

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition :  
of :  
**DOMINIC J. BASILE, SR.** :  
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 June 1, 1988 :  
through August 31, 1989. :

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DECISION  
DTA NOS. 809483  
AND 809794

In the Matter of the Petition :  
of :  
**DOMINIC J. BASILE, OFFICER OF** :  
**WALT'S SUBMARINE SANDWICHES, INC.** :  
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, 1988 :  
through February 28, 1990. :

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Petitioner Dominic J. Basile, Sr.,<sup>1</sup> Officer of Walt's Submarine Sandwiches, Inc., 981 Washington Avenue, Albany, New York 12206, filed an exception to the determination of the Administrative Law Judge issued on March 18, 1993. Petitioner appeared by Richard V. D'Alessandro, P.C. (Richard V. D'Alessandro, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel).

Petitioner filed a brief in support of his exception and the Division of Taxation filed a brief in response. Petitioner filed a reply to the Division of Taxation's brief. The reply brief was received on June 7, 1993 and began the six-month period for the issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

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<sup>1</sup>Dominic J. Basile and Dominic J. Basile, Sr., as referenced in the caption, are one and the same person.

### ***ISSUES***

I. Whether petitioner was a person under a duty to collect and remit sales and use taxes on behalf of Walt's Submarine Sandwiches, Inc. pursuant to Tax Law §§ 1133(a) and 1131(1) during the periods at issue.

II. Whether, if so, petitioner has nonetheless advanced grounds sufficient to warrant abatement of penalties imposed.

### ***FINDINGS OF FACT***

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

Petitioner, Dominic J. Basile, was co-founder of a business incorporated under the name of Walt's Submarine Sandwiches, Inc. ("Walt's"). The corporation operated various fast food shops throughout the area of Albany and Schenectady, New York, selling hot and cold submarine sandwiches and other food items.

Between approximately April 3, 1990 and September 7, 1990, the Division of Taxation ("Division") conducted a field audit of the sales and use tax liability of Walt's for the period spanning December 1, 1986 through February 28, 1990.

As a result of the aforementioned audit, the Division issued a total of five notices of determination and demands for payment of sales and use taxes due against Dominic J. Basile, assessing Mr. Basile as a person under a duty to collect and remit sales and use taxes on behalf of Walt's. These notices, together with the periods to which they pertain, are set forth as follows:

<u>Issuance Date</u>	<u>Notice No.</u>	<u>Period</u>	<u>Tax Assessed</u>
4/20/90	S900420700A	6/1/88-8/31/88	\$ -0-
4/20/90	S900420701A	12/1/88-2/28/89	15,796.59
4/20/90	S900420702A	3/1/89-5/31/89	31,278.74
4/20/90	S900420703A	6/1/89-8/31/89	43,429.26
9/11/90	S900914004A	3/1/88-2/28/90	12,391.96

Notice Number S900420700A, listed first above and covering the period June 1, 1988 through August 31, 1988, assesses penalty only, in the amount of \$228.34, with zero tax assessed. The

other four notices were issued for tax, penalty and interest; their listing above reflects the tax assessed, but does not reflect the dollar amounts of penalty and interest assessed.

Petitioner requested conciliation conferences to challenge the above-described assessments. On January 25, 1991, a Conciliation Order was issued with respect to the first four notices set forth above. Pursuant to this Order, these notices were reduced to the respective amounts of \$196.67 (penalty only), \$15,042.43, \$31,278.74,<sup>2</sup> and \$33,097.59 (plus penalty and interest). A second Conciliation Order dated May 3, 1991 sustained in full the fifth notice described above (plus penalty and interest).

For many years, petitioner was fully involved and in charge of all aspects of operating and expanding Walt's business, including daily visits to each of its local stores. In or about July 1986, petitioner's health was in decline and he reduced to some degree his physical activities in the operation of Walt's. In view of these circumstances petitioner's brother, Joseph Basile, was elected president of Walt's and petitioner "retired." However, petitioner continued to receive full salary and benefits, retained the position of chairman of the board of directors of Walt's, and as described hereinafter remained involved to some degree in the operation of Walt's business. At all times from July 1986 through the period in question, petitioner owned 66-2/3% of Walt's issued and outstanding shares of stock while Joseph Basile owned the remaining 33-1/3% of Walt's stock. Walt's board of directors consisted of petitioner, Joseph Basile and one Walter Breakell.

As of early 1988, petitioner had become dissatisfied with Joseph Basile's performance as president of Walt's. In turn, on or about March 17, 1988, petitioner convened a purported meeting of Walt's board of directors. This meeting was attended by petitioner, his wife Jeanette Basile, and one Norman Tillman, but did not include Joseph Basile or Walter Breakell. At this meeting, petitioner moved to oust Joseph Basile as president of Walt's, to name himself to such position, and to relegate Joseph Basile to the position of vice-president/director of marketing.

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The dollar amount of notice number S900420702A apparently was not changed (reduced) as the result of the conciliation proceedings.

Petitioner's wife also moved to appoint Norman Tillman as executive vice-president of Walt's. These actions were "approved" by those present at the meeting.

In response to these actions, Joseph Basile commenced a proceeding in Supreme Court, Albany County, by Order to Show Cause dated June 23, 1988, seeking judicial dissolution of Walt's pursuant to Business Corporation Law ("BCL") § 1104-a.<sup>3</sup> By this proceeding, Joseph Basile sought to void the above-described acts. More specifically, he sought to be returned to the office of president with full salary and benefits, a limitation against petitioner changing the composition of Walt's board of directors, officers and/or stock ownership ratio, an accounting of assets and liabilities and, ultimately, dissolution of Walt's.

The record does not detail what occurred, if anything, on the July 22, 1988 return date for the Order to Show Cause, nor is there any evidence of subsequent judicial intervention in the dissolution proceeding. In April 1990, Walt's filed for Chapter 11 bankruptcy protection. Thereafter, on or about November 27, 1990, Walt's bankruptcy filing was converted from a Chapter 11 (reorganization) proceeding to a Chapter 7 (liquidation) proceeding. There is no evidence that the dissolution proceeding was terminated at any time prior to Walt's April 1990 bankruptcy filing.

As part of its bankruptcy proceeding, Walt's moved for disallowance of all or a portion of the sales and use tax claims filed against it by the Division. The Bankruptcy Court, in turn, issued an order fixing and allowing, in part, the sales tax claims of the Division. As is relevant to this proceeding, the Bankruptcy Court allowed the following amounts for the following periods:

<u>Period</u>	<u>Tax Amount</u>
12/1/88 - 2/28/89	\$15,042.43 ( <u>see</u> Notice No. S900420701A)
3/1/89 - 5/31/89	32,816.50 ( <u>see</u> Notice No. S900420702A)
6/1/89 - 8/31/89	33,097.59 ( <u>see</u> Notice No. S900420703A)
3/1/88 - 5/31/88	915.01 ( <u>see</u> Notice No. S900914004A)
6/1/88 - 8/31/88	1,521.30
9/1/88 - 11/30/88	856.21
12/1/88 - 2/28/89	1,041.91

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<sup>3</sup>Pursuant to BCL § 1106, copies of the Order to Show Cause and petition in the dissolution proceeding were required to be served on the (former) State Tax Commission.

3/1/89 - 5/31/89	958.91
6/1/89 - 8/31/89	668.00
9/1/89 - 11/30/89	879.16
12/1/89 - 2/28/90	59.50

At hearing, the parties stipulated that the amounts remaining at issue are those set by the Order of the Bankruptcy Court, as above, plus penalty and interest, subject to two minor modifications. First, the Division conceded that the \$32,816.50 amount set for the period 3/1/89 - 5/31/89, per order of the Bankruptcy Court, should be reduced to the \$31,278.74 amount initially assessed and subsequently sustained at conference (see above). The second adjustment involves including the penalty assessed for the period 6/1/88 - 8/31/88 (Notice Number S900420700A) which item was apparently not addressed in the bankruptcy proceeding. Although not specified by either party at hearing said penalty, initially assessed at \$228.34, should presumably be reduced to the \$196.67 amount determined at conference (see above).

In conducting the audit, the auditor dealt with Norman Tillman. During the course of the audit, the auditor sought to meet with or speak directly to petitioner. However, he never directly met with Mr. Basile, due to Mr. Basile's poor health condition which left him unable to come to Walt's offices. The record does not describe why the auditor was not able (or was not allowed) to speak directly to Mr. Basile during the audit. Information requested by the auditor, if available, was obtained and given to the auditor by Norman Tillman. According to the auditor's testimony Mr. Tillman advised that, for the period December 1, 1986 through February 28, 1988, Joseph Basile was the "officer in charge" and that for the period March 1, 1988 through February 28, 1990, Dominic Basile was the "officer of charge". The auditor's conclusion that Dominic Basile was responsible to collect and remit sales tax was based, in addition to his discussions with Mr. Tillman, upon the factors that certain sales tax returns bore the stamp-affixed signature of Dominic J. Basile, that petitioner was listed as a shareholder on Walt's income tax returns (owning 67.5% of Walt's shares), that petitioner was paid a salary of some \$36,400.00 annually, and that petitioner devoted 100% of his time to the business (as reflected on Walt's income tax return [Form 1120] for the year 1988).

The auditor testified to his belief that Norman Tillman and Dominic Basile were in fact running the corporation and to his belief, based on discussions with Norman Tillman during the course of the audit, that Dominic Basile was the "ultimate source to answer questions that Norman could not answer."

With respect to the auditor's reliance on sales tax returns, it is unclear exactly which returns were reviewed in detail by the auditor during the audit. However, some 13 sales and use tax returns were introduced in evidence. One such return (for the period 6/1/88 - 8/31/88) was unsigned, one such return (for the period 12/1/88 - 2/28/89) bore the signature of Norman Tillman, and the balance of such returns (covering periods between 3/1/88 - 3/31/90) each bore a stamp-affixed signature reading "Dominic J. Basile - Pres."

Petitioner testified regarding his brother's commencement of dissolution proceedings via the June 23, 1988 Order to Show Cause, as follows: "[I] assumed that I was under the jurisdiction of the Supreme Court, I think was on the paper, and I had no say in the matter from that point on." Mr. Basile testified he understood this to mean there could be no more shareholder meetings, election of officers, and that matters were to be kept in "status quo."

Dominic Basile testified that during the period in question he was under ongoing medical treatment for edema and for an angina condition, both of which limited his mobility. He testified that during the period at issue he made approximately six visits to Walt's corporate offices located at 155 Exchange Street in Albany. He indicated that Norman Tillman generally ran the corporation during the period 1988 through 1990, overseeing the office functions and operations, including the filing of tax returns and payment of taxes including sales tax. Petitioner alleged that he had no "active role" in the management of the corporation, and that that he did not direct Mr. Tillman as to the day-to-day "nitty gritty" operational aspects of the business.

Petitioner noted that he, Joseph Basile and Norman Tillman were the three authorized signatories to Walt's bank accounts. Petitioner explained that while he was authorized to sign checks and other documents, he delegated the authority to stamp-sign his name to Norman

Tillman, "rather than have Norman keep sending me papers." Petitioner continued to receive a paycheck in the approximate amount of \$700.00 per week throughout the audit period. He described his salary as being for the responsibility of overseeing and conducting staff meetings at his home, plus "keeping the policies of the company in line with respect to the food aspect of the business", as well as for his title of chairman of the board. Petitioner received the highest salary of anyone in the corporation, and was aware of and was involved in setting other employees' salaries. Petitioner had the authority to hire and fire personnel as did the supervisory staff employed by Walt's. He explained that supervisors could hire and fire at the store level, and that only if an upper-level supervisory person's firing or hiring was in question would he become involved. Petitioner had use of a corporate automobile as did all supervisory personnel.

Petitioner testified that he first learned of the sales tax liability at issue at or about the time of Walt's bankruptcy filing, when Norman Tillman advised him that Walt's "had not been keeping up with sales tax." In this regard, petitioner alluded to a prior experience where the corporation had paid bills instead of sales tax, ultimately resulting in a sales tax liability determined on audit. Petitioner stated he had "made it clear [apparently to Mr. Tillman] I didn't want it to happen again." Petitioner testified he told Norman Tillman, "you know how I feel about this and you know the position that it places me in." In turn, Norman Tillman allegedly presented petitioner with a letter of resignation. However, petitioner did not accept Mr. Tillman's resignation and, in view of petitioner's health situation, Norman Tillman agreed, at petitioner's request, to stay on with Walt's.

The only documentary evidence presented with respect to the proceeding for judicial dissolution was a copy of the Order to Show Cause commencing such proceeding, together with annexed affidavits and the petition for dissolution. Review of the Order to Show Cause indicates the same does not specifically seek to prohibit or enjoin Walt's from carrying out its daily operational activities. The Order to Show Cause does indicate, inter alia, that on its return date a showing would be required as to why a temporary receiver should not be appointed to

conduct the corporation's activities. There is, however, no evidence that such a receiver was in fact appointed. Petitioner also alluded to his understanding that as part of resolving the dissolution proceeding, attempts would be made to value his brother Joseph Basile's stock ownership interest in Walt's and to pay Joseph Basile for the same. Petitioner noted that such efforts were terminated at or about the time of bankruptcy filing.

A reading of the Order to Show Cause and Petition for Dissolution as well as the annexed affidavits provides some additional background in this matter. More specifically, according to these documents petitioner "formally" retired in or about July 1986, although it was claimed that petitioner's activities in the corporation had been diminished for some two years prior thereto due to petitioner's poor health condition. It is also made clear that the dissolution proceeding itself was sparked as the result of the March 17, 1988 meeting described in Finding of Fact "6". The record does not further detail Joseph Basile's responsibilities, duties and/or actions on behalf of Walt's in his role of president. Similarly, the documents do not more specifically disclose or describe Dominic Basile's involvement in the corporation prior to the meeting of March 17, 1988. However, the Order to Show Cause as well as the attached affidavit by Joseph Basile list petitioner as the majority shareholder and the "individual in control of" Walt's.

Submitted as part of petitioner's brief were proposed findings of fact numbered "1" through "27," plus a request for ultimate findings of fact numbered "28" and "29." Petitioner's request to find such facts is addressed as follows:

- proposed facts "1," "2," "3," "6," "8," "9," "11," "12," "16," "17," "18," "19," "20," "21," "22," "24," "25," "26" and "27" are accepted and have been incorporate hereinabove;

- proposed fact "4" is accepted insofar as it states that "[a]s a result of the dissolution proceeding, the Corporation and petitioner became subject to the jurisdiction and supervision of the Supreme Court . . .", but is otherwise rejected as overly broad and as setting forth a conclusion of law;



- proposed fact "5" is rejected as setting forth a conclusion of law;
- proposed fact "7" is accepted only as a reflection of part of petitioner's testimony, noting that such proposed fact is not entirely consistent with the balance of the record, including, to some degree, the balance of petitioner's testimony as to his actions;
- proposed fact "10" is rejected as misleading, in that while petitioner did not personally and physically sign the noted documents, such documents were stamp signed in petitioner's name by another person specifically authorized to use petitioner's signature stamp;
- proposed facts "13" and "14" are modified to more accurately reflect the record, to wit, that Mr. Tillman managed the day-to-day operational aspects (the "nitty gritty") of the business. Similarly, proposed fact "15" has been modified to provide that Mr. Tillman undertook the described filing and payment duties in his day-to-day managerial role, undertaking such role at petitioner's request. As modified, these proposed facts are accepted;
- proposed fact "23" is accepted only as a reflection of petitioner's testimony;
- proposed fact "26" is accepted only as a partial listing of the auditor's bases for concluding an assessment against petitioner was warranted (omitted from such listing is, inter alia, the auditor's reliance on conversations during audit with Mr. Tillman); and
- proposed facts "28" and "29" are rejected as constituting conclusions of law on the ultimate issues presented for determination herein.

### ***OPINION***

The Administrative Law Judge concluded that there was no evidence that petitioner's involvement in the actual operation of Walt's was diminished by the commencement or pendency of the dissolution proceeding. The Administrative Law Judge noted that the Order to Show Cause required petitioner to show why a temporary receiver should not be appointed, but that there was no evidence, nor even an allegation, that a temporary receiver was appointed or that petitioner's authority to act was in any other way reduced. Having concluded that the

commencement of the dissolution proceeding did not relieve petitioner of the duty to collect and remit sales tax, the Administrative Law Judge next considered whether "petitioner was a person whose position, authority and acts within the corporation left him with the duty and ability to collect and remit (Determination, conclusion of law "F"). The Administrative Law Judge concluded that petitioner remained active in the business, notwithstanding his illness. The Administrative Law Judge also found significant that petitioner set employee salaries, had authority to hire and fire employees and got involved in the serious questions regarding the management of the business. The Administrative Law Judge held that petitioner's delegation of authority to Mr. Tillman to affix petitioner's signature by stamp was merely a convenience to petitioner and did not absolve petitioner of responsibility for the taxes. Based on these factors, the Administrative Law Judge ultimately concluded that petitioner was personally liable for the taxes of the corporation. The Administrative Law Judge further determined that petitioner had not established a basis for abatement of the penalty.

On exception, petitioner asserts that the provisions of section 1114 of the BCL "nullified any authority petitioner may have had over the affairs of the Corporation, including the sale and purchase of taxable goods and services and the payment of any tax due as a result of such sales and purchases" (Petitioner's brief, p. 5). After the commencement of the dissolution proceeding, petitioner contends that only the court could confer authority to act on behalf of the corporation and that he did not seek nor obtain orders permitting him to act. Petitioner also asserts that he was unaware of the failure to pay the sales tax until informed of this fact by Mr. Tillman in April 1990 and that knowledge of corporate affairs is an important consideration in assessing responsibility. Finally, petitioner contends that his lack of authority and knowledge of the deficiency demonstrate reasonable cause and provide a basis to abate penalty.

In response, the Division argues that a corporation collects the tax as trustee for the state and, therefore, the sales tax is not the property of the corporation. As a result, the Division contends that the collection and remittance of sales tax is not prohibited by the provisions of section 1114 of the BCL because that section only prohibits the sale or other transfer of

corporate property. The Division also notes that petitioner continued to receive his full salary during the dissolution proceeding, even though he allegedly had no authority to act on behalf of the corporation. The Division also asserts that petitioner did not establish reasonable cause for his failure to remit the sales tax.

We affirm the determination of the Administrative Law Judge.

Section 1114 of the BCL states:

"[a] sale, mortgage, conveyance or other transfer of, or the creation of a security interest in, any property of a corporation made, without prior approval of the court, after service upon the corporation of a summons in an action, or of an order to show cause in a special proceeding, under this article in payment of or as security for an existing or prior debt or for any other or for no consideration, or a judgment thereafter rendered against the corporation by confession or upon the acceptance of any offer, shall be void as against such persons and to such extent, if any, as the court shall determine."

We see nothing on the face of this statute which precluded petitioner from exercising the authority that he had over the operation of the corporation. The statute provides that transfers of corporate property may be voided by a court (see, Matter of Schramm, 107 Misc 2d 393, 434 NYS2d 333); it does not state that corporate officers and directors are prohibited from taking any action on behalf of the corporation. A court presiding over a judicial dissolution may enjoin the officers and directors from exercising any corporate powers pursuant to section 1115 of the BCL, but the existence of section 1115 confirms that the officers' and directors' powers are not automatically terminated under section 1114 by the commencement of the dissolution proceeding. Therefore, we find no basis for petitioner's assertion that the commencement of the dissolution proceeding in itself ended all of his authority to act on behalf of the corporation.

We also agree with the Division that the prohibition imposed by section 1114 of the BCL on transfers of corporate property would not preclude the payment of sales tax. As the Division correctly points out, a vendor collects the sales tax "as trustee for and on account of the state" (Tax Law § 1132[a]); therefore, the sales tax owed was not the property of the corporation.

Even if the payment of tax was a transfer of property within the meaning of section 1114, the statute does not automatically nullify any payment made, but instead voids the transfer only

"against such persons and to such extent, if any, as the court shall determine" (BCL § 1114; see also, Matter of Schramm, supra). Because there has not been any court order voiding the payment of tax by petitioner to the Division, we do not see that the statute has any impact on petitioner's sales and use tax responsibility.

Further, petitioner's own testimony belies his assertion that he believed that he had no authority to act after the dissolution proceeding was commenced. Petitioner testified that during the period of March 1, 1988 through February 28, 1990: he was the chairman of the board (Tr., p. 61); he held staff meetings with the supervisors and discussed problems with them as necessary (Tr., p. 63); he had the authority to sign checks and sales tax returns but authorized another to affix his signature by facsimile stamp (Tr., pp. 63-65); and the corporation paid his salary because he oversaw the staff meetings and generally kept control of the company policies (Tr., p. 66). Another indication of petitioner's control over the corporation during this period is that Mr. Tillman, the individual responsible for the day-to-day operation of the corporation, tendered his letter of resignation to petitioner in April of 1990 and petitioner on his own authority rejected it (Tr. pp. 57-58). We cannot reconcile this exercise of control over the corporation by petitioner with petitioner's claim that he thought he had no right to exercise such control.

In conclusion, we agree with the Administrative Law Judge that the record reveals no factual basis for finding that the commencement of the proceeding for dissolution in any way impaired petitioner's substantial control over the corporation. As we also have concluded that section 1114 of the BCL did not in itself create a legal impediment to petitioner's authority to act for the corporation, we agree with the Administrative Law Judge's ultimate conclusion that petitioner is liable for the sales and use taxes of the corporation pursuant to sections 1131(1) and 1133(a) of the Tax Law.

We also agree with the Administrative Law Judge that petitioner has not established any grounds to abate the penalty imposed. With respect to petitioner's argument that he did not know of the failure to pay tax until April of 1990, we conclude that ignorance of the affairs of

the corporation is as ineffective to establish reasonable cause for the nonpayment of tax as it is to absolve a responsible officer from liability for the tax itself (see, Matter of Blodnick v. New York State Tax Commn., 124 AD2d 437, 507 NYS2d 536).

Lastly, in response to petitioner's citation of Laks v. Division of Taxation (183 AD2d 316, 590 NYS2d 958 [4th Dept 1992]) with respect to an officer's responsibility for penalty and interest, we note that the Appellate Division, Third Department, in Matter of Hall v. Tax Appeals Tribunal (176 AD2d 1006, 574 NYS2d 862 [3d Dept 1991]) affirmed our holding that a responsible officer could be liable for penalty and interest in excess of the statutory minimum.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner Dominic J. Basile, Sr., Officer of Walt's Submarine Sandwiches, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Dominic J. Basile, Sr., Officer of Walt's Submarine Sandwiches, Inc. is denied; and
4. The notices of determination as modified and reduced as described in the findings of fact are sustained.

DATED: Troy, New York  
December 2, 1993

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

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