STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
PETER J. NAPOLI, AS OFFICER OF NAPOLI MARINE SERVICE, INC.	:	DECISION DTA No. 808694
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1983 through August 31, 1986.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on April 1, 1994 with respect to the petition of Peter J. Napoli, as officer of Napoli Marine Service, Inc., Echo Hill Farm, Route 45, Pomona, New York 10970. Petitioner appeared by Steven M. Coren, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Robert J. Jarvis, Esq., of counsel).

The Division of Taxation filed a brief in support of its exception and petitioner filed a brief in opposition. The Division of Taxation's reply brief was filed on January 24, 1995, which date began the six-month period for the issuance of this decision. The Division of Taxation's request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether petitioner is liable for sales tax due on behalf of Napoli Marine Service, 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 except for findings of fact "7" and "11" which have been modified. We have also made an additional finding of fact. The Administrative Law Judge's findings of fact, the modified findings of fact and the additional finding of fact are set forth below.

Findings of Fact "1" through "7" are based in large part upon the consistent and credible testimony of Peter J. Napoli, petitioner; Susan Shurtleff, Office Manager of Napoli Marine Service, Inc.; Thomas Simonton, Sea Captain; Lyle V. Hillman, Director of Dealer Finance for Bayliner Marine Corp. and National Operations Manager for Borg-Warner AcceptanceCorporation; and Stephen Savodsky, preparer of National Marine Service, Inc.'s boats for delivery.

1. Napoli Marine Service, Inc. ("NMS") was in the business of the sale and service of boats and accessories. The Sales and Marketing Divisions of NMS were situated in one building while the Service and Accounting Divisions were situated in another building. The buildings were located approximately one-half mile from each other. NMS was situated close to the New Jersey border and maintained satellite sites in New Jersey and Connecticut for customer inspection, closing of titles, rigging and delivery.

2. NMS maintained an inventory of boats and financed the purchase of its inventory pursuant to a floor plan finance agreement. The floor plan finance company paid the boat manufacturer on behalf of the purchaser (NMS) and received a security interest in the unsold boat, represented by a trust receipt. As payment was received from the purchaser of the boat, NMS was required by its floor plan finance agreement to pay the finance company until the trust receipt was paid off. At that time, the finance company would release the lien on the boat. During the years at issue, NMS purchased its inventory from Bayliner Marine Corporation ("Bayliner") and employed Borg-Warner Acceptance Corporation ("Borg-Warner") as its floor plan finance company.

The purchase of a boat generally began with the customer placing a deposit upon the execution of the sales agreement. The remainder of the purchase price was usually financed by obtaining a loan through a lending institution. When the loan proceeds were released by the institution, they were paid to NMS which was then required to pay the security interest held by Borg-Warner, the floor plan financing company. At the time that the boat was delivered to the customer, the balance of the purchase price was paid by the customer.

3. The boats that were small enough to ride on boat trailers were delivered to NMS customers in three ways: (1) the boats were delivered by service employees to the customers; (2) the customers picked up the boats at the marina; or (3) an independent contractor delivered the boats to the customers.

Boats that were too large to be carried on boat carriers were also delivered to NMS customers in three ways: (1) the boats were hauled on flat-bed semitrailers to the customers; (2) the customers picked the boat up at the marina and sailed it away; or (3) NMS would hire a captain to deliver the boats by water to the customers.

Arrangements for the delivery of boats were handled by Stephen Savodsky, an independent contractor who also prepared the boats for delivery. When boats were delivered to the customers, the customers signed a document entitled "customer delivery sheet". This document was stamped with the delivery date. A "customer check-off sheet" was signed by those customers picking up their boat at the marina.

4. It was the policy of NMS during most of the audit period, and specifically during the month of March 1986, to deem a transaction as a completed sale upon delivery of the boat to the customer. When the sale was completed upon delivery, NMS recognized the sales for purposes of reporting and remitting the sales tax. Completed boat sales were recorded by NMS in the cash receipts journal.

For recordkeeping purposes, NMS recorded sales on an inventory (accrual) basis. When a customer paid the bulk of the purchase price, the sale was noted in the sales journal and the general ledger as a removal from inventory. This was done for inventory control purposes and by agreement with Bayliner and Borg-Warner to insure the payment of the security interests of the floor plan company. Sales tax was noted as accrued until the sale was completed by delivery to the customer. Delivery sheets, which were created on a monthly basis indicated the delivery dates for those boats delivered in that month. Monthly inventory sheets were prepared to develop a sales report for Bayliner, which had guaranteed the floor plan financing. These reports were based upon the point in time when the boats were removed from the floor plan, not when the boats were delivered to the customer.

The sales tax returns were based upon the monthly delivery sheets. A bookkeeper employed by NMS would gather the information relating to a month's deliveries, compile delivery sheets and give the information to the business' accountants. The accountants would determine what boats had been delivered in a particular month and would then provide to Susan Shurtleff, the office manager, the sales tax return data. Ms. Shurtleff would complete the return, issue a check and either sign the return or have petitioner sign it.

5. Petitioner, Peter J. Napoli, started his boat business in 1969 and later incorporated it in 1970 as the entity known as Napoli Marine Service, Inc. Prior to 1982, he was the sole officer and shareholder. In late 1981 or early 1982, Borg-Warner discovered that NMS had sold boats "out of trust"; that is, boats were sold and taken out of inventory upon receipt of funds, generally from financial institutions, without payment to Borg-Warner as part of the floor plan financing agreement. Borg-Warner became concerned about both the financial condition of NMS as well as how NMS was being operated. In order to satisfy its concerns and to maintain its continued financial support, Borg-Warner wanted additional capital invested into the business and petitioner removed from the financial aspects of the business. As a result of Borg-Warner's concerns, Edward Glatz became chief financial officer of NMS, overseeing the financial management of the company. Mr. Glatz brought in his own accounting firm to assist

him in the financial management of NMS. In addition, Mr. Glatz became a 50% shareholder on October 27, 1982, a personal guarantor, an officer of NMS and the head of the accounting department of NMS.

6. Petitioner's responsibilities changed upon the arrival of Mr. Glatz at NMS. Mr. Napoli was explicitly restricted to marketing, sales and customer relations. He supervised the salesmen, made sure service was performing well, checked the boats, did general troubleshooting and addressed engine problems.

Petitioner was barred by the agreement between Borg-Warner, Mr. Glatz and himself from the day-to-day financial management of NMS. He had no operational role with respect to the finances, tax payments or financial management of the company. Petitioner did not receive reports from the accounting department indicating tax payments and accounting procedures.

During the audit period, petitioner signed some sales tax returns, but only at the direction of Edward Glatz or Susan Shurtleff. Mr. Napoli was not provided with any information concerning their contents or how the amounts were calculated. Petitioner did not assist in the preparation of the returns and was not responsible for the operation of the accounting department or payment of sales tax.

The sales tax was computed by NMS' accounting staff, supervised by the business' (Mr. Glatz's) accountants under the supervision of Mr. Glatz. Petitioner had no financial background and no knowledge of how the returns were prepared. Accounting and financial issues were not discussed with Mr. Napoli; such discussions involved only Mr. Glatz, the accountants or Borg-Warner.

Petitioner had no authority in connection with the maintenance of the corporate books and records. In fact, he was precluded from any involvement with corporate finances and was denied access to corporate financial records. He was not permitted to make financial commitments without the approval of Mr. Glatz. Petitioner had no authority to determine which bills should be paid and no authority to pay corporate bills with cash or checks. His

hiring authority was limited to sales personnel and he could not hire or fire employees in the accounting department.

Petitioner's lack of involvement in the financial affairs of NMS was a condition of Borg-Warner remaining a financial backer of the business. Had Mr. Napoli become involved in the financial affairs, Borg-Warner would have ceased to back NMS and would have repossessed the inventory.

We modify the Administrative Law Judge's finding of fact "7" to read as follows:

> During the later part of 1985, Edward Glatz decided to leave NMS. In order to protect their financial interests, Borg-Warner, and later the purchaser of Borg-Warner, Transamerica Financial Services, Inc. ("Transamerica"), placed their own people, including Lyle V. Hillman, National Operations Manager, in NMS to handle its financial management. Borg-Warner, and later Transamerica, were concerned about their trust receipts and wished to insure that NMS was not sold out of trust. In early 1986, Bayliner invested money into the business and guaranteed the floor plan to Borg-Warner. To protect its interest in NMS, Bayliner placed a supervisor over the accountant who was involved in the decisions as to what was to be paid and not paid. At this point in time, Borg-Warner or Transamerica and Bayliner were handling the financial management of NMS, with all transactions subject to their approval.
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> Petitioner's role remained the same when Borg-Warner, Transamerica and Bayliner managed the financial affairs of NMS. He was precluded from the day-to-day financial management of the company. Mr. Napoli's activities were restricted to marketing, sales and customer relations. Alone, he could not bind the corporation as to ordering and paying for inventory. His check-signing authority was subject to Transamerica's approval. Sales tax returns were computed as before, with petitioner having no involvement in their preparation. He continued to have no corporate authority in connection with the maintenance of corporate books and records. Mr. Napoli continued to be precluded from any involvement with corporate finances and was denied access to corporate financial records. The record does not reflect, however, that Mr. Napoli was precluded from exercising overall control over Napoli Marine. While the testimony at hearing established that petitioner would likely lose the financial backing of Borg-Warner/Transamerica if he tried to get involved in the day-to-day finances, the record does not indicate that petitioner, in his capacity as at least a 50% shareholder, director and sole officer, could not assert himself over the entire business.
>
> In late 1986, Donald Cohen and Alan Epstein entered into an agreement with petitioner and NMS whereby they became shareholders and officers of NMS, with each possessing, along with petitioner, a one-third interest in NMS. Although the agreement was dated December 22, 1986, by late spring-early summer of 1986 Cohen

> and Epstein exercised managerial and financial control of NMS. Petitioner continued to be barred from involvement in the financial affairs of the company.[1]

8. During the course of the audit, NMS executed five consents extending the period of limitation for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law. The consents are dated from September 8, 1986 to June 6, 1988 and extend, in total, the period of assessment for the taxable period June 1, 1983 through August 31, 1985 to December 20, 1988.

9. The records available on audit included sales tax returns, Federal and State income tax returns, sales journal, cash receipts journal, sales invoices, purchases journal, check disbursements journal, purchase invoices, general ledger, monthly bank statements and cash register tapes. The auditor determined that the purchase and sales records were adequate and requested that NMS sign an Audit Method Election Form. NMS executed, on December 13, 1986 and May 26, 1987, two Audit Method Election Forms relating to the Division of Taxation's ("Division") audit of recurring expense purchases and sales. The election forms provide that the Division:

> "has advised that the records available for audit are adequate and sufficient to warrant an audit method that utilizes all records within the audit period. In lieu of such an audit, I elect utilization of a representative test period audit method to determine any sales or use tax liability."

The election forms were signed by Mr. Napoli as president of NMS.

10. The auditor began the audit by reviewing boat sales as shown on the inventory boat sale sheets and the general ledger for the month of March 1986. For those boats that were shown as nontaxable sales, the auditor requested that documentation substantiating such claim be produced. If, as determined by the auditor, insufficient documentation was produced, the sale would be deemed taxable. The test resulted in a disallowance of nontaxable sales at the rate of 32.08%. This error rate was applied to nontaxable sales of $2,175,380.49 for the period June 1, 1983 through February 28, 1984, resulting in a disallowance of $697,862.06 in nontaxable sales. The tax rate of .0425 was applied, resulting in tax due of $29,659.14. In

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[1] We modified finding of fact "7" by adding the last two sentences to the second paragraph in order to accurately reflect the record.

addition, the error rate was applied to nontaxable sales of $22,221,962.22 for the period March 1, 1984 through August 31, 1986, resulting in a disallowance of $7,128,805.48 in nontaxable sales. The tax rate of .0625 was applied, resulting in tax due of $445,550.34. NMS had leasing income of $2,400.00 on which no tax was collected. The tax rate of .0425 was applied, resulting in tax due of $102.00. Total tax due based upon the disallowance of nontaxable sales and the leasing income was $475,311.47.

During the auditor's review, it was determined that NMS was charging the wrong tax rate. The auditor determined a jurisdictional error rate and applied it to the sales tax accrued for the audit period, resulting in additional tax due of $29,107.44.

The auditor tested NMS' recurring expenses by reviewing the purchase invoices for the year 1985. Error rates were determined and applied to each account, resulting in tax assessed of $1,272.07. The auditor reviewed the fixed assets accounts in detail and determined that tax had not been paid on certain equipment, furniture, fixtures and leasehold improvements totalling $129,341.61, with tax due of $7,741.84. Finally, the sales tax accrual account was reviewed for the entire audit period. The review determined that NMS had collected but not paid to the State $269,575.64.

In sum, the additional taxable sales and additional tax due as determined on audit are as follows:

	Additional Taxable Sales	Additional Tax Due
Sales	$ 7,829,067.45	$475,311.47
Purchases (expenses)	22,314.94	1,272.07
Assets	129,341.61	7,741.84
Tax Accrual	4,293,333.67	269,575.64
Jurisdictional Errors		29,107.44
Total	$12,274,057.67	$783,008.46

We modify the Administrative Law Judge's finding of fact "11" to read as follows:

> 11. Petitioner signed the sales and use tax returns of NMS for the quarters ended February 29, 1984, May 31, 1984, August 31, 1984, August 31, 1986 and November 30, 1986 as president. He signed the corporation franchise tax reports, Form CT-3, of NMS as president for the years 1982, 1983, 1984 and 1985. In 1986, Alan Epstein signed as secretary-treasurer. Petitioner also signed extensions for the filing of the corporation franchise tax return for 1985 as well as a reconciliation

for tax withheld, Form IT-203 for 1985. The U.S. corporation income tax returns, Form 1120, for 1983 and 1985 were signed by Mr. Napoli. All the Form CT-3's and 1120's listed petitioner as the sole officer of NMS and that he received a salary of $52,575.00 in 1985 and $103,000.00 in 1986.

Petitioner also signed a tax amnesty application, two applications for three-month extensions, Form CT-5, for the years 1984 and 1985, a return of tax withheld, Form IT-2101, for April 1983, and a reconciliation of tax withheld, Form IT-2103, for the year 1985. All these documents were signed by petitioner as president of NMS.[2]

12. The minutes of the first meeting of the board of directors of NMS, held on March 18, 1981, indicated that the board elected petitioner as its president. The minutes of the organization meeting of NMS, held on March 18, 1981, indicated that petitioner was named a director of NMS.

13. On December 16, 1988, the Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against NMS covering the period June 1, 1983 through August 31, 1986 for taxes due of $783,008.46, plus penalties and interest. On the same date, a separate notice was issued to NMS assessing additional penalties of $45,231.10 under Tax Law § 1145(a)(1)(vi) for omitting more than 25% of the sales tax found due in the quarters ended August 31, 1985, November 30, 1985 and May 31, 1986.

Notices identical to those issued to NMS were issued to Peter J. Napoli, as president of Napoli Marine Service, Inc., under Tax Law §§ 1131(1) and 1133(a).

14. Among the documents petitioner introduced into the record of this matter were: 40 sales agreements[3] between NMS and its customers with addresses outside New York State to establish that these transactions were nontaxable sales; inventory boat sale sheets for March 1986 containing the transactions reviewed by the auditor; and files relating to the approximately 159 transactions listed on the inventory sheets. Each file contained some, but not necessarily all, of the following documents: invoice to customer, owner warranty registration form,

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[2] We modified the first paragraph of finding of fact "1l" by adding the fourth sentence. We also inserted the language "and that he received a salary of $52,575.00 in 1985 and $103,000.00 in 1986" in the last sentence. We made these modifications in order to reflect additional details in the record.

[3] Exhibits "1" through "40."

customer check-off sheet, registration statements, customer delivery receipt, customer checklists, boat registration, statement of final payment and check form notice. Some of the documents contain the date of delivery (customer delivery receipt, customer check-off sheet, boat registration, statement of final payment and owner warranty registration form) and some of the documents, in conjunction with the sales agreements, indicate place of delivery (customer delivery receipt and customer check-off sheet).

A review of the approximately 159 transactions comprising the March 1986 test analyzed by the auditor indicates that petitioner presented files on 136 of these transactions. The files presented indicate that the customers accepted delivery of their boats in March 1986 on 21 occasions, that the date of delivery could not be verified in the 23 transactions for which there were no files, and that there is no date of delivery in the files for 8 transactions. The remaining 107 transactions involved delivery in the months after March 1986.

Petitioner established, through the credible testimony of Thomas Simonton, a sea captain employed by NMS to deliver boats by water, that he or another sea captain delivered the following four boats to customers at out-of-state locations:

Exhibit	Customer	File #
8	Hammons, James	147
11	Fleishman, Harris	142
28	Wichart, Wayne	39
38	Wilson, Woody	22

A review of the remaining files indicated that, based upon the sales agreements, the customer delivery receipts and the customer check-off sheets, the following transactions involved the delivery of the boat to the customer outside of New York State:

Exhibit	Customer	File #
2	Brown, Sharon	100
5	Byrd, William	101
9	Dinsdale, Emily	106
10	Phillips, William	134
16	Cerka, Peter	122
18	Craft, Timothy	34
19	Silbereisen, Roy	36
21	Scalione, Joseph	53
23	Schuck, Jan	26
26	DeMarco, Sal/Victor	19
29	Redden, Douglas	83
31	Lindner, Harold	96
32	Moeller, Charles	78
34	Baran, Steven	61
36	Gronquist, Paul	3
37	Acciardi, Peter	25
39	Melgar, Edward	20
40	Schembri, Joseph	60

In addition to the facts found by the Administrative Law Judge, we find the following:

> When asked if petitioner had at any point during the period at issue attempted to make a determination as to whether or not sales tax was recorded and paid, petitioner responded "no." When asked why not, petitioner responded, "Because there was no way I had any knowledge of where these numbers came from or how they did them. There is no way I could know that or have the information" (Tr., pp. 351, 352).

OPINION

The Administrative Law Judge determined the method of audit employed by the Division was reasonably calculated to reflect the amount of tax due. The Administrative Law Judge further found, however, that petitioner had established that certain transactions were exempt from the imposition of sales and use tax inasmuch as they involved the delivery of boats to customers located outside New York. The Administrative Law Judge also cancelled the portion of the assessment based upon a review of the sales tax accrual account because the account was merely a bookkeeping entry used to protect the State's potential interest during the course of pending transactions and did not reflect sales tax collected but not remitted to the State.

The Administrative Law Judge concluded that petitioner was not a person responsible for collection and payment of sales tax. The Administrative Law Judge found that beginning with

the year 1982 petitioner's role with NMS was reduced and limited out of necessity. As a result of financial difficulties, NMS' floor plan financing company, Borg-Warner demanded that additional capital be invested in the company and that petitioner be removed from the financial aspects of the business. The Administrative Law Judge noted that during the period when Edward Glatz was a shareholder, from October 27, 1982 to the later part of 1985, petitioner was explicitly restricted to marketing, sales and customer relations. The Administrative Law Judge found that Borg-Warner's continued support was contingent on petitioner avoiding any involvement with financial matters at NMS. The Administrative Law Judge found the following factors significant in determining that petitioner was not a responsible officer: 1) petitioner had no authority in connection with corporate books and records; 2) petitioner was not permitted to make financial commitments without the approval of Mr. Glatz; 3) he had no authority to determine which bills should be paid; 4) petitioner had no authority to pay corporate bills and 5) petitioner could not hire or fire accounting personnel.

The Administrative Law Judge also determined that petitioner was not a responsible officer during the period after Edward Glatz left and before the involvement of Messrs. Cohen and Epstein. The Administrative Law Judge found that during this period, in order

> "to protect their financial interests, Borg-Warner, Transamerica and later Bayliner placed their own individuals in NMS to supervise and run the business, to the point where they were handling the financial management of NMS, with all transactions subject to their approval. Petitioner's role remained the same. He was precluded from day-to-day financial management of the company, including the preparation of the sales tax returns, decision as to which creditors were to be paid and the ability to write checks or bind the corporation, except with the approval of others" (Determination, conclusion of law "G").

The Administrative Law Judge also concluded that when Donald Cohen and David Epstein became involved with NMS, petitioner's status with respect to the financial affairs of the company remained unchanged. The Administrative Law Judge noted that it was not dispositive that petitioner held corporate office, because any acts of corporate responsibility petitioner did engage in were done under the supervision and control of others.

On exception, the Division of Taxation elected to challenge only the part of the Administrative Law Judge's determination addressing petitioner's responsible officer status for the period between Edward Glatz's departure in 1985 and the arrival of Donald Cohen and David Epstein in 1986 (Division's brief on exception, p. 3). The Division argues that during this period, petitioner was the only officer and shareholder, and as such was the only person who had legal authority to direct corporate activities during this time. The Division asserts the instant matter is analogous to Matter of Blodnick v. New York State Tax Commn. (124 AD2d 437, 507 NYS2d 536) and that, if petitioner is not held responsible for the corporation's taxes, no person will be liable for these taxes. The Division argues that petitioner did not establish that he was denied access to corporate books and records or that he was precluded from reviewing the accuracy of corporate filings of sales tax returns. The Division further contends that petitioner was authorized to act on behalf of the corporation in all its affairs, including assuring that it paid the correct amount of tax.

The Division disputes the Administrative Law Judge's conclusion that petitioner was precluded from exercising authority. Citing Matter of Mason (Tax Appeals Tribunal, July 29, 1993), the Division asserts that petitioner merely delegated his authority to others. The Division further contends that Borg-Warner wanted an employee at NMS to supervise the day-to-day activities of the corporation, but there was no evidence that petitioner was prevented from reviewing tax information or was denied access to records or precluded from exercising authority. Further, the Division argues that there is no evidence that Borg-Warner or Bayliner directed that they or any other creditor be paid in lieu of paying taxes, but rather the record indicates that bills were paid, including sales tax, as they came due without question.

Petitioner on exception asserts that, "[d]espite the Division's assertions to the contrary, there is no evidence that Glatz's shares were ever returned to Napoli. The testimony of the former national operations manager of Borg-Warner shows that Borg-Warner took control of the financial side of the business for the period commencing after Glatz departed and before his replacements took office. [citation omitted] Petitioner had no operational role with respect to

the finances, tax payments or financial management" (Petitioner's brief in opposition, p. 7). Petitioner argues that "[w]hile Napoli maintained the title of president of the corporation for much of the audit period, he was not the individual who was in control of the financial affairs of the firm in question" (Petitioner's brief in opposition, p. 16). Petitioner further argues that "[t]he record holds no evidence that Napoli ever regained control of the financial side of the business" (Petitioner's brief in opposition, p. 19). Petitioner further asserts "Borg-Warner simply would not have accepted that role for Napoli in light of his previous [sold out of trust] condition and Borg-Warner's exposure as guarantor to Bayliner, the principle manufacturing supplier to NMSI" (Petitioner's brief in opposition, pp. 19-20). Petitioner also rejects the Division's claim that petitioner is liable by virtue of the fact that he was the sole officer of NMS during the period at issue on exception.

We reverse the determination of the Administrative Law Judge.

Tax Law § 1133(a) places personal liability for taxes imposed, collected or required to be collected under Article 28 upon a "person required to collect such tax." Tax Law § 1131(1) defines this term as:

> "any officer, director or employee of a corporation . . . who as such officer . . . is under a duty to act for such corporation . . . in complying with any requirement of [Article 28]."

It is a settled matter that the holding of corporate office does not result in the per se tax liability of an officeholder (Chevlowe v. Koerner, 95 Misc 2d 388, 407 NYS2d 427). Rather, finding a person to be an individual responsible for collecting and paying over sales and use tax must turn on the particular facts of each case (Matter of Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564). "The question to be resolved in any particular case is whether an individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee" (Matter of Constantino, Tax Appeals Tribunal, September 27, 1990). Factors to consider in determining responsibility include: "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 [citations omitted]" (Matter of Constantino, supra).

Turning to the facts throughout the period at issue, petitioner remained at least a 50% shareholder,[4] president and director of the corporation, a situation that typically suggests responsible person status (see, Matter of Blodnick v. New York State Tax Commn., supra; Matter of LaPenna, Tax Appeals Tribunal, March 14, 1991). In addition, during this period, petitioner performed the following acts which indicated that he had authority to act for the corporation in paying its sales taxes: petitioner signed sales tax returns, as well as a reconciliation for tax withheld, Form IT-203 for 1985; corporate franchise tax report, Form CT-3; and corporate income tax return, Form 1120 for 1985. Petitioner also signed extensions for filing the corporate franchise tax return for 1985. Petitioner had check signing authority and authority to hire and fire employees in the sales department. Petitioner also managed on a day-to-day basis the sales, marketing and customer relations areas of the business. Petitioner also signed loan applications on behalf of Napoli Marine. Further, corporate franchise and income tax returns for 1985 and 1986 list petitioner as the only officer and that he received a salary from the corporation of $52,575.00 and $103,000.00, respectively. Thus, in addition to his shareholder status, petitioner derived substantial income from the corporation. While we recognize that entering into the agreement with Borg-Warner and Edward Glatz served a logical business purpose for petitioner, we do not find it sufficient to absolve him of responsibility for ensuring that sales tax was collected and paid (cf., Chevlowe v. Koerner, supra [where after merger the petitioner became vice president with no management responsibilities, no longer signed returns, had no right to hire and fire, and had no control of financial affairs of business]). It is well settled that an officer cannot relieve himself of his responsibility for operating his corporation and expect that he will be relieved of sales tax liability (see, Matter of Unger, Tax Appeals Tribunal, March 24, 1994). In this matter, we find no basis to diverge from this

[4]In the agreement between petitioner and Cohen, Epstein and Napoli Marine, petitioner is listed as sole shareholder, as well as director and president of Napoli Marine (Petitioner's Exhibit "49").

general rule. Absent compelling circumstances which establish that apparent authority is not actual authority, an individual with the indicia of responsibility for the collection and payment of sales tax will be liable for the failure to do so (cf., Matter of Taylor, Tax Appeals Tribunal, October 24, 1991 [petitioner, president of company, could not exercise authority out of fear for his life from those in actual control]). To relieve petitioner from liability for the corporation's taxes would result in allowing petitioner to derive the benefit of the continued operation of his business at the expense of ensuring that sales tax was paid (see, Matter of Byram, Tax Appeals Tribunal, August 11, 1994 [where an officer of a not-for-profit corporation was held liable for the corporation's withholding taxes even though the monies were used to keep the hospital running]).

We find this matter distinguishable from our decisions in which officers who possessed apparent authority sufficient to establish responsible officer status were found not liable because they were precluded from exercising any authority. In Matter of Taylor (supra), we found the petitioner was precluded from exercising authority by three individuals who were later convicted on criminal racketeering charges for tax evasion. The petitioner, bearing the titles of president and owner of Mar Jear Restaurant, Inc., operated under the complete supervision and control of others who used petitioner as a pawn in their illegal activities unbeknownst to him. The individuals gave petitioner a title but no actual authority, nor did he have an ownership interest but was ordered to hold himself out as such. The petitioner testified that he remained in this position without attempting to leave out of fear for his personal safety.

We also find this case distinguishable from our recent decision in Matter of Defeo (Tax Appeals Tribunal, March 9, 1995).[5] In Defeo, the petitioner agreed to a merger of his financially troubled corporation with Luis Electrical Contracting Corp. After the transaction

[5]While the potential liability of the petitioner in Matter of Defeo (supra) was based on a different statute than at issue here, the definitional phrase in Tax Law § 685(n) for the term "person" is virtually identical to that found in Tax Law § 1131(1) (cf., Tax Law § 685[n] "the term person includes an individual . . . who as such officer, employee . . . is under a duty to perform the act in respect of which the violation occurs" and Tax Law § 1131[1] "[a]ny officer, director, or employee of a corporation . . . who . . . is under a duty to act for such corporation . . . in complying with any requirement of [Article 28]").

the petitioner no longer had an ownership interest in the business, but he retained his title of president. Through a pattern of intimidation, however, the petitioner was precluded from exercising the authority attendant to his position, e.g., control over the corporate checking account, control over the corporate tax returns, hiring and firing employees, and determining what debts to pay. The petitioner credibly testified he was precluded from acting out of fear for his life.

Unlike the petitioners in Taylor and Defeo, whose officer positions were merely titles without substance, petitioner retained at least a 50% ownership interest in the corporation during the period at issue on exception, as well as his titles of director and president. We conclude that during this period petitioner had actual authority over the corporation but chose not to exercise this authority. While the prospect of losing his financial backing if he remained in control of the corporation's finances was daunting, petitioner was still obligated by virtue of his position to ensure that sales tax was being paid. Nevertheless, the record reflects that petitioner did not even attempt to ascertain whether or not sales tax was being collected or paid. Petitioner signed the corporation's sales tax returns, yet he never requested to review the information relied on to fill out the returns.

The instant case is also distinguishable from Matter of Constantino, (supra). In Constantino, the Tribunal concluded that the taxpayer was controlled by the majority shareholder and that the petitioner's role was essentially that of a minority investor and supervising employee who was precluded from taking actions with respect to corporate finances. In addition, the petitioner in Constantino, unlike petitioner in the matter before us, lacked any indicia of responsibility as he could not, for example, hire or fire employees, make significant purchases, determine what checks were to be written and he was a minority shareholder.

We also conclude that petitioner's reliance on the decision in Vogel v. New York State Dept. of Taxation & Fin. (98 Misc 2d 222, 413 NYS2d 862) is unfounded. In Vogel, the petitioner was a 50% shareholder and secretary of the corporation, who the Court determined as

a "silent partner" was not involved in the operation and management of the corporation other than making loans. Subsequent to Vogel, the Appellate Division, Third Department has held that where an officer has the authority to act on behalf of a corporation but declines to do so, such failure does not operate to shed the officer of liability (Matter of Blodnick v. New York State Tax Commn., supra [where the petitioners, the sole shareholders and officers, allowed others to run business, did not even know where corporate office was located, yet were found to be responsible officers]; see also, Matter of Martin v. Commissioner of Taxation & Fin., 162 AD2d 890, 558 NYS2d 239 [where sole officer and shareholder of corporation was not actively involved in the daily operation of the business, but despite limited involvement was found a responsible officer]). As a result, we find that the holding in Vogel is not consistent with recent case law.

The effect of this decision does not extend beyond the period during which petitioner was the sole officer of Napoli Marine, as this is the only part of the Administrative Law Judge's determination to which the Division has elected to except. The Division in its exception asserts that the period at issue on exception begins with the departure of Edward Glatz, which the Division asserts occurred in late 1984 and not late 1985 as found by the Administrative Law Judge. The Division, however, in its brief in support of its exception and its reply brief, argues that Mr. Glatz departed in 1985. We believe the Division's confusion over the date of Mr. Glatz's departure reflects the uncertainty of the witnesses at hearing with respect to this issue. Upon our review, however, we find that, in general, the witnesses testified that Mr. Glatz left sometime in 1985. Consequently, we conclude that the Administrative Law Judge's selection of late 1985 as the time of Mr. Glatz's departure to be plausible and we decline to disturb this finding. We also find that the period at issue on exception ends at the conclusion of the audit period, i.e., August 31, 1986 because the record shows that Messrs. Cohen and Epstein did not become one-third shareholders and officers of Napoli Marine until after the audit period. Therefore, we conclude that the period at issue on exception encompasses the quarters ending: November 30, 1985; February 28, 1986; May 31, 1986; and August 31, 1986.

Our decision should not be construed as relying on petitioner's status as sole officer to find liability and we reject the Division's argument in support of such a conclusion. We have in the past stated that where the record indicates there may be other individuals involved in the business who appear to have the requisite authority and control to meet the statutory definition of "responsible officer," we will decline to find the only known officer liable solely by virtue of his position. Given that, "the statutory definition of 'responsible officer' (see, Tax Law § 1131[1]) includes 'employee'; . . . there may be other employees . . . who could be held liable for the taxes due [citation omitted]" (Matter of Taylor, supra; see also, Matter of Ianniello v. New York Tax Appeals Tribunal, 209 AD2d 740, 617 NYS2d 973).

Finally, petitioner had requested that the Tribunal return to the Division its reply brief and disregard it, since it was filed late. Petitioner was informed by letter that this issue would be addressed by the Tribunal in its decision. The Division was originally given 15 days to file its reply brief. It was granted three extensions to file its brief for a total of 48 additional days. Pursuant to the last extension granted by the Tribunal, the Division's reply brief was due on January 23, 1995. It was filed on January 24, 1995, one day late. While we can understand petitioner's frustration and cannot countenance the behavior of the Division in receiving three extensions and still filing its brief one day late, we have previously held that a brief filed one day late is not so unreasonable as to cause us to disregard it (Matter of Angelico, Tax Appeals Tribunal, June 16, 1993; Matter of O'Keh Caterers Corp., Tax Appeals Tribunal, November 5, 1992). Petitioner has not provided any facts or arguments to us that distinguish the present case. Therefore, the Division's reply brief will be accepted.

Accordingly it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted;

2. The determination of the Administrative Law Judge is reversed to the extent that petitioner is liable for sales tax for the period at issue on exception, i.e., September 1, 1985 through August 31, 1986;

3. The petition of Peter J. Napoli, as officer of Napoli Marine Service, Inc. is denied to the extent indicated in paragraph "1," but is otherwise granted; and

4. The notices of determination and demand for payment of sales and use taxes due issued against Napoli Marine Service, Inc. on December 16, 1988 are sustained to the extent indicated in paragraph "1," but are otherwise cancelled.

DATED: Troy, New York
July 13, 1995

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

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

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner