception, the Administrative Law Judge reviewed the factors used to determine whether a person is responsible for collecting and remitting sales tax. In so doing, the Administrative Law Judge noted that the question is not whether the person actually exercised authority over an entity, but whether that person *could* have exercised such authority and control to ensure that the proper tax was collected and paid.

Herein, the Administrative Law Judge noted that petitioner held herself out as an officer of BMW NY, executed a corporate guaranty, received wages, and signed checks. Petitioner was

named a principal on the franchise termination agreement. Additionally, petitioner conceded that she was responsible for taxes due on behalf of BMW NY for the periods immediately preceding and following the periods at issue. While acknowledging that petitioner did not manage the daily affairs of BMW NY, the Administrative Law Judge rejected her contention that she was not a corporate officer.

The Administrative Law Judge noted that, in order prevail, petitioner needed to demonstrate that she was prevented from exercising her authority over the corporation, and that, through no fault of her own, she was thwarted from ensuring that proper tax was collected and paid. In reviewing the record, the Administrative Law Judge concluded that petitioner was not prevented from so acting. Rather, she delegated sole authority to her husband, who had a history of irresponsible business behavior, including nonpayment of taxes. The Administrative Law Judge found this to be both unreasonable and insufficient to establish that petitioner was thwarted from exercising authority over BMW NY. Accordingly, the Administrative Law Judge sustained the subject notices of determination.

ARGUMENTS ON EXCEPTION

As noted, petitioner challenges only the Administrative Law Judge's determination that she was under a duty to act on behalf of BMW NY, and thus was personally liable for BMW NY's sales tax obligations.

Petitioner asserts that the record lacks evidence that she was a responsible person during the periods at issue. She specifically contends that she signed no checks or tax returns during those periods. Additionally, petitioner notes that her husband was the sole shareholder, board member, and (assertedly) officer of BMW NY. She states that she had no knowledge of the corporation's business and spent no time there. Although she acquired credit for the company,

specifically, the guaranty with BMW of North America, petitioner claims that she neither worked for the corporation nor held herself out as one of its officers. She stated that her employment with the company was a “no-show” job. Additionally, petitioner argues that the agreements between herself and the Division specifically leave her liability for the periods at issue to be “determined at a later date.”

Relying upon the foregoing facts, petitioner contends that the Administrative Law Judge erroneously concluded that she was under a duty to act for BMW NY. She contends that her husband ran the business as his own and that she did not have any control or authority over the company’s affairs. While she does not dispute that she signed certain documents and checks, as well as held herself out as a corporate officer, she contends that these events occurred outside of the periods at issue, and, therefore, the Administrative Law Judge erred by relying upon these facts in reaching his determination. Based on her assertion that she did not have the requisite authority and control over BMW NY, petitioner requests that the determination be reversed and that the notices of determination be canceled.

The Division argues that the Administrative Law Judge properly determined that petitioner was under a duty to collect and remit taxes on behalf of BMW NY. It contends that petitioner held herself out as an officer of BMW NY, and that she used her authority as such an officer on several occasions. The Division emphasizes that petitioner’s involvement was critical in acquiring third party agreements required for the business’ existence. Additionally, the Division notes that nothing in the record suggests that petitioner was prevented from exercising her authority over the corporation.

The Division asserts that the Administrative Law Judge correctly rejected petitioner’s argument that she should not be liable for the corporation’s liability because she was not

involved in its daily operations. It notes that liability for sales tax is joint and several, and that one may not escape liability by delegating authority. Accordingly, the Division argues that the determination should be affirmed and, accordingly, the notices of determination be sustained.

OPINION

Tax Law § 1133 (a) imposes personal liability upon any person required to collect the tax imposed by Article 28 of the Tax Law 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 any requirement of Article 28 (Tax Law § 1131 [1]). The personal liability imposed on individuals pursuant to Tax Law § 1133 (a) is joint and several (*see Matter of Tafeen*, Tax Appeals Tribunal, January 3, 2002).

Petitioner bears the burden of proof to show, by clear and convincing evidence, that she was not a person required to collect tax under Tax Law §§ 1131 (1) and 1133 (a) (*Matter of Goodfriend*, Tax Appeals Tribunal, January 15, 1998).

Whether a person is responsible for collecting and remitting sales tax for a corporation so that the person would have personal liability for the taxes not collected or paid depends on the facts of each case (*Matter of Cohen v State Tax Commn.*, 128 AD2d 1022 [1987]). We look to various factors in making this factual determination. The holding of corporate office is one such factor, but personal liability under Tax Law § 1131 (1) is not limited to individuals holding official titles (*see Matter of Ianniello*, Tax Appeals Tribunal, November 25, 1992, confirmed 209 AD2d 740 [1994]; *see also Chevlowe v Koerner*, 95 Misc 2d 388 [1978]). Other relevant factors include the individual's authority to sign corporate checks; the individual's economic interest in the corporation; and the individual's knowledge of and control over the financial

affairs of the corporation (*see Matter of Constantino*, Tax Appeals Tribunal, September 27, 1990). The relevant consideration is “petitioner’s authority and responsibility to exercise control over the corporation, not [her] actual assertion of such authority (citations omitted)” (*Matter of Coppola v Tax Appeals Trib. of State of N.Y.*, 37 AD3d 901 [2007]).

Upon review of the facts in the present matter, viewed in light of these factors, we find that petitioner has failed to meet her burden to show that she was not a person required to collect tax under Tax Law § 1131 (1) during the periods at issue. Accordingly, we find that she was liable for sales taxes due from BMW NY under Tax Law § 1133 (a) with respect to those periods.

We first note that petitioner held herself out to third parties as an officer of BMW NY. Specifically, she was listed on various corporate bank accounts as a corporate officer and she signed the corporation’s guaranty for any indebtedness to BMW of North America (*see* Findings of Fact 13 and 14). We therefore find that petitioner was, in fact, an officer of BMW NY during the periods at issue. We also note that petitioner had authority to sign checks on behalf of the corporation and did, on occasion, exercise that authority.

Additionally, petitioner signed a personal guaranty for any indebtedness of the corporation to BMW of North America. Such a guaranty is an “important consideration” in determining an individual’s responsible officer status (*see Matter of Luongo*, Tax Appeals Tribunal, July 10, 2012). Here, petitioner’s guaranty to BMW of North America is particularly important because, as the Administrative Law Judge noted, without that guaranty, BMW NY would not have obtained the BMW of North America motorcycle franchise. Furthermore, the circumstances necessitating her guaranty, i.e., Mr. Sacher’s poor business record, amount to a red flag alerting petitioner, at least, to inquire about ongoing business operations and to make some

effort to assure compliance with tax obligations. The record clearly shows, however, that petitioner made no such inquiries or efforts.

We also note that petitioner gained a unique economic benefit from the operation of the BMW NY dealerships through her insurance business, which had an office in the Huntington, New York dealership and to which customers of BMW NY were referred for insurance (*see* Finding of Fact 16). Petitioner's relationship the BMW NY also gained her economic benefits in the operation of her motor scooter business as, BMW NY became the first dealership to sell the scooters (*id.*).

Secondarily, we note that, by her execution of the closing agreement with the Division (*see* Finding of Fact 9), petitioner conceded her liability as a responsible officer for the periods both immediately before and immediately after the periods at issue herein. We see no significant difference in petitioner's ties to the corporation for the periods covered by the closing agreement and the periods at issue herein.

Finally, we note that the record contains no proof that petitioner "was thwarted by others in carrying out [her] corporate duties through no fault of [her] own" (citations omitted) (*Matter of Goodfriend*, Tax Appeals Tribunal, January 15, 1998). There is no evidence that petitioner was affirmatively stopped from acting on behalf of BMW NY. Rather, petitioner allowed her husband to operate the business, which she essentially acquired for him, without supervision.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Susan Sacher is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Susan Sacher is denied; and

4. The notices of determination, dated August 31, 2009, are sustained.

DATED: Albany, New York
July 2, 2015

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner

/s/ James H. Tully, Jr.
James H. Tully, Jr.
Commissioner