

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**FRANK S. CONSTANTINO** :  
**OFFICER OF JORDAN ELEVATOR CO., INC.** : DECISION  
: :  
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, 1983 through :  
November 30, 1984. :

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The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on December 7, 1989 with respect to the petition of Frank S. Constantino, 37 Bailey Avenue, East Meadow, New York 11554 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, 1983 through November 30, 1984 (File No. 802335). The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel). Petitioner appeared by Pauline A. Constantino, Esq.

The Division and petitioner filed briefs on exception. Oral argument was not requested by the Division. Petitioner's request for oral argument was denied.

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

***ISSUE***

Whether petitioner is liable for the sales and use taxes due on behalf of Jordan Elevator Co., Inc. as a person responsible for the collection and payment of sales tax pursuant to Tax Law §§ 1131 and 1133.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge. The Administrative Law Judge's findings of fact are set forth below.

On April 18, 1985, the Division of Taxation issued to Frank S. Constantino, petitioner herein, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due setting forth tax due of \$82,527.02, penalty of \$13,076.81 and interest of \$9,741.06, for a total amount due of \$105,344.89. The tax due is stated to be for the period March 1, 1983 through November 30, 1984 and the explanation offered on said notice was as follows:

"This tax has also been determined by Notice Numbers D8308271080 dated 11/20/84, D8312133443 dated 11/20/84, D8403054810 dated 10/10/84, D8405265170 dated 11/20/84, D8409011453 dated 11/20/84, S8411203344 dated 11/20/84, and S8502184828 dated 2/18/85, against Jordan Elevator Company, Inc., which is now in an arrangement and of which the taxpayer is an officer."

Petitioner, Frank S. Constantino ("Constantino"), has been in the elevator business for approximately 38 years. His career began as an instructor for The General Electric Company after his discharge from the Navy in 1951. Immediately prior to joining Jordan Elevator Co., Inc. ("Jordan") in 1977, Constantino worked as a service manager for Universal Elevator Company ("Universal") dealing with employees, customers and various superintendents of buildings in the New York City area. At Universal, petitioner had no administrative duties in the financial affairs of the company. One of the 50% owners of Universal was one Jordan Danziger who provided an expertise in the elevator industry and also a knowledge of financial management.

In 1977, Mr. Danziger sold his shares of Universal and organized Jordan, which corporation is the source of the derivative liability assessed against petitioner herein. Jordan began with four shareholders, three of whom were Jordan Danziger, petitioner and Joseph Drlicka. The fourth shareholder remained with the company for only a brief period and his shares were purchased by petitioner. Jordan Danziger was the majority shareholder with 55% of the stock, while petitioner owned 30% and Mr. Drlicka 15%.

Although Constantino held an office with the corporation, it is not clear from the record precisely which office he held. The corporation franchise tax reports filed for the periods in issue indicate two different offices held. The reports filed for the fiscal years ended March 31, 1983

and March 31, 1984 indicate that Constantino held the office of vice president, while the corporation franchise tax report for the fiscal year ended March 31, 1985 indicated that Constantino was the secretary of the corporation. A sales tax return filed for the period June 1, 1982 through August 31, 1982, outside of the period in issue, merely indicates that Constantino was an "officer".

During the period in issue, Constantino received the following salaries from the corporation for his services as a supervisor of the maintenance and repair departments of the elevator company and as a liaison with customers:

<u>FISCAL YEAR ENDED</u>	<u>SALARY</u>
3/31/83	\$38,340.00
3/31/84	41,518.00
3/31/85	34,016.00

Constantino chose to join the new company, hoping to make an investment in a company he hoped would grow with his future. Besides the \$30,000.00 capital investment Constantino made in Jordan, Constantino brought with him to Jordan his vast experience and knowledge of elevator maintenance and repair and his numerous contacts with former clients and building superintendents throughout New York City.

At Jordan, Constantino was principally engaged in supervising field work, preparing estimates of work to be done and meeting with customers. At no time did his duties include the financial management of the company, the keeping of books and records, or the preparation of any tax returns. The company was managed and controlled by its majority shareholder and president, Jordan Danziger.

Jordan maintained two checking accounts, a general corporate account and a payroll account. All bills were paid on checks drawn from the general corporate account and said drafts required the signatures of two officers of the corporation. Therefore, petitioner alone could not execute any check drawn on the general corporate account.

All decisions with regard to which bills were paid were made by the president and majority shareholder, Jordan Danziger. The corporation's general practice was for its

bookkeeper to prepare a list of outstanding bills which would be reviewed by Mr. Danziger who would determine which were to be paid and in what amount. Although petitioner could recommend the payment of certain outstanding debts, the final determination was always with Mr. Danziger. Constantino could order material for some projects, but significant orders required Mr. Danziger's approval.

It should be noted that petitioner signed no sales tax returns or corporate franchise tax reports during the period in issue. He did sign payroll checks but only as a convenience to the corporation and as a courtesy to the employees, since Constantino was often the only officer authorized to sign said checks who was in the office at an early hour. During the audit period, the corporation employed anywhere between 5 and 20 employees at any given time.

During the years 1983 and 1984, the corporation lost money and underwent financial hardship. Constantino and the other officers and their wives executed personal guarantees for a corporate debt with Chemical Bank.

Petitioner was aware during these years that Jordan was having financial problems even though he never inspected the books and records of the corporation. He was asked by Jordan Danziger to loan the corporation money in the form of cash advances, which were explained as necessary for the continuation of the business. As with the funds in the general operating account, Constantino had no control over which creditors received these further advances to the corporation. That determination was made by Mr. Danziger.

In 1983 and 1984, the relationship between Constantino and the other officers grew strained and Constantino made his intent known that he would not sign any tax returns which were not accompanied by the proper payment of tax, even though the decision as to whether or not taxes would be paid was made by Mr. Danziger. In the month following the close of this audit period, December 1984, Jordan filed for bankruptcy under Chapter 11 of the Bankruptcy Code. In that same month, Mr. Danziger and the other officer of Jordan, Mr. Drlicka, became partners in a dormant company, Jordelco, and endeavored to continue the business of Jordan in

1985. In early January 1985, Mr. Danziger informed Constantino that his services were no longer required with Jordan.

Although Constantino was not denied access to the books and records of the corporation, any such request would have been interpreted by Mr. Danziger as a sign of mistrust and a cause for animosity between the two men and an obvious threat to Mr. Constantino's job security. Therefore, petitioner was constructively barred from free access to the books and records of the corporation.

In fact, during the years 1983 and 1984, when Jordan was experiencing difficult financial times, Mr. Danziger made the conscious decision not to pay Federal or State tax prior to other creditors in order to ensure the continuation of business.

The period in issue contained seven fiscal quarters for which sales and use tax returns were due. Those for the first five quarters commencing March 1, 1983 and ending on May 31, 1984 were received late by the Division on October 12, 1984 and were not accompanied by any payment. The final two returns for the period, the quarters June 1, 1984 through August 31, 1984 and September 1, 1984 through November 30, 1984, were presumably received on time but likewise without remittance. As set forth above, none of these returns were signed by petitioner herein. Petitioner stated, with regard to the nonremittance, that he was unaware that the returns were not filed or that payment was not being submitted with said returns.

Although petitioner did have supervisory control over employees on the job, he did not have the authority to hire or fire employees. This authority rested in the president, Mr. Danziger.

### ***OPINION***

The Administrative Law Judge held that petitioner was not a person under a duty to act for the corporation pursuant to Tax Law § 1131(1) and therefore, was not personally liable for the taxes imposed, collected or required to be collected under Article 28 by the corporation.

The Division of Taxation, in its exception, disagrees with many of the findings of fact used by the Administrative Law Judge to support his conclusion that petitioner was not a person

under a duty to collect and pay tax for the corporation. The Division argues that petitioner's actions support its contention that petitioner was under a duty to act on behalf of the corporation and should be held personally liable for the sales and use taxes unpaid by the corporation.

We uphold the determination of the Administrative Law Judge.

Tax Law § 1133(a) imposes personal liability for taxes required to be collected under Article 28 of the Tax Law upon a person required to collect such tax. A person required to collect such tax is defined as "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]). Whether an individual is under a duty to act for a corporation with regard to its tax collection responsibilities so that the individual would have personal liability for the taxes not collected or paid depends on the particular facts (Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564; Vogel v. New York State Dept. of Taxation & Fin., 98 Misc 2d 222, 413 NYS2d 862; Matter of William R. Hall, Jr., Tax Appeals Tribunal, March 22, 1990; Matter of William D. Barton, Tax Appeals Tribunal, December 28, 1989; Matter of Zefania Baumvoll, Tax Appeals Tribunal, November 22, 1989; Matter of William F. Martin, Tax Appeals Tribunal, July 20, 1989; Matter of D & W Auto Service Center, Tax Appeals Tribunal, April 20, 1989; Matter of Autex Corp., Tax Appeals Tribunal, November 23, 1988; Matter of Robert Stern, Tax Appeals Tribunal, September 1, 1988).

The 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 interests in the corporation (Cohen v. State Tax Commn., supra, 513 NYS2d 564, 565; Blodnick v. State Tax Commn., 124 AD2d 437, 507 NYS2d 536, 538, appeal dismissed 69 NY2d 822, 513 NYS2d 1027; Vogel v. New York State Dept. of Taxation & Fin., supra, 413 NYS2d 862, 865; Chevlowe v. Koerner, 95 Misc 2d 388, 407 NYS2d 427, 429; Matter of William D. Barton, supra; Matter of William F. Martin, supra; Matter of Autex Corp., supra). The holding of corporate office does not in and of itself impose liability (Chevlowe v. Koerner, supra).

The Division argues that many of the factors which support a finding of responsibility are present here. The Division alleges that petitioner was a shareholder and officer of the corporation, had check signing authority, had signed at least one sales tax return (although not during the audit period), regularly signed payroll checks for the corporation, was involved full time in the elevator repair business conducted by the corporation, could hire and fire employees, and had invested money in the business, including money borrowed specifically for that purpose. In addition, the Division contends that it is significant that petitioner was aware that the corporation was not meeting its tax and other financial obligations.

Petitioner argues that as a minority shareholder, he was not in control of the financial affairs and management of the corporation. He testified at the hearing that the business was controlled by the majority shareholder who made all the final decisions for the corporation. He was, therefore, not in a position to insure that the taxes were being paid and should not be held responsible for the unpaid taxes.

We find that the evidence here supports the Administrative Law Judge's conclusions that the majority shareholder controlled the finances and operations of the corporation and that petitioner's role was essentially that of a minority investor and supervising employee who was precluded from taking actions with regard to the financial and management activities of the corporation. Petitioner testified, among other things, that: except for payroll checks which he routinely signed as a convenience, all checks to pay debts or make purchases required two signatures; the majority shareholder made all the decisions as to what checks were to be written,

petitioner, as one of first three and then two minority shareholders, did not have the power to overrule such decisions; and the majority shareholder made all the final decisions as to the hiring and firing of employees and most purchases for the corporation, petitioner could only make recommendations.<sup>1</sup>

The significance of petitioner's officer and shareholder status in the determination of responsibility is offset by the circumstances relating to control of the corporation which are present here. Petitioner lacked the power to exercise the tax collection responsibilities on behalf of the corporation. The evidence does not support a conclusion that petitioner could have acted but chose not to. This case is, therefore, not like Blodnick v. State Tax Commn. (supra), where the responsibility rested with the corporate officers and shareholders because it was not possible to ascertain who else, if anyone, was in control and it appeared that the officer/shareholders had simply declined to exercise any responsibility with regard to the corporation.

This case can also be distinguished from the cases cited by the Division in which the Tribunal has found the petitioners to be responsible officers or employees. In Matter of D & W Auto Service Center (supra), the petitioner was a 50% owner and a corporate officer of the corporation, who participated in its day to day operation including signing a sales tax return and being a required signatory on the corporate checks. The Administrative Law Judge found the petitioner not to be a responsible officer primarily due to the petitioner's age. This determination was reversed by the Tribunal. The record in that case did not support a conclusion that the petitioner was not able to act on behalf of the corporation. As a 50% owner and active participant in the business, the petitioner had the legal authority and the duty to act on behalf of the corporation. Without evidence that the petitioner was otherwise precluded from acting, these facts and the other facts present in the case supported the conclusion that the

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<sup>1</sup>We note that the Administrative Law Judge here specifically found petitioner's testimony to be credible. Because a determination of responsibility under Tax Law § 1131(1) must be based upon the facts in the particular case, the Administrative Law Judge's analysis of the credibility of the witness presenting the facts before him should not be disturbed except for significant reasons. We do not find such reasons here.

petitioner was a responsible officer. The evidence necessary to make a finding concerning the petitioner's inability to act was similarly lacking in Matter of Zefania Baumvoll (supra). No determinations of credibility were made by the Administrative Law Judge. Nothing in the record supported the Administrative Law Judge's conclusion that the petitioner's role in the corporation "was minimal" or that the petitioner could not have taken actions to insure that the taxes were paid. In the absence of such findings, the facts in that case (the petitioner's officer status, check signing authority, the signing of sales tax returns during the audit period, the receipt of compensation from the corporation, and his daily visits to the station which were apparently for the purpose of keeping track of what was going on there and not for some regular employee function) supported the conclusion that the petitioner was a responsible officer.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Frank S. Constantino is granted in full; and
4. The Notice of Determination and Demand for Payment of Sales and Use Taxes Due

issued on April 18, 1985 is cancelled.

DATED: Troy, New York  
September 27, 1990

/s/John P. Dugan  
John P. Dugan  
President

/s/Maria T. Jones  
Maria T. Jones  
Commissioner