

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JASON GUCK : DETERMINATION
for Revision of a Determination or for Refund of : DTA NO. 828973
Sales and Use Taxes under Articles 28 and 29 of the :
Tax Law for the Period September 1, 2012 through :
August 31, 2015. :
_____:

Petitioner, Jason Guck, 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 September 1, 2012 through August 31, 2015.

A videoconferencing hearing via CISCO Webex was held before Barbara J. Russo, Administrative Law Judge, on March 4, 2021, with all briefs to be submitted by August 24, 2021, which date began the six-month period for issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Adam Roberts, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect and remit tax under Tax Law §§ 1131 (1) and 1133 so that he is personally liable for sales tax determined due from 5Linx Enterprises, Inc. for the period September 1, 2012 through August 31, 2015.

FINDINGS OF FACT

1. The Division of Taxation (Division) conducted an audit of 5Linx Enterprises, Inc. (5Linx) for the period September 1, 2012 through August 31, 2015 (the audit period or period at issue).

2. 5Linx maintained a place of business in Rochester, New York, and sold tangible personal property and services in New York State during the audit period. The Field Audit Report of the Division describes 5Linx's business as "primarily a telecommunications company. However, the business operates as a multi-level marketing company headquartered in Rochester, NY, which offers utility and telecommunication services, health insurance, nutritional supplements, and other business services."

3. 5Linx was registered as a sales tax vendor in New York State during the audit period. 5Linx's initial application for registration as a sales tax vendor (application), dated October 8, 2006, lists the following individuals under the section for "owners/officers": Craig Jerabeck, CEO; Jeb Tyler, Vice President; and Jason Guck, Vice President. The application is signed by Robert Hoffman, Financial Assistant.

4. 5Linx's application to renew sales tax certificate of authority (renewal application), dated September 9, 2009, lists the following under "Section G – Responsible person(s)": Craig Jerabeck, CEO; Jeb Tyler, VP; Jason Guck, VP. The renewal application is signed by Craig Jerabeck.

5. The audit for the period at issue was initiated by the Division's auditor, James Nichols, CPA, on July 8, 2015. The Division sent 5Linx an audit appointment letter and information document request (IDR) dated July 8, 2015, requesting that 5Linx provide books and records for the audit period. Additional IDRs were sent to 5Linx from the Division on January 11, 2016, January 20, 2017, and February 16, 2017.

6. During the audit, 5Linx consented to extensions of time for the Division to review records and issue assessments. Petitioner, Jason Guck, signed a consent to extension of time,

dated July 22, 2016, on behalf of 5Linx, extending the deadline for the tax period September 1, 2012 through February 28, 2014 to March 20, 2017. Petitioner signed another consent to extension of time, dated January 26, 2017, on behalf of 5Linx, extending the deadline for the tax period September 1, 2012 through August 31, 2014 to September 30, 2017.

7. 5Linx agreed to a test period audit method election for the audit period. The test period audit method election form for 5Linx, dated March 7, 2017, contains petitioner's signature and lists his title as "EVP." Petitioner testified that the signature "looks like a stamped signature."

8. The Division reviewed the books and records provided from 5Linx and determined additional tax due for unreported sales, expenses purchases and capital purchases. To determine the appropriate amount of taxable sales, the auditor reviewed the sales journal information for the agreed test period and attempted to reconcile the sales tax returns for the same period. Based on the review, the auditor determined unreported gross sales of \$1,817.94 for the test period June through August 2014 and tax of \$145.44. The auditor calculated an error rate, applied the error rate to the reported taxable sales for each quarter, and determined additional sales tax due of \$2,426.52 for unreported sales for the audit period.

For expense purchases, the auditor used the calendar year 2014 as the test period and reviewed general ledgers and invoices provided by 5Linx. Based on the review, the auditor determined that some of the invoices were subject to tax and others were missing or not provided by 5Linx. The auditor determined tax due of \$5,780.46 for the test period. The auditor calculated an error rate of 0.05427 to determine tax due for the entire audit period. The auditor

applied the error rate to the amount reported for each quarter resulting in tax due of \$20,836.55 for expense purchases.

For capital purchases, the auditor reviewed 5Linx's capital records for the whole audit period. Based on a review of the records, the auditor determined additional tax due for capital purchases of \$23,735.88.

9. The Division determined total additional tax due in the amount of \$46,998.00, plus interest and penalty, from 5Linx for the audit period. The Division imposed a penalty of \$14,098.25 on the basis that this was the third audit of 5Linx where tax was determined due for the same areas, and due to poor record keeping.

10. The Division issued a notice of determination (notice), number L-047358977, dated October 23, 2017, to petitioner as an officer/responsible person of 5Linx, asserting tax due of \$46,998.00, plus penalty of \$14,098.25 and interest for the period at issue.

11. Petitioner was a vice president of 5Linx during the period at issue.

12. During the period at issue, petitioner owned 20.440% of the stock of 5Linx and devoted 100% of his time to the business.

13. 5Linx's forms 1125-E, Compensation of Officers, report that petitioner received the following compensation from 5Linx during the period at issue: \$408,620.00 in 2012; \$367,575.00 in 2013; \$321,727.00 in 2014; and \$314,367.00 in 2015.

14. Petitioner testified that his role with 5Linx was to drive new sales and train the sales force. Petitioner further testified that he was in charge of the sales force, was responsible for the top sales producers and was "the one driving new sales."

15. Petitioner testified that his day-to-day duties did not involve accounting or taxes. He further testified that he was not on 5Linx's bank account; however, he did not present the bank signature cards for 5Linx into the record. Petitioner also testified that if Jane Mulvehill, 5Linx's manager of taxation, asked him to sign something for the company, he would ask the CEO, Mr. Jerabeck if it was good, and if so, he would sign it.

16. On June 20, 2017, petitioner, Craig Jerabeck, and Jeb Tyler were indicted for conspiracy to commit wire fraud. The indictment charges, in part, that between in or about May 2009 and May 2015, petitioner, Mr. Jerabeck, and Mr. Tyler conspired to defraud 5Linx and investors, fraudulently obtained and concealed money from 5Linx and investors, and diverted from 5Linx and investors and used for their own personal benefit approximately \$11 million which belonged to and should have been used for the benefit of 5Linx.

17. The Division introduced into the record a press release from the United States Attorney's Office for the Western District of New York, dated May 8, 2019. According to the press release, petitioner was convicted of conspiracy to commit wire fraud and filing a false tax return for the year 2012, and was sentenced to seven months in prison. According to the press release:

"Guck admitted in the plea agreement that from in or about May 2010 to April 2016, 5Linx sold and distributed products for a Florida vendor. Guck, along with Tyler and Jerabeck, and without the knowledge of the Investors, Board of Directors, or other stockholders, conspired and agreed to cause the Florida vendor to pay them personally or companies they owned approximately \$2,310,501.00, which their Stockholders Agreements prohibited them from receiving. 5Linx, its investors, as owners between 2006 and January 2014, and as creditors thereafter, and stockholders were entitled to and should have received such funds instead of defendant, Guck and Tyler."

The press release further states that petitioner was the sole owner of YaYa Holdings Corporation (YaYa Holdings) and that from 2012 to 2015, YaYa Holdings failed to report

income received from 5Linx. The Division did not introduce into the record the plea agreement, plea allocution, or record of conviction.

18. During the hearing in this matter, petitioner initially testified that he did not recall what he pleaded guilty to, but that he entered two guilty pleas. He later testified that one of the guilty pleas was for conspiracy. When asked during cross-examination if money was transferred from 5Linx into a bank account he owned, petitioner responded, “of course.” When asked if money was transferred from 5Linx to YaYa Holdings, petitioner responded, “Not that I recall.” Petitioner admitted that he was the sole owner of YaYa Holdings.

19. Petitioner did not introduce any documentary evidence into the record. The record was held open for petitioner to submit a letter from his former power of attorney; however, he did not submit the document within the time allowed.

CONCLUSIONS OF LAW

A. Tax Law § 1133 (a) provides that:

“Every person required to collect any tax imposed by this article [Article 28] shall be personally liable for the tax imposed, collected or required to be collected under this article. . . .”

Tax Law § 1131 (1), in turn, defines “persons required to collect tax” and a “person required to collect any tax imposed by this article [Article 28]” to include, among others, corporate officers, directors and employees who are under a duty to act for such corporation in complying with the requirements of article 28 of the Tax Law.

B. Whether a person is an officer or employee liable for tax must be determined based upon the particular facts of each case (*Matter of Cohen v State Tax Commn.*, 128 AD2d 1022 [3d Dept 1987]; *Matter of Hall*, Tax Appeals Tribunal, March 22, 1990, *confirmed* 176 AD2d

1006 [3d Dept 1991]; *Matter of Martin*, Tax Appeals Tribunal, July 20, 1989, *confirmed* 162 AD2d 890 [3d Dept 1990]; *Matter of Autex Corp.*, Tax Appeals Tribunal, November 23, 1988). The pivotal question is whether the individual had or could have had sufficient authority and control over the affairs of the corporation (*Matter of Ianniello*, Tax Appeals Tribunal, November 25, 1992, *confirmed* 209 AD2d 740 [3d Dept 1994]). Failure to exercise such authority does not relieve the individual of liability: “the fact that petitioners did not in fact exercise their responsibilities is irrelevant” (*Matter of Blodnick v New York State Tax Commn.*, 124 AD2d 437, 438 [3d Dept 1986]; *see also, Matter of LaPenna*, Tax Appeals Tribunal, March 14, 1991). Factors to be considered include the individual’s status as an officer, director, or shareholder; the individual’s day-to-day responsibilities; the duties and functions as outlined in the certificate of incorporation and bylaws; knowledge of and control over the financial affairs of the corporation; the authority to write checks on behalf of the corporation; responsibility for maintaining the corporate books; authority to sign sales tax forms; the preparation and filing of sales tax returns; authority to hire and fire employees; and the individual’s economic interest in the corporation (*see Matter of Autex Corp.; Matter of Ianniello; Matter of Young*, Tax Appeals Tribunal, Sept 19, 1991; *Matter of Constantino*, Tax Appeals Tribunal, September 27, 1990; *Matter of Cohen* at 1023).

C. Petitioner does not dispute the underlying sales tax liability assessed against 5Linx.¹ The only issue in dispute is whether petitioner had, or could have had, sufficient authority and control over the affairs of 5Linx to be considered a person under a duty to collect and remit the

¹ Although the petition filed in this matter appears to raise an issue regarding the underlying determination of tax due against 5Linx, at the hearing in this matter petitioner stated that “I’m not debating all the different sales tax and audits.” At the hearing, petitioner did not raise the issue of the underlying determination of sales tax due from 5Linx and did not introduce any evidence to show that the Division’s determination was erroneous. The

unpaid taxes in question. In order to prevail, “petitioner was required to establish by clear and convincing evidence that he was not an officer having a duty to act on behalf of the corporation, i.e., that he lacked the necessary authority or he had the necessary authority, but he was thwarted by others in carrying out his corporate duties through no fault of his own [citations omitted]” (*Matter of Goodfriend*, Tax Appeals Tribunal, January 15, 1998).

D. Petitioner bears the burden of proof to overcome the presumed correctness of the Division’s assessment (*Matter of Mera v Tax Appeals Trib.*, 204 AD2d 818 [3d Dept 1994]; *Matter of Blodnick v State Tax Commn.*). Upon review of the record, it is clear that petitioner has not met this burden and is properly held responsible for 5Linx as an officer under a duty to act for such corporation in complying with the requirements of article 28.

Petitioner was an owner and vice president of 5Linx during the period at issue and devoted 100% of his time to the business. Section G of 5Linx’s application to renew sales tax certificate of authority lists petitioner as one of the responsible persons for 5Linx. Petitioner admits that he was an officer of 5Linx and testified that his role and responsibility was to drive new sales and train the sales force. While the record is unclear whether petitioner hired or fired employees for 5Linx, petitioner testified that he was in charge of, and trained, the sales force. Petitioner derived substantial income from 5Linx during the period at issue, as evidenced by the corporation’s forms 1125-E, Compensation of Officers. Petitioner also admits that money was transferred from 5Linx into a bank account he owned. Moreover, petitioner had the authority to sign sales tax forms on behalf of 5Linx for the period at issue, as evidenced by his signature on the consents to extend the period of limitations on assessments. Petitioner’s signature also

Division showed that it requested the books and records from 5Linx, reviewed the records provided, and properly determined sales tax due from 5Linx.

appears on the test period audit method election form for 5Linx for the audit period. Although petitioner testified that this signature appears to be a stamp, he did not contend that his stamped signature was used without his permission. The use of his signature, whether by stamp or personal signing, shows that he had the authority to sign the tax form on behalf of 5Linx.

While petitioner contends that he was not responsible for 5Linx's accounting, finances, and taxes, he has failed to carry his burden of proving that he lacked sufficient authority or control over the corporation to be considered a person under a duty to collect and remit the unpaid taxes in question. (*see e.g. Matter of Tavolacci v State Tax Commn.*, 77 AD2d 759 [3d Dept 1980]). Petitioner did not submit documentation proving his roles and responsibilities as an owner and officer of the corporation (e.g., the articles of incorporation, corporate minutes or bylaws), but instead relies solely upon self-serving testimony, which is insufficient to meet his burden of proof (*see e.g. Matter of Marchello*, Tax Appeals Tribunal, April 14, 2011).

Similarly, although petitioner testified that he was not on 5Linx's bank account, he did not introduce the corporation's bank signature cards into the record to show that he lacked authority to sign checks on behalf of the corporation. While petitioner argues that he was only responsible for the company's sales, and was not responsible for its taxes, he has not shown that he lacked sufficient authority to ensure that the business's sales tax obligations were paid.

Petitioner has not met his burden of proof to show that he did not have or could not have exercised sufficient authority and control over 5Linx's affairs during the period at issue so as to be excused from responsibility for its tax obligations (*see Matter of Shah*, Tax Appeals Tribunal, February 25, 1999).

E. The principal argument advanced by petitioner is that other individuals are the persons responsible for any tax due from 5Linx, and the Division should pursue these individuals. Such argument is unavailing. It is well-settled law that more than one person can be held liable as a responsible officer under the statute, and liability is joint and several (*see Matter of Blodnick v State Tax Commn.; Matter of LaPenna; Matter of Hurley*, Tax Appeals Tribunal, July 16, 1998). Merely pointing to one individual and alleging such individual is a responsible officer does not necessarily establish that other individuals are not responsible officers as well (*see Matter of LaPenna*). Moreover, the Division is under no obligation to pursue other allegedly responsible persons before proceeding against petitioner (*see Matter of Risoli v Commissioner of Taxation and Fin.*, 237 AD2d 675 [3d Dept 1997]). As such, whether other individuals may also be responsible for 5Linx's sales tax obligations does not relieve petitioner of liability.

F. The petition of Jason Guck is denied, and the notice of determination dated October 23, 2017 is sustained.

DATED: Albany, New York
February 24, 2022

/s/ Barbara J. Russo
ADMINISTRATIVE LAW JUDGE