

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SCOTT HERSH	:	DETERMINATION 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 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 March 1, 2019 through November 30, 2019.

A hearing was held before Kevin R. Law, Administrative Law Judge, in New York, New York, on January 12, 2023, with all briefs due by May 19, 2023, which date began the six-month period the issuance of this determination. 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).

ISSUE

Whether petitioner, Scott Hersh, was personally liable for the 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

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 a 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 to petitioner as a responsible person of the corporation because petitioner was listed as the incorporator, sole shareholder, and listed as the responsible person for collection of tax on the corporation's application for a sales tax certificate of authority (form DTF-17). The Corporation's form DTF-17 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. 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. Only later did petitioner 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.¹

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 Sundack. Mr. Sundack is an enrolled agent and provided various accounting services to the corporation beginning in 2017. Mr. Sundack explained that after the corporation was incorporated, he met with petitioner and Mr. Larrea. It was Mr. Sundack's understanding that petitioner would not be involved with running the business operations of the corporation, and that all future operations would be handled by Mr. Larrea. Mr. Sundack 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.

¹ 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.

Larrea on March 8, 2019, authorizing Mr. Sundack to represent the corporation. Mr. Sundack 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, 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.

CONCLUSIONS OF LAW

A. Tax Law former § 1133 (a) provided, in part, 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."

B. During the periods at issue, Tax Law former § 1131 (1) provided, in relevant part, that:

"Persons required to collect tax' or 'person required to collect any tax imposed by this article' shall include: every 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, any employee or manager of a limited liability company, or any employee of an individual proprietorship who as such officer, director, employee or manager is under a duty to act for such corporation, partnership, limited liability company or individual proprietorship in complying with any requirement of this article; and any member of a partnership or limited liability company."

Whether a person is a responsible officer must be determined based upon the particular facts of each case (*see Matter of Coppolla v Tax Appeals Trib.*, 37 AD3d 901 [3rd Dept 2007]; *Matter of Hall*, Tax Appeals Tribunal, March 22, 1990, *confirmed* 176 AD2d 1006 [3rd Dept 1991]. Factors outlined in the Division's regulations include: 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 Tax Appeals Tribunal, in *Matter of Constantino* (Tax Appeals Tribunal, September 27, 1990), stated:

“[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 Cohen v State Tax Commn*, 128 AD2d 1022, 1023 [3d Dept 1987]; *Matter of Blodnick v State Tax Commn*, 124 AD2d 437, 437-438 [3d Dept 1986], *appeal dismissed* 69 NY2d 822 [1987]; *Vogel v New York State Dept. of Taxation & Fin.*, 98 Misc 2d 222, 225-226 [Sup Ct, Monroe County 1979]; *Chevlowe v. Koerner*, 95 Misc 2d 388, 391-392 [Sup Ct, Queens County 1978]; *Matter of Barton*, Tax Appeals Tribunal, December 28, 1989, *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.

C. Petitioner bears the burden of proving by clear and convincing evidence that the notices of estimated determination are irrational or unreasonable (*see Matter of Mera v Tax Appeals Trib.*, 204 AD2d 818 [3d Dept 1994]; *see also Matter of Blodnick v New York State Tax Commn*, at 124 AD2d at 438). Petitioner has not met this burden.

D. Petitioner was the sole shareholder and only signatory on the corporation’s checking account and listed on the corporation’s bank signature card as president of the corporation. Based on these factors, 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, *Matter of Luongo*, Tax Appeals Tribunal, July 10, 2012). Although petitioner claims he did not exercise control over the corporation, instead allowing Mr. Larrea to run the operations, there is no evidence that petitioner could not have exercised such control over the corporate affairs (*see Matter of Constantino*). Although petitioner has claimed that this arrangement with Mr. Larrea was to be of limited duration, petitioner did not present any evidence documenting when his shares of stock were surrendered to Mr. Larrea and when he ceased being the corporation’s

president. Because petitioner willingly entered into this arrangement so Mr. Larrea could side-step the Division and other creditors, he cannot now be heard to complain that he had no responsibility for the corporate affairs, including payment of sales tax. Although there is evidence in the record that Mr. Larrea held himself out as the corporation's president and sole shareholder (*see* findings of fact 7 and 9), this evidence is not enough for petitioner to establish, by clear and convincing proof, when he ceased being president and sole shareholder of the corporation.

E. In the alternative, petitioner argues that the notices of estimated determination should be canceled because the Division's witness was unable to articulate how the estimated tax was determined. It is well settled that a presumption of correctness attaches to a properly issued statutory notice issued by the Division and the taxpayer bears the burden to prove that the assessment is incorrect (*see Matter of Hotel Depot, Inc.*, Tax Appeals Tribunal, January 24, 2020, citing *Matter of Darman Bldg. Supply Corp. v Mattox*, 106 AD3d 1150, 1151 [3d Dept 2013]; *Matter of Blodnick v New York State Tax Commn*, 124 AD2d at 438). Although a determination of tax must have a rational basis in order to be sustained, the presumption of correctness raised by the issuance of the assessment, in itself, provides the rational basis, so long as no evidence is introduced challenging the assessment (*see Leogrande v Tax Appeals Trib.*, 187 AD2d 768 [1992], *lv denied* 81 NY2d 704 [1993]). If it has no rational basis, it must be set aside (*see Matter of Snyder v State Tax Commn*, 114 AD2d 567, 568 [3d Dept 1986]; *Matter of Ristorante Puglia, Ltd. v Chu*, 102 AD2d 348, 350 [3d Dept 1984]). In this case, although the Division's witness was unable to specially explain how the tax was estimated, the amounts asserted mirror the tax as reported in the corporation's filed sales tax returns for the periods ended August 31, 2018, and November 30, 2018. Here, petitioner did not submit any evidence

that these estimates are incorrect or unreasonable. It is evident they were based on previously filed returns, which forms the rational basis for their issuance.

F. The petition of Scott Hersh is denied, and the notices of estimated determination dated January 5, 2021, are sustained.

DATED: Albany, New York
November 16, 2023

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE