

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

---

In the Matter of the Petition	:	
of	:	
<b>SCOTT HERSH</b>	:	DECISION DTA NO. 830264
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 March 1, 2019 through November 30, 2019.	:	

---

Petitioner, Scott Hersh, filed an exception to the determination of the Administrative Law Judge issued on November 16, 2023. Petitioner appeared by Sales Tax Defense LLC (Mark Stone, CPA, and Jennifer Koo, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Mary Humphrey, Esq., of counsel).

Petitioner filed a brief in support his exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument was heard on September 26, 2024 in New York, New York, which date began the six-month period for issuance of this decision.

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

***ISSUE***

Whether the Administrative Law Judge erred in determining that petitioner is personally liable for sales and use taxes due on behalf of 472 Glen Cove Corp., as a person required to collect and pay such taxes under the Tax Law.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge except for findings of

fact 2 and 3, which we have slightly modified to reflect the record more fully. As so modified, the findings of fact are set forth below.

1. On January 5, 2021, the Division of Taxation (Division) issued to petitioner, Scott Hersh, the following notices of estimated determination (notices):

Notice Number	Tax Period Ended	Tax Asserted	Interest	Penalty
L-052622206	05/31/19	\$19,393.66	\$4,869.43	\$5,430.10
L-052622205	08/31/19	\$19,393.66	\$3,998.85	\$4,848.31
L-052622204	11/30/19	\$16,904.48	\$2,761.79	\$3,718.92

Each of the notices stated that sales tax was asserted against petitioner as an officer/responsible person of 472 Glen Cove Corp (the corporation). The notices advise petitioner that the corporation did not file sales tax return for the respective periods for which they were issued, and tax was estimated in accordance with Tax Law § 1138.

2. The Division issued the notices of determination assessing a deficiency of sales and use taxes to petitioner as a responsible officer of the corporation. The corporation's form DTF-17, Application to Register for a Sales Tax Certificate of Authority, was filed electronically and lists petitioner as the only responsible person of the corporation. At the time of incorporation, and when form DTF-17 was filed, the corporation and petitioner had the same address. In addition, petitioner is listed as having electronically submitted sales tax returns for the periods ended February 28, 2018, May 31, 2018, August 31, 2018, November 30, 2018, and February 28, 2019 on behalf of the corporation. The sales tax reported for these periods was \$1,872.92, \$13,720.91, \$19,393.66, \$16,904.48, and \$7,818.22, respectively.

3. Petitioner testified in this matter and candidly admitted that he allowed his friend Mario Larrea to use his name and agreed to incorporate the business. Petitioner explained that he had met Mr. Larrea at a bagel shop that petitioner worked at supplementing his income as a make-up artist, and that the two became friends. Petitioner explained that, at the time, Mr.

Larrea had young children and had run into financial difficulty and requested that petitioner incorporate the business and lend his name so he could get it started. The corporation did business as Cobra Auto Concepts performing auto repair services. Petitioner's understanding was that once the business was up and running, everything would be transferred out of his name into Mr. Larrea's. According to petitioner, when he opened the corporate bank account, he was the signatory on the corporate account but believed that the corporation only had a debit card. According to petitioner, only later did he learn that paper checks had been issued. Petitioner claimed that Mr. Larrea had forged his name on the checks that had been issued by the corporation.

4. Petitioner submitted into the record copies of various checks issued by the corporation. Petitioner also submitted copies of checks from his personal checking account as well as a copy of his passport and driver's license.<sup>1</sup>

5. Petitioner is a professional make-up artist for the film and television industries. At the time of hearing, petitioner had been a professional make-up artist for 42 years. Petitioner has no training or experience in automotive repair.

6. Petitioner did not earn a salary from the corporation and there is no evidence in the record that petitioner was otherwise remunerated by the corporation.

7. Petitioner submitted the affidavit of Jonathan Sundak. Mr. Sundak is an enrolled agent and provided various accounting services to the corporation beginning in 2017. Mr. Sundak explained that after the corporation was incorporated, he met with petitioner and Mr. Larrea. It was Mr. Sundak's understanding that petitioner would not be involved with running the business

---

<sup>1</sup> A determination cannot be made as to whether petitioner signed or did not sign any of the corporation's checks based on a comparison of the checks from petitioner's personal checking account, the corporation's checking account, and petitioner's signature appearing on the copies of his passport and driver's license.

operations of the corporation, and that all future operations would be handled by Mr. Larrea. Mr. Sundak averred that petitioner was not involved with any of the operations of the corporation and that all communications that he had concerning the corporation were with Mr. Larrea. Included with the Division's exhibits was a power of attorney form signed by Mr. Larrea on March 8, 2019, authorizing Mr. Sundak to represent the corporation. Mr. Sundak had been in contact with the Division concerning a possible seizure of the corporation's assets by the Division for unpaid taxes.

8. Petitioner introduced a copy of a complaint that he filed against Mr. Larrea with the Nassau County Police Department, in August 2021, concerning checks that were written from the corporation's business account. The complaint alleges that petitioner knew that a debit card had been issued for that account but did not know that checks had been issued for the account; the complaint further alleges that Mr. Larrea forged his signature on said checks. The complaint indicates that it was filed for documentation purposes and that petitioner's then-representative, Joseph Endres, Esq., advised him to file said complaint.

9. Also included in the record is a printout from the New York State Department of State's State Tax Warrant System. This printout details 10 tax warrants issued by the Division against Mr. Larrea, two of which were issued to Mr. Larrea individually and as responsible person of the corporation. The other eight warrants were filed at various times in 2010, 2011, 2013 and 2018 and total over \$400,000.00 in New York State tax debt.

10. The Internal Revenue Service did not assess the trust fund recovery penalty against petitioner for the outstanding employment tax liabilities of the corporation.

11. Petitioner introduced a copy of an affidavit Mr. Larrea executed on June 4, 2019, in connection with an alleged bankruptcy filing of the corporation. In the affidavit, Mr. Larrea

identifies himself as president and sole shareholder of the corporation. No certified copies of any bankruptcy court records were introduced into the hearing record. The record does not contain any evidence as to the status of the corporation's alleged bankruptcy filing.

12. The Division's witness in the matter, Carlos Briceno, could not specifically answer how the tax asserted in the notices of estimated determination were estimated but stated that notices of estimated determination are generally issued based on previously filed tax returns.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

The Administrative Law Judge explained that Tax Law former § 1133 (a) provided, in part, that: “[e]very person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected, or required to be collected under this article.” The Administrative Law Judge noted that whether a person is a responsible officer must be determined based upon the specific facts of each case (*see Matter of Coppola v Tax Appeals Trib. of State of N.Y.*, 37 AD3d 901 [3d Dept 2007]; *Matter of Hall*, Tax Appeals Tribunal, March 22, 1990, *confirmed* 176 AD2d 1006 [3d Dept 1991]). The Administrative Law Judge listed the various factors outlined in the Division's regulations, including whether the person was authorized to sign the corporate tax return, was responsible for managing or maintaining the corporate books or was permitted to generally manage the corporation (*see* 20 NYCRR 526.11 [b] [2]).

The Administrative Law Judge found that petitioner did not meet his burden of proving by clear and convincing evidence that the notices of estimated determination were irrational or unreasonable. In finding petitioner a responsible person for the corporation, the Administrative Law Judge determined that petitioner was the sole shareholder and only signatory on the

corporation's checking account and was listed on the corporation's bank signature card as president of the corporation.

The Administrative Law Judge concluded that despite petitioner's claim that he did not exercise any control over the corporation, there is no evidence that petitioner could not have exercised control. Further, petitioner did not present any evidence documenting exactly when he surrendered his shares of stock to Mr. Larrea. Finally, the Administrative Law Judge dismissed petitioner's argument that the notices of estimated determination should be cancelled because the Division's witness was unable to articulate how the estimated tax was determined. The Administrative Law Judge stated notwithstanding the fact that Division's witness was unable to specifically explain how the tax was estimated, the amounts asserted mirrored the tax as reported in the corporation's filed sales tax returns for the periods ended August 31, 2018, and November 30, 2018, thus forming a rational basis for issuance of the notices (*see Matter of Leogrande v Tax Appeals Trib.*, 187 AD2d 768 [3d Dept 1992], *lv denied* 81 NY2d 704 (1993)).

#### ***ARGUMENTS ON EXCEPTION***

On exception, petitioner makes the same arguments as he did below. Petitioner argues that he is not the responsible person for the business and that he let Mr. Larrea use his name as a favor. Petitioner states that the Administrative Law Judge did not consider all the factors for determining whether a taxpayer qualifies as a person responsible for the collection and paying over of sales tax (*see Matter of Constantino*, Tax Appeals Tribunal, September 27, 1990). Petitioner contends that the Administrative Law Judge erred in concluding that petitioner, as the sole shareholder, is a responsible person of the business. In doing so, petitioner alleges that the Administrative Law Judge failed to consider Mr. Larrea's affidavit to bankruptcy court and power of attorney signed by Mr. Larrea when he rendered his determination. Petitioner further

contends that the Administrative Law Judge erred by not considering the affidavit of Jonathan Sundak wherein Mr. Sundak asserted that petitioner had no control over the financial affairs of the business. Furthermore, petitioner asserts that he never signed form DTF-17 and that the address and the telephone number listed thereon are not his.

The Division argues that the Administrative Law Judge correctly determined that petitioner was a responsible person for 472 Glen Cove Corp. and is personally liable for the sales taxes due. The Division contends that several letters dated between May 18, 2018, and December 5, 2019, were mailed to petitioner at his home address notifying petitioner of his unpaid debt. Petitioner did not contact the Division until February 27, 2020, when he spoke to a representative of the Division. The Division asserts that petitioner did not inform the representative that he never signed DTF-17. Further, the Division argues that petitioner's testimony was contradictory and lacked credibility. The Division states that petitioner never transferred his shares of the corporation to Mr. Larrea and contrary to petitioner's claim, adding Mr. Larrea's name to the bank account did not replace his name as president of the business in the bank records. Further, the Division states that petitioner could have filled out DTF-95, Business Tax Account Update, to remove his name as the responsible officer, but did not. The Division asserts that the evidence petitioner relies upon, such as the bankruptcy petition and email from James Bandoblu, are not relevant here as the bankruptcy court and the IRS do not make responsible person determinations for New York State tax purposes.

### ***OPINION***

We affirm the determination of the Administrative Law Judge. The primary issue in this matter is whether petitioner, who is the sole shareholder of the corporation, should be held liable

as a “person required to collect tax” under Tax Law former § 1131 (1). Tax Law former § 1131

(1) expansively defines “persons required to collect [sales] tax” as follows:

“[E]very vendor of tangible personal property or services; every recipient of amusement charges; and every operator of a hotel. Said terms shall also include any officer, director or employee of a corporation or of a dissolved corporation, any employee of a partnership, . . . or any employee of an individual proprietorship who as such officer, director, employee or manager is under a duty to act for such corporation, . . . in complying with any requirement of this article . . .”

The determination of whether an individual is a responsible person under a duty to act for a business or to collect sales taxes “is a factual determination to be made on a case-by-case basis” (*see Luongo v Tax Appeals Trib. of the State of N.Y.*, 117 AD3d 1286 [3d Dept 2014], affg *Matter of Luongo*, Tax Appeals Tribunal, July 10, 2012). As we stated in the *Moschetto*:

“[t]he question to be resolved in any particular 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. The case law and the decisions of this Tribunal have identified a variety of factors as indicia of responsibility: the individual’s status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual’s knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; the individual’s economic interest in the corporation” (*Matter of Moschetto*, Tax Appeals Tribunal, March 17, 1994; *see also Matter of Constantino*).

The evidence in the record shows that petitioner had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer (*see Matter of Ippolito*, Tax Appeals Tribunal, August 23, 2012, *confirmed* 116 AD3d 1176 [3d Dept 2014]). First, it is undisputed that petitioner was the sole shareholder of the corporation. Next, the electronically submitted form DTF-17 contained petitioner’s name and electronic signature and confirmed this status as a responsible person of the corporation. Additionally, petitioner was the only signatory on the corporation’s checking account and was listed on the



corporation's bank signature card as president of the corporation. Although petitioner contends that he incorporated the corporation as a favor to his friend, Mr. Larrea, the record shows that petitioner failed to establish by clear and convincing evidence that he lacked sufficient authority to act on behalf of the business (*see Matter of Goodfriend*, Tax Appeals Tribunal, January 15, 1998; *see also Matter of Ippolito*). "What must be considered is petitioner's authority and responsibility to exercise control over the corporation, not his actual assertion of such authority" (*Matter of Coppola v Tax Appeals Trib. of State of N.Y.*, 37 AD3d at 903). Based on the above, we agree with the Administrative Law Judge that petitioner was a responsible person of the corporation who had duty to act on behalf of the corporation (*see Matter of Pais*, Tax Appeals Tribunal, July 18, 1991, *see also Matter of Luongo*).

Petitioner asks us to consider Mr. Larrea's affidavit that he submitted to the bankruptcy court, naming himself as the president of the corporation. Petitioner also wants us to consider the affidavit by Mr. Sundak that states that it was his understanding that petitioner would not be involved with running the business operations of the corporation. The assertions made in the affidavits, when considered together with the other evidence, are insufficient for petitioner to meet his burden of proof in showing by clear and convincing evidence whether he ceased being president and sole shareholder of the corporation (*see Matter of Erdman and Keyloun*, Tax Appeals Tribunal, April 6, 1995).

Petitioner asserts that he incorporated this business corporation as a favor to a friend, however, it was ultimately petitioner's responsibility to sever his ties to the corporation. Reliance on his friend's word is not enough to absolve petitioner of his responsibility to collect and pay over the sales taxes owed by the corporation. Petitioner could have taken the additional step of filing a form DTF-95 to remove his name as a corporate officer and responsible person of

the corporation but failed to do so (*see Matter of Coppola; Matter of LaPenna*, Tax Appeals Tribunal, March 14, 1991 [potential liability of others does not relieve petitioner of his own liability as a responsible officer]).

Lastly, we have consistently held that the Division of Tax Appeals is a forum of limited jurisdiction (*see* Tax Law §§ 2000, 2008 and 681; *see also Matter of Crow & Sutton Assoc.*, Tax Appeals Tribunal, January 10, 2013, citing *Matter of Scharff*, Tax Appeals Tribunal, October 4, 1990, *revd* on other grounds sub nom *Matter of New York State Dept. of Taxation & Fin. v Tax Appeals Trib.*, 151 Misc 2d 326 [1991]). The Division of Tax Appeals' power to adjudicate disputes is exclusively statutory (*id.*). This Tribunal lacks the authority to determine Mr. Larrea's tax liability in the absence of a notice of determination issued by the Division against Mr. Larrea and a petition filed with the Division of Tax Appeals appealing that determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Scott Hersh is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Scott Hersh is denied; and
4. The notices of determination issued on January 5, 2021, are sustained.

DATED: Albany, New York  
November 27, 2024

/s/ Jonathan S. Kaiman  
Jonathan S. Kaiman  
President

/s/ Cynthia M. Monaco  
Cynthia M. Monaco  
Commissioner

/s/ Kevin A. Cahill  
Kevin A. Cahill  
Commissioner