

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**RONALD SERUYA** : **DECISION**  
**OFFICER OF SERUYA'S SERVICE CENTER, LTD.** : **DTA No. 804931**  
: :  
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, 1980 through August 31, 1984. :

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The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on October 8, 1992 with respect to the petition of Ronald Seruya, Officer of Seruya's Service Center, Ltd., 33 Heath Avenue, Oakhurst, New Jersey 07755. Petitioner appeared by Sheldon Eisenberger, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq. and John O. Michaelson, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception. Petitioner filed a brief in opposition. The Division of Taxation filed a reply brief on June 25, 1993, which date began the six-month period to issue this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

***ISSUES***

I. Whether, pursuant to the provisions of Tax Law §§ 1131(1) and 1133(a), petitioner was a person required to collect sales and use taxes on behalf of Seruya's Service Center, Ltd. and, as such, was personally liable therefor.

II. Whether petitioner is collaterally estopped from denying he was a person required to collect sales and use taxes after pleading guilty to filing false sales tax returns on behalf of the corporation.

***FINDINGS OF FACT***

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

Pursuant to a field audit of Seruya's Service Center, Ltd. ("the Service Center"), the Division of Taxation issued to Ronald Seruya, officer of Seruya's Service Center, Ltd. ("petitioner"), on February 27, 1985, two notices of determination and demands for payment of sales and use taxes due as follows:

<u>Notice No.</u>	<u>Period</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
S850227123C	3/1/80-8/31/83	\$100,330.58	\$51,165.28	\$48,156.51	\$199,652.37
S850227124C	9/1/83-8/31/84	17,693.37	8,896.68	1,834.06	28,424.11

Each of the notices of determination advised petitioner that he was personally liable as an officer of the Service Center for the taxes assessed thereon and, in addition, that fraud penalty of 50 percent of the amount of tax due was also being assessed.

The Service Center's accountant, Irwin Karpf, C.P.A., executed consents extending the period of limitation for assessment of sales and use taxes as follows:

<u>Date Executed</u>	<u>Period</u>	<u>Date for Assessment</u>
5/17/83	3/1/80-11/30/80	12/20/83
11/5/83	3/1/80- 5/31/81	6/20/84
6/2/84	3/1/80- 8/31/81	12/20/84
11/26/84	3/1/80- 2/28/82	6/20/85

It should be noted herein that the Service Center was also assessed in the identical amounts for the identical period. The Service Center, by its accountant, filed a petition for an administrative hearing and such hearing was also scheduled for March 28, 1989. At that time, no one appeared on behalf of the Service Center. Petitioner's representative, Sheldon Eisenberger, Esq., was advised that if he could obtain a power of attorney from the Service Center, no default order would be entered. Mr. Eisenberger subsequently advised that he was unable to obtain a power of attorney and, accordingly, on August 22, 1991, a default order was issued against the Service Center.

At a Bureau of Conciliation and Mediation Services conference held on September 14, 1987, petitioner presented evidence which indicated that the corporation changed hands on October 4, 1983. Therefore, the assessment for all periods after September 30, 1983 was cancelled. By a Conciliation Order dated November 6, 1987, the first notice of determination (Notice No. S850227123C) was sustained and the second notice of determination (Notice No. S850227124C) was reduced from \$17,693.37 to \$1,484.67 plus fraud penalty and statutory interest.

The audit commenced in March 1983. Surveys of the premises were performed on March 11 and June 20, 1983. Per observation, it was determined that there were three mechanics on duty. A letter was sent on March 11, 1983 to the Service Center's accountant, Irwin Karpf, requesting books and records for the period under audit (March 1, 1980 through November 30, 1982). The form letter, scheduling an appointment for April 27, 1983 (the meeting was adjourned to May 17, 1983), set forth 12 types of records requested. Of the 12, 7 were circled by the auditor and handwritten notations were made as follows:

<u>Records</u>	<u>Notation</u>
1. General Ledger	Audit Period
2. Cash Receipts Journal	Audit Period
3. Cash Disbursement Journal	Audit Period
4. Federal Income Tax Returns for Years:	1980 - 81 & 82
5. Sales tax returns and cancelled checks for Quarters Ended:	8/82 & 11/82
6. Purchase Invoices For:	to be determined
8. Expense Invoices For:	to be determined

The remaining records on this form were:

7. Sales invoices For:
9. All Fixed Asset Invoices For  
Fixed Assets Acquired During  
Audit Period
10. Guest Checks and Register Tapes  
For:

11. Resale, Exempt and Capital Improvement Certificates Supporting Non Taxable Sales For:
12. Other:

These numbered paragraphs contained no circled marks or any other indication that a request was being made therefor.

Records produced were sales tax returns for the quarters at issue, Federal income tax returns for 1981, 1982 and 1983, depreciation schedules, cash receipts and cash disbursements journals, general ledger and bank statements including a check register and cancelled checks. No sales or purchase invoices, pump readouts, daily summaries or register tapes were provided.

A reconciliation of the Federal income tax returns, sales tax returns and available records was done and, by virtue thereof, the auditor determined that sales per sales tax returns were substantially underreported. The auditor determined that the Service Center's books and records were incomplete and inadequate for the performance of a detailed audit and, therefore, that it was necessary to resort to external indices to determine taxable sales for the audit period.

In order to determine gasoline sales, the Service Center's supplier, Mobil Oil Corp. ("Mobil"), was contacted to provide the Service Center's purchases of gasoline for the years 1981 and 1982.<sup>1</sup>

At the hearing, the auditor admitted that she computed quarterly taxable sales by initially adding together 353,500 gallons (1982) and 378,454 gallons (1981) when, in fact, the 378,454 figure represented purchases in dollars rather than the previous year's purchases in gallons. At the second hearing on June 13, 1991, a corrected computation (Exhibit "S") was submitted which, using gallons purchased in 1981 (401,991), would have resulted in greater quarterly

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<sup>1</sup>The auditor testified that purchases for 1981 and 1982 were requested and that such figures were utilized to determine quarterly taxable sales. An examination of the audit report reveals that Mobil also provided purchase figures for 1980. While it is unclear why the 1980 purchases were not used in making this computation, it should be noted that the failure to factor in 1980 gasoline purchases (386,900 gallons) worked to the advantage of the taxpayer (the two-year average was 377,745.5 gallons; the three-year average was 380,797 gallons) so no adjustment shall be made herein.

taxable sales and, accordingly, a greater assessment of additional tax due. Since the corrected computation would, correspondingly, have increased the assessment, the auditor's initial computation will be utilized herein.

As previously indicated, the figures of 353,500 and 378,454 were combined (731,954) and then divided by 24 months to arrive at 30,498 gallons per month. To determine quarterly purchases, 30,498 was multiplied by 3 months which totalled 91,494 gallons per quarter. The 91,494 gallons per quarter were then multiplied by \$1.25 per gallon to arrive at \$114,363.50 per quarter. The auditor testified that \$1.25 per gallon was the average retail selling price of regular gasoline per an April 5, 1982 memorandum from the sales tax section of the District Office Audit Bureau (Exhibit "T"). It should be noted that the aforesaid memorandum set forth the average retail selling price of regular gasoline per quarter as follows:

<u>Period Ending</u>	<u>Selling Price</u>
5/31/79	85.8
8/31/79	102.9
11/30/79	106.3
2/28/80	124.3
5/31/80	127.6
8/31/80	128.9
11/30/80	127.2
2/28/81	142.9
5/31/81	141.4
8/31/81	138.8
11/30/81	138.4
2/28/82	135.3

The memorandum indicated that the above prices include State gasoline tax of .08¢, Federal gasoline tax of \$.04¢ and sales tax.

During her observation of the premises on March 11, 1983, the auditor noted that the Service Center sold three grades of gasoline, regular-leaded, unleaded and unleaded-super which, on that date, sold for \$1.199, \$1.299 and \$1.359, respectively. It is unclear from the record as to the reason for the across-the board application of \$1.25 per gallon for all grades of gasoline for the period March 1, 1980 through August 31, 1982 (from September 1, 1982 through the

remainder of the audit period, retail gasoline stations were no longer required to collect and remit sales tax on sales of gasoline).

To determine repair sales, the auditor, per her observation of the premises, used 3 mechanics x 8 hours per day x \$30.00 per hour (\$20.00 labor + \$10.00 parts) x 6 days per week x 13 weeks per quarter which equaled \$56,160.00 in repair sales per quarter. It must be noted that on the gasoline station information sheet prepared for her observation of March 11, 1983, the auditor noted that there was one owner/mechanic. During the observation on June 20, 1983, her handwritten notes stated that there appeared to be three mechanics.

Sales of oil, like gasoline, were determined from information provided by Mobil regarding the Service Center's purchases. As was the case with gasoline purchases, the auditor erroneously assumed that the figures provided by Mobil represented units purchased when, in fact, such figures were purchases in dollar amounts.

In her original computation, she assumed 1,236 units purchased in 1982 added to 5,239 units purchased in 1981 for a total of 6,475 divided by 24 months = 270 units per month x 3 months per quarter = 810 units per quarter x \$6.00 per unit = \$4,960.00 in oil sales per quarter. The \$6.00 per unit was a figure which the auditor stated was derived from her experience in auditing other similar businesses.

In her recomputation (Exhibit "S"), utilizing the dollar amounts reported by Mobil for 1981 and 1982 (\$3,548.00 for 1981 and \$5,239.00 for 1982), she added the yearly figures together (\$8,787.00) and divided by 8 (the number of quarters in the two-year period) to arrive at \$1,098.00 in oil sales per quarter. Accordingly, quarterly oil sales are hereby reduced from \$4,960.00 to \$1,098.00.

The auditor recommended that fraud penalty be assessed based upon the Service Center's substantial underreporting of sales on its sales tax returns when compared to figures contained on its Federal income tax returns.

As indicated above, the auditor's initial observation on March 11, 1983 indicated one owner/mechanic plus two gas attendants. The auditor testified that when she returned on June 20, 1983, an unidentified employee stated that there were two mechanics; however, she testified that she observed three men working on cars. Therefore, in calculating repair sales, she assumed that there were three mechanics on duty. She did not request payroll records in an attempt to verify the number of employees. The Federal income tax return indicated that the Service Center paid employee salaries of \$13,660.00 for 1981 and \$7,640.00 for 1982 which, the auditor admitted at the hearing, were rather small amounts for two or three full-time mechanics.

The auditor never met petitioner. She stated that she was told that he was the president. Her information sheet (contained within the audit report) indicates that Lawrence Seruya was the president and that Ronald Seruya was the secretary. The corporate power of attorney appointing Irwin Karpf, C.P.A. to represent the Service Center in the present matter was signed by Lawrence Seruya. The auditor never requested the Service Center's corporate books or bank authorizations to determine who were its responsible officers.

For each of the quarters from March 1, 1980 through February 28, 1983, the Service Center's sales tax returns were signed by Ronald Seruya and by Irwin Karpf, as preparer. The corporation's Federal income tax returns were signed solely by Irwin Karpf. Ronald Seruya's title, on most of the returns, was that of secretary, although some returns listed his title as vice-president or secretary-treasurer.

Petitioner began working at the Service Center (he was hired by his brother Lawrence Seruya) on a part-time basis in 1974 while he was still in high school. In 1980, he began working there on a more or less full-time basis.

Lawrence Seruya owned several other service stations in the New York City metropolitan area. Petitioner was hired to "take care of things" for his brother who was teaching him to be a mechanic. In 1980, his salary was approximately \$300.00 to \$325.00 per week. In 1981, his salary increased by about \$20.00 per week. For the years in which he was employed at the

Service Center, petitioner's sole income was the wages he earned from such employment. During his years of employment (from 1980 through April or May 1983), there were three other employees at the Service Center, Daniel Villy, Lloyd Austin and a part-time gas attendant. Daniel Villy was a gas attendant and Lloyd Austin assisted petitioner as a mechanic. The station was opened, by a gas attendant, prior to petitioner's reporting for work and remained open after his working hours concluded.

In late April or May 1983, petitioner's brother fired him due to a dispute over salary. Petitioner never hired or fired any of the employees; all matters regarding employment were handled by Lawrence Seruya. Petitioner owned no shares in the corporation and, other than his salary, earned no other income from the business. All stock was owned by Lawrence Seruya who was also the sole officer and director of the corporation. Petitioner was told by his brother to sign the tax returns. His title, i.e., secretary, treasurer, vice-president, was filled in on the return by the corporation's accountant, Irwin Karpf, who prepared the sales tax returns and also prepared all checks for payment of taxes and other obligations. According to corporate records (Exhibit No. 5), Lawrence Seruya was the incorporator and was the sole officer and director of the Service Center. For convenience purposes (since Lawrence Seruya was only at the station on occasion), petitioner was given check-signing authority and was directed by Lawrence Seruya to sign the checks prepared by Irwin Karpf.

Gasoline was purchased from Mobil under the name Lawrence Seruya d/b/a Seruya's Service Center. All credit card adjustments from Mobil were issued to Lawrence Seruya. Equipment for the Service Center was purchased by Lawrence Seruya. Petitioner had no authority to make any of the above purchases.

Daniel Villy, who was employed at the Service Center from 1979 or 1980 through May 1983, testified that he was hired and fired by Lawrence Seruya who he stated was the "boss". Petitioner was the mechanic during this time. When Mr. Villy got out of the hospital in the spring of 1983, petitioner was no longer employed at the station. Inventory worksheets and

shift reports were prepared daily (to show gas in and out and money collected) and were put in a drawer for the accountant who would collect the sheets when preparing tax returns. Mr. Villy stated that he was paid by checks signed by petitioner. He testified that the Service Center had one gas stand with three pumps (two hoses per pump). The station sold only regular and premium until 1982 or 1983 when it also began selling unleaded gasoline. Mr. Villy also testified as to his recollection of the prices charged for gasoline although such testimony was, at best, unclear. He also stated that more than 50 percent of the station's business was performed for religious organizations which would show exemption certificates at the time of purchase.

Both Mr. Villy and petitioner stated that the Service Center had a very small parts inventory.

On February 14, 1986, petitioner was indicted (Indictment No. 880-86) on seven counts of offering a false instrument for filing in the first degree (a Class E felony - Penal Law § 175.35). On March 19, 1986, petitioner entered a plea of guilty to three counts of attempted offering a false instrument for filing (a Class A misdemeanor - Penal Law §§ 175.35 and 110.05). On April 28, 1986, petitioner was sentenced to three years probation on each count, a fine of \$3,000.00 (\$1,000.00 on each count) plus restitution in the amount of \$14,288.13 payable at a rate of \$200.00 per month commencing May 1, 1986.

On May 6, 1989, petitioner signed an affidavit of confession of judgment which stated as follows:

"I was the manager of a gas station known as Seruya Service Center, Ltd. located at 411 Empire Boulevard, Brooklyn, New York. During the period December 1, 1980 through August 31, 1982, the gas station purchased gasoline from Mobil Oil Company and sold that gasoline to the general public. During the aforementioned period of time, I, as manager of the gas station, signed and forwarded Sales Tax Returns to the Department of Taxation and Finance which I knew to contain inaccurate sales figures. As a result of the underreporting of these sales figures during the period mentioned above, I, as manager of the gas station, forwarded sales tax monies to the Department of Taxation and Finance in an amount \$14,288.13 less than the true amount owed.

"I agree to pay to the New York State Department of Taxation and Finance the sum of \$200/month on the first day of each month until the above-mentioned total of \$14,288.13 is remitted to New York State, pursuant to judgment entered in case no. 880/86 (S.Ct. N.Y.Co.)."

***OPINION***

The Administrative Law Judge found that petitioner was not a person required to collect sales and use taxes on behalf of the Service Center. The Administrative Law Judge based this finding on an analysis of the indicia of responsibility set forth in Matter of Taylor (Tax Appeals Tribunal, October 24, 1991). Specifically, the Administrative Law Judge found that:

"(1) Petitioner was neither an officer, director nor stockholder of the corporation;

"(2) Other than his salary from his employment at the Service Center, petitioner received no income, profits or other benefits from the corporation;

"(3) Petitioner's duties at the Service Center were to repair vehicles, i.e., he was the mechanic. He had no authority to make purchases on behalf of the corporation nor did he have responsibilities or involvement with the financial affairs of the Service Center. While he may have had some supervisory responsibilities over the assistant mechanic, Lloyd Austin, petitioner's sole decision-making functions related to his duties as a mechanic;

"(4) Petitioner had no authority to nor did he hire or fire any of the Service Center's employees. As was the case with all of the employees, he was hired and fired by the sole officer, director and shareholder of the corporation, Lawrence Seruya; and

"(5) Because Lawrence Seruya owned several other gas stations and was, therefore, not present at the Service Center on a daily basis, he gave check-signing authority to petitioner, his brother. Petitioner signed sales tax returns and checks (sales tax payments and payroll), all of which were prepared by the accountant, Irwin Karpf. Petitioner had no knowledge of or control over the contents of the returns nor did he make any decisions regarding the amounts of the salaries paid to himself or to the other employees" (Determination, conclusion of law "A").

The Administrative Law Judge next addressed the issue of whether petitioner was collaterally estopped from contesting the responsible officer issue because of his guilty plea to

three counts of offering a false instrument for filing in the prior criminal proceeding. First, the Administrative Law Judge stated that a taxpayer was not collaterally estopped from challenging a factual or legal issue that was not an issue essential for the conviction in the criminal case (Blanton v. Commissioner, 94 TC 491), regardless of the fact that the conviction was based on petitioner's guilty plea (United States v. Abbott, 75-1 USTC ¶ 9440 [CD Cal]). Second, the Administrative Law Judge found that the record did not contain any evidence that the issue of whether petitioner had authority to act for the corporation, i.e., whether petitioner was a responsible officer, had been litigated in the criminal proceeding in Supreme Court. Therefore, the Administrative Law Judge, relying on Matter of Planit (Tax Appeals Tribunal, February 7, 1991), determined that petitioner was not collaterally estopped from litigating this issue before the Division of Tax Appeals (Determination, conclusion of law "D").

The Administrative Law Judge next addressed the effect of petitioner's statement, in his affidavit of confession of judgment relative to his guilty plea, that he was the manager of the Service Center. The Administrative Law Judge, citing Matter of Roncolato (Tax Appeals Tribunal, August 15, 1991) and Matter of Taylor (*supra*), stated that title alone does not confer authority to see that proper taxes are remitted to the State. The Administrative Law Judge found that petitioner only signed the returns and checks at the request of either his brother or the company's accountant and played no part in preparing the returns and checks. The Administrative Law Judge found that petitioner entered a guilty plea to three counts of filing a false instrument because of fear of extensive legal costs, fear of imprisonment and the belief that \$14,288.13 would be his total liability. In view of the above, the Administrative Law Judge concluded that petitioner did not have the authority to see that proper taxes were remitted to the State and cannot be held personally liable for the sales and use taxes of the Service Center.

On exception, the Division argues that the Administrative Law Judge erred in finding that petitioner was not a person required to collect tax on behalf of the Service Center. The Division, citing Matter of Roncolato (*supra*), asserts that petitioner clearly had a duty to act for the Service

Center. In support of this assertion, the Division argues that petitioner signed 12 sales tax returns and the accompanying checks and was in charge of the daily operations of the Service Center (Division's brief, p. 10). With regard to petitioner's claim that he was acting under the supervision of his brother, the Division, citing People v. Alrich Rest. Corp. (53 Misc 2d 574, 279 NYS2d 624), argues that petitioner cannot escape liability when he was actually the person conducting the business. The Division also argues that petitioner cannot escape liability by claiming that his brother was the responsible party (Matter of LaPenna, Tax Appeals Tribunal, March 14, 1991).

The Division also argues that it relied to its detriment on petitioner's admission in his guilty plea that he was the manager of the Service Center. The Division states that because it detrimentally relied on this admission, petitioner should be estopped from changing his position now.

The Division further argues that petitioner's previous plea of guilty in the criminal proceeding collaterally estops him from denying that he was a responsible officer of the Service Center. The Division, relying on Matter of Cumberland Pharmacy v. Blum (69 AD2d 903, 415 NYS2d 898), argues that "a conviction is conclusive proof of the underlying facts upon which it rests and the defendant is estopped from relitigating those facts in any future proceeding" (Division's brief, p. 12). Further, the Division states that petitioner's plea of guilty to the criminal charges involved the high standard of proof of "beyond a reasonable doubt." The Division maintains that this high standard of proof is sufficient to find petitioner liable for the civil fraud penalty and to establish petitioner's liability as a responsible officer.

Finally, the Division, citing Tax Law § 1131(1), argues that an individual does not have to fulfill all the duties relating to a corporation in order to be a person under a duty to act for the corporation. The Division contends that petitioner's signing of the tax returns and checks fulfills a crucial requirement of Article 28 (Division's brief, p. 14). Therefore, the Division asserts that

by pleading guilty to the act of filing the false returns petitioner was also admitting that he had authority to act for the Service Center.

In response, petitioner states that the Administrative Law Judge correctly determined that petitioner was not a person responsible for the collection of sales tax. Petitioner states that the Administrative Law Judge correctly applied the indicia of responsibility set forth in Matter of Roncolato (supra) and Matter of Taylor (supra) in making this determination. Petitioner asserts that he was not an officer, director or shareholder of the corporation and had little knowledge of and no control over the financial affairs of the corporation.

In addition, petitioner argues that, under the indicia set forth in Vogel v. New York State Dept. of Taxation & Fin. (98 Misc 2d 222, 413 NYS2d 862) regarding a "duty to act," he clearly was not under a duty to act for the corporation. Petitioner states that "[n]ot only was he not an officer of the Service Center, but also he received no part of corporate profits, and was not involved with the financial affairs and certainly not the management of the corporation" (Petitioner's brief, p. 11).

Petitioner then goes on to contrast the corporate roles of those held responsible in Matter of Hall v. Tax Appeals Tribunal (176 AD2d 1006, 574 NYS2d 862) and Matter of Cohen v. State Tax Commn. (128 AD2d 1022, 513 NYS2d 564) with his role in the corporation's affairs. Petitioner states that, unlike those cases, his "lack of any authority whatsoever to order or pay for gasoline and oil, to control inventory even in the repair department, or to hire or fire other employees" clearly indicates that he was not a responsible person (Petitioner's brief, p. 12). Further, petitioner, relying on Matter of Taylor (supra), argues that he was merely a "dupe" of his brother and the accountant and, therefore, cannot be found to be a person under a duty to act for the corporation. In support of this, petitioner argues that: (1) the returns were completely prepared and only presented to him for signature, (2) he had no opportunity or authority to take part in their preparation and (3) due to this very lack of authority and subordinate position, he questioned whether he should be signing the returns at all.

With regard to the Division's assertion that it relied to its detriment on petitioner's admission in his guilty plea, petitioner argues that the Tribunal should not consider this issue as it was raised for the first time in the Division's brief on exception. Petitioner also argues that the Division's assertion is totally without support in the record.

Petitioner next argues that he is not collaterally estopped from challenging the responsible officer issue. Petitioner, relying on Matter of Halyalkar v. Board of Regents (72 NY2d 261, 532 NYS2d 85) and Kaufman v. Lilly & Co. (65 NY2d 449, 492 NYS2d 584), states that in order for collateral estoppel to be applicable "the question must have been 'actually litigated' so as to satisfy the 'identity' requirement of collateral estoppel. In addition, the party against whom collateral estoppel is being asserted must have had a full and fair opportunity to contest the issue in the prior action" (Petitioner's brief, p. 18). In support of this argument, petitioner states that there is nothing in the Affidavit of Confession of Judgment or the certificate of conviction to indicate that petitioner was under a duty to act for the corporation. Further, petitioner argues, there is no evidence in the record to show that petitioner had an opportunity to litigate the issue of whether he was under a duty to act for the corporation.

Finally, petitioner asserts that the Division's claim, that he intentionally filed false sales tax returns to advance the corporation's income, is distorted. Petitioner states that he had no financial interest in the corporation and only received a small salary.

In its reply brief, the Division continues to argue that petitioner did not meet his burden to show that he did not have a full and fair opportunity to litigate the issue in the prior criminal proceeding.

We agree with the Administrative Law Judge that the issue of petitioner's authority to act for the corporation was not an issue that was essential to petitioner's conviction for filing a false instrument. Therefore, we find that the Administrative Law Judge correctly determined that petitioner was not collaterally estopped from denying he was a responsible officer of the Service Center. As a result, we find the witness credibility issue regarding petitioner's responsible officer

status to be relevant. In this matter, the Administrative Law Judge found petitioner's testimony to be credible. "Since the responsible officer determination pursuant to Tax Law § 1131(1) is based upon the specific facts in a given case, the analysis of the Administrative Law Judge regarding the credibility of the witness relating the facts to him should not, in the absence of compelling reasons, be disturbed" (Matter of Taylor, supra; see, Matter of Constantino, Tax Appeals Tribunal, September 27, 1990). After reviewing the record before us, we agree with the Administrative Law Judge that petitioner was not a responsible officer of the Service Center.

We find no basis in the record before us for modifying the determination of the Administrative Law Judge in any respect. Therefore, we affirm the determination of the Administrative Law Judge for the reasons stated in said determination.

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 Ronald Seruya, Officer of Seruya's Service Center, Ltd. is granted; and
4. The Division of Taxation is directed to cancel the notices of determination and demand for payment of sales and use taxes due issued on February 27, 1985.

DATED: Troy, New York  
December 2, 1993

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

/s/Francis R. Koenig  
Francis R. Koenig  
Commissioner