STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
IRWIN GOODFRIEND	:	
for Redetermination of Deficiencies or for Refund of New York State and New York City Income Taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Periods December 1, 1989 through December 31, 1989 and June 16, 1990 through June 30, 1990, and for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Periods June 1, 1990 through August 31, 1990 and December 1, 1990 through August 31, 1991.	:	DECISION DTA No. 813674

Petitioner Irwin Goodfriend, 438 Fifth Avenue, Pelham, New York 10803, filed an exception to the determination of the Administrative Law Judge issued on January 23, 1997. Petitioner appeared by Kostelanetz & Fink, LLP (Kevin M. Flynn, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (David C. Gannon, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a brief in opposition. Oral argument was not requested.

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

ISSUES

I. Whether petitioner is a person required to collect and pay over withholding taxes due from 305 Restaurant Corp. for the periods December 1, 1989 through December 31, 1989 and June 16, 1990 through June 30, 1990.

II. Whether petitioner was a person responsible to collect and remit sales taxes on behalf of 305 Restaurant Corp. for the periods June 1, 1990 through August 31, 1990 and December 1,

1990 through August 31, 1991.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "4," "9," "14," "15," "16," "19" through "24," "30" through "36," "40" and "42" which have been modified. We delete findings of fact "7" and "8" as irrelevant to this matter and we delete findings of fact "43" and "44" since they are not properly included as findings of fact. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

On August 5, 1993, the Division of Taxation (the "Division") issued to petitioner, Irwin Goodfriend, a Notice of Deficiency (L-007736454-9) for withholding tax penalties under Tax Law § 685(g) in the amount of $15,799.00 for the period December 1, 1989 through December 31, 1989.

On the same date, the Division also issued to petitioner a Notice of Deficiency (L-007736453-1) for withholding tax penalties under Tax Law § 685(g) in the amount of $7,762.00 for the period June 16, 1990 through June 30, 1990.

Each of the notices stated that petitioner was personally liable "as an officer/responsible person for a penalty in an amount equal to the tax not paid by" 305 Restaurant Corp.

On August 5, 1993, the Division issued to petitioner four notices of determination of sales and use taxes due as follows: (1) Assessment No. L-007736263-8 for the period March 1, 1991 through May 31, 1991 for penalty due in the amount of $50.00 and zero tax and interest, for a total amount due of $50.00; (2) Assessment No. L-007736264-7 for the period December 1, 1990 through February 28, 1991 for penalty due in the amount of $50.00 and zero tax and interest, for a total amount of $50.00; (3) Assessment No. L-007736265-6 for the period June 1, 1991 through August 31, 1991 for penalty due in the amount of $50.00 and zero tax and interest, for a total amount due of $50.00; and (4) Assessment No. L-007736266-5 for the period June 1, 1990 through August 31, 1990 for tax due in the amount of $17,606.04, penalty due of $5,281.80 and interest due of $7,249.04, for a total amount due of $30,136.88.

Each of the notices stated that petitioner was personally liable as an officer/responsible person of 305 Restaurant Corp. under Tax Law §§ 1131(1) and 1133(a) for taxes determined to be due in accordance with Tax Law § 1138(a).

After a conciliation conference, the conferee issued a Conciliation Order (CMS No. 134283), dated December 30, 1994, sustaining the statutory notices -- notices of deficiency numbers L007736453 and L007736454.

The conferee issued a Conciliation Order (CMS No. 134383), dated December 30, 1994, which sustained statutory notices of determination numbers L007736264 and L007736266. On the same date, the conferee also issued a Conciliation Order (CMS No. 133996) which sustained statutory notices of determination numbers L007736263 and L007736265.

We modify finding of fact "4" of the Administrative Law Judge's determination to read as follows:

> Petitioner filed a petition, dated March 16, 1995, which requested (1) redetermination of the deficiencies of withholding tax penalties for the periods December 1, 1989 through December 31, 1989 and June 16, 1990 through June 30, 1990 in the total amount of $23,561.00, and (2) revision of the determinations of sales and use taxes for the periods June 1, 1990 through August 31, 1990 and December 1, 1990 through August 31, 1991 in the total amount of $30,286.80.[1]

Petitioner is a certified public accountant who has been employed in the accounting field since 1969. During the periods in issue, he was a member of the accounting firm of Goodfriend and Borden.

Petitioner performed, ***inter alia***, comprehensive bookkeeping services, corporate tax planning and preparation, certified audit functions, and the filing of tax returns for clients since at least 1980, including performing various degrees of accounting services for 20 to 30 restaurants during the years 1988 through 1990.

We modify finding of fact "9" of the Administrative Law Judge's determination to read as

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[1] This amount includes tax, interest and penalties. We modified finding of fact "4" of the Administrative Law Judge's determination to concisely reflect the record.

follows:

> Prior to the periods in issue, petitioner owned stock in three corporations which ran restaurants in New York City -- Claire and two Hamburger Harry's. Marvin Paige, a client of petitioner's, was involved in all three of these corporations/restaurants. Petitioner was an officer of the corporation which ran Claire. He also performed accounting work for all three restaurants. Petitioner did not have an ownership interest in any of the other 20-plus restaurants which were owned by his accounting firm's clients.[2]

According to petitioner, at some point in 1988, he was approached by Mr. Paige with the concept of a "Claire type" seafood restaurant to be located someplace on the upper west side of Manhattan. Mr. Paige wanted petitioner to solicit his accounting clients as potential investors.

On April 23, 1987, 55 Third Ave. Rest. Corp. was incorporated in New York State. On September 30, 1988, 55 Third Ave. Rest. Corp.'s certificate of incorporation was amended to change the corporation's name to "305 Rest. Corp." (the "corporation"). The certificate of amendment was executed by Steven Borden,[3] as vice president, and petitioner, as secretary.

During the periods in issue, the corporation operated a restaurant called "MAX" located in the lobby of the Hotel Esplanade, 305 West End Avenue, New York, New York. MAX was a seafood grill, which opened for business in either May or June of 1989. The seating capacity of MAX was approximately 150 to 180 people.

Petitioner was one of three original shareholders of the corporation, owning 112 shares. The other two original shareholders were Marvin Paige and Steven Borden.[4] Petitioner's initial investment in the corporation was $5,000.00.

We modify finding of fact "14" of the Administrative Law Judge's determination to read as follows:

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[2] We modified finding of fact "9" of the Administrative Law Judge's determination to note that Marvin Paige was a client of petitioner.

[3] Mr. Borden is petitioner's partner in the accounting firm.

[4] Marvin Paige owned 240 shares, while Steven Borden owned 112 shares in the corporation.

> Throughout the periods in issue, petitioner was secretary - treasurer of the corporation. The other corporate officers were: Marvin Paige, president, and Steven Borden, vice president. Petitioner was a member of the board of directors of the corporation, along with Messrs. Paige and Borden.[5]

According to petitioner, at some point in 1988, a law firm prepared an offering circular in which it was stated that Mr. Paige "was going to actively maintain the restaurant and if anything ever happened to him, that the restaurant was in jeopardy of failing" (tr., p. 70). Petitioner did not submit a copy of this circular into the record.

Prior to MAX's opening, Marvin Paige's role was to:

> "oversee construction, oversee whatever was built as far as inside, ordering all the kitchen equipment, staffing the restaurant, hiring all the employees, setting up menus, what would be in the restaurant and basically ordering whatever was necessary to get the restaurant functioning." (Tr., p. 57.)

We modify findings of fact "19," "20" and "21" of the Administrative Law Judge's determination to read as follows:

> Petitioner's accounting firm was employed as the outside accounting firm of both Claire and MAX.
>
> Petitioner testified that part of his function in late 1988 and the beginning of 1989, before MAX opened, was to do the accounting and auditing work and to protect his investors' client's money. He explained that to mean that he "would at the beginning oversee various controls of the restaurant and make sure that monies coming in for construction and everything else were done in a proper manner and making sure that he [Mr. Paige] did what he [Mr. Paige] was supposed to do" (tr., p. 57).
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> As far as operating the restaurant goes, once MAX opened "[w]e were going to do total accounting functions which was preparing all taxes, reviewing work of the bookkeepers to make sure everything was in proper form, reviewing various bills that would come in that were prepared by the bookkeeper" (tr., p. 59). Petitioner testified that he did not hire or fire employees. Petitioner stated that Mr. Paige hired a manager, David Poisal, and that Mr. Poisal did the hiring and firing, tallied up the daily receipts and deposited them in the bank.
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> The corporation applied for a liquor license from the State

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[5] We modified finding of fact "14" of the Administrative Law Judge's determination by incorporating the substance of findings of fact "15" and "16."

> Liquor Authority ("SLA"). In connection with that application, on December 19, 1988, petitioner signed as applicant for the license on behalf of the corporation. Among the documents submitted to the SLA was a personal questionnaire executed by petitioner in which he states that he was to take an active role in the financial management of the corporation.
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> Petitioner, as well as Messrs. Paige and Borden, was authorized to sign checks on each of the corporation's checking accounts. There is no evidence to show that more than one signature was required on any of these accounts. Petitioner admits that at various times he signed checks on behalf of the corporation, including checks to vendors, payroll checks and checks submitted with tax returns.[6]

We modify findings of fact "22 and "23" of the Administrative Law Judge's determination to read as follows:

> The corporation had at least three checking accounts, one at Chemical Bank and two at State Bank of Westchester ("SBW"). The Chemical Bank checking account in the name of MAX was used primarily by Mr. Paige for payment of expenses related to the day-to-day operating expenses of MAX, including advertising and the acquisition of products, food and beverages, both alcoholic and nonalcoholic. One of the SBW checking accounts in the name of 305 Restaurant Corp. appears to be an account used primarily by petitioner for, inter alia, the payment of large ticket items such as taxes, rent, salaries, insurance and utilities; while the third SBW checking account was used for payroll. As noted earlier, petitioner and his two fellow owner-officers, could each write checks on these accounts. Petitioner testified that he never made deposits to the accounts, but he admits writing checks on them. Petitioner also admits that on occasion he would shift money from one corporate bank account to another if the balance on an account got too low.
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> MAX employed Joe Lippi as its bookkeeper. The business records for MAX were maintained at the Claire Restaurant. Mr. Lippi's job was to enter all invoices into the corporation's books as they came in, check all the bills and prepare checks for payment of bills. Petitioner would visit the Claire Restaurant once a week to carry out his accounting functions for MAX and Claire
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> (tr., pp. 87-91). During these weekly visits, petitioner made sure that the checks were correctly prepared by Mr. Lippi by matching them against the invoices. Sometimes petitioner would sign the pre-prepared checks, and sometimes he would leave them to be signed by Mr. Paige. During these visits, petitioner would also prepare withholding and sales tax returns that might be due and prepare the checks to pay the tax due. Again, sometimes he would sign these

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[6] We modified findings of fact "19," "20" and "21" of the Administrative Law Judge's determination to more accurately reflect the record and by incorporating the substance of finding of fact "24."

> checks and returns and sometimes he would leave them for Mr. Paige to sign. After petitioner completed his weekly review, he returned the checks clipped to the invoices and the tax returns with attached checks to Mr. Lippi, the bookkeeper.
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> Petitioner testified that he visited MAX very little, "[a]side from eating there a couple of times a month with family and friends" (tr., p. 87). But the business records for MAX were maintained at the Claire Restaurant. Petitioner estimated that out of a full year, he was at Claire, doing accounting work for Claire and MAX, about 30 or 36 weeks, usually two or three times a month. His visit usually included lunch.[7]

The corporation's General Business Corporation Franchise Tax Return (Form CT-4) for 1988 reflects petitioner's signature as both an officer and as the preparer of such report. Attached to the Form CT-4 is an unsigned copy of the corporation's 1988 Form 1120, U.S. Corporation Income Tax Return. Schedule E of the Form 1120, entitled "Compensation of Officers", contains, ***inter alia***, the names of each corporate officer, the percentage of time each officer devoted to the business and the amount of compensation each officer received. Review of Schedule E reveals that in 1988 petitioner devoted 20% of his time to the business, while Messrs. Paige and Borden devoted 25% and 10% of their time, respectively, to the business. According to the schedule, none of the officers received any compensation.

On February 8, 1989, petitioner, as secretary/treasurer, executed Form CT-6, Election by Shareholders of a Small Business Corporation for New York State Personal Income Tax and Corporation Franchise Tax Purposes ("Sub S election form"). This Sub S election form contains the following information concerning the corporation: its address was listed as 305 West End Avenue, New York, New York and its principal business activity was a restaurant; there were 800 shares of stock issued and outstanding, which were held by a total of 17 shareholders; petitioner and Messrs. Paige and Borden held a total of 464 shares.[8] The remaining 14 individuals held shares in various amounts. The Federal election to be treated as a

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[7] We modified findings of fact "22" and "23" of the Administrative Law Judge's determination by incorporating the substance of findings of fact "30," "31" and "32."

[8] As previously noted, Marvin Paige held 240 shares, while petitioner and Steven Borden each held 112 shares.

subchapter S corporation was "applied for" on January 1, 1989. The election for New York purposes was "to become effective for the period beginning January 1, 1989 and ending December 31, 1989". All 17 shareholders signed the form.

Included in the record are copies of SBW bank statements for the corporation's checking account number 10105930. These bank statements are addressed to the corporation in care of Goodfriend & Borden, 35 E. Grassy Sprain Road, Yonkers, NY 10710.

On March 29, 1990, the corporation's workers compensation renewal policy, dated December 9, 1989, was sent to petitioner at his Yonkers, New York office.

According to petitioner, Marvin Paige along with MAX's manager and a fellow stockholder, David Poisal, took care of the daily operations of the restaurant.

We modify findings of fact "33," "34," "35" and "36" of the Administrative Law Judge's determination to read as follows:

> Accounting work on behalf of the corporation was also performed at petitioner's accounting office by him, Mr. Borden or one of the accounting firm's staff members. Some of the tax returns prepared for MAX were paid through petitioner's accounting office. Petitioner did not keep track of billable hours and did not bill the corporation for accounting work which he performed on its behalf. In 1989, he and Mr. Borden each received a salary of approximately $12,000.00 from the corporation.
>
> Petitioner's accounting firm prepared the corporation's sales tax returns, corporate tax returns and payroll tax returns -- both Federal and State.[9]

At the end of 1989, the corporation had 14 shareholders including petitioner.

The record includes an S Corporation Information Return ("Form CT-3-S") for 1989 and an attached 1989 Federal Form 1120S for the corporation, together with the accompanying Schedules K-1 for the corporation's 14 shareholders, including petitioner. The 1989 Form 1120S shows an ordinary loss of $209,379.00, with petitioner receiving $35,594.00 as his distributive share of such ordinary loss. Compensation of officers was reported as $48,000.00 on the 1989 Form 1120S.

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[9] We modified findings of fact "33" through "36" by combining the substance thereof into a single finding.

Review of the 1989 Form CT-3-S reveals that petitioner signed this return as preparer on March 26, 1990. It is also noted that he listed himself as the tax matters person ("TMP") on the Form 1120S.

The record also includes the same forms for 1990, which reflect an ordinary loss of $212,662.00, with petitioner receiving $36,153.00 as his distributive share thereof. The corporation did not report any compensation for its officers on the 1990 Form 1120S.

Review of the 1990 Form CT-3-S reveals that petitioner signed it as preparer on September 10, 1991. He was listed as the TMP on the 1990 Form 1120S.

We modify finding of fact "40" of the Administrative Law Judge's determination to read as follows:

> Due to business difficulties, MAX ceased operating as a restaurant in August 1990.[10]

Petitioner did not submit the Articles of Incorporation or minutes of any meeting of the corporation into the record.

At the outset of the hearing, Administrative Law Judge Maloney stated that she was the Administrative Law Judge assigned to hear the Matter of Marvin Paige, officer of 305 Restaurant Corp. at which point petitioner's representative made a motion to recuse Judge Maloney pursuant to 20 NYCRR 3000.8(a) on the ground that Judge Maloney had heard the Paige matter and as a result might have preconceived knowledge concerning petitioner's case. Chief Administrative Law Judge Andrew F. Marchese denied Mr. Flynn's motion and Judge Maloney heard this matter.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge rejected petitioner's motion to reconsider the motion to recuse. She noted that the motion had already been denied by the Chief Administrative Law Judge and concluded that under the rules of this Tribunal, an Administrative Law Judge has no

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[10] We modified finding of fact "40" of the Administrative Law Judge's determination to concisely reflect the record.

authority to reverse a determination of a fellow Administrative Law Judge.

The Administrative Law Judge also rejected, as being without merit, petitioner's arguments that he was not a responsible officer. The Administrative Law Judge concluded that while others may have had responsibility for the day-to-day running of the restaurant, petitioner was responsible for the financial aspects of the corporation. The Administrative Law Judge further concluded that the allocation of corporate responsibilities among petitioner, Mr. Paige and Mr. Borden did not exonerate petitioner from being a person required to collect taxes.

The Administrative Law Judge also rejected petitioner's claim that Mr. Paige is the responsible officer in this matter and pointed out that more than one person can be liable as a responsible officer under the statute. The Administrative Law Judge concluded that the evidence in this case supports the conclusion that, during the periods in issue, petitioner had authority and control over corporate affairs and was under a duty to act for the corporation in complying with Articles 28 and 29 of the Tax Law governing sales and use tax.

Furthermore, the Administrative Law Judge found that, based on the record, petitioner was a person under a duty to collect and remit the withholding taxes at issue. The Administrative Law Judge noted that petitioner failed to produce any evidence to show that there were restrictions or limitations placed on his ability to perform his duties as a corporate officer. Accordingly, the Administrative Law Judge concluded petitioner failed to sustain his burden of proving that he was not a responsible person under Tax Law § 685(n).

Next, the Administrative Law Judge concluded that petitioner's failure to collect and remit withholding tax was willful within the meaning of Tax Law § 685(g).

The Administrative Law Judge rejected petitioner's attempt to shift responsibility to Mr. Paige. The Administrative Law Judge determined that a responsible person cannot insulate himself from liability by disregarding his duty and leaving it to someone else to discharge and sustained the statutory notices.

ARGUMENTS ON EXCEPTION

Petitioner takes exception to all of the Administrative Law Judge's findings of fact, but

fails to set forth in what respect they are claimed to be in error. Petitioner takes exception to all of the above conclusions of the Administrative Law Judge.

Petitioner contends that the Chief Administrative Law Judge erred in denying his motion for recusal. Petitioner urges that it was improper for Administrative Law Judge Maloney to hear and determine this case because she had previously heard the related responsible officer case involving Marvin Paige.

Petitioner also contends, as he did below, that he was not a responsible person under the Tax Law for the sales and withholding taxes of MAX. He argues that the evidence shows he did not take an active role in the business affairs of MAX nor did he control its financial and tax affairs. Petitioner claims that he was only the accountant for the business, as well as an investor. Accordingly, petitioner argues, the Administrative Law Judge erred in finding him liable for the subject taxes and her determination should be reversed.

OPINION

We first address the issue of whether petitioner was a responsible officer of the corporation for purposes of the sales and use tax provisions of the Tax Law.

Tax Law § 1133(a) imposes personal liability for taxes required to be collected under Articles 28 and 29 of the Tax Law upon a person required to collect such tax. A person required to collect such tax includes "any officer, director, or employee of a corporation . . . who as such officer, director [or] employee . . . is under a duty to act for such corporation . . . in complying with any requirement of [Article 28] . . ." (Tax Law § 1131[1]).

Whether an individual is under a duty to act for a corporation with regard to its tax collection responsibilities such that the individual would have personal liability for the taxes not collected or paid depends on the particular facts of the case (***Matter of Cohen v. State Tax Commn.***, 128 AD2d 1022, 513 NYS2d 564).

The question to be resolved in a particular case:

> "is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee" (***Matter of Constantino***, Tax Appeals Tribunal, September 27, 1990).

Factors to consider when determining responsible officer status under Article 28 are the authorization to hire and fire employees (***Matter of Blodnick v. New York State Tax Commn***., 124 AD2d 437, 507 NYS2d 536, ***appeal dismissed*** 69 NY2d 822, 513 NYS2d 1027); the individual's day-to-day responsibilities, involvement with, knowledge of and control over the financial affairs and management of the corporation (***Vogel v. New York State Dept. of Taxation & Fin***., 98 Misc 2d 222, 413 NYS2d 862; ***Matter of Stern***, Tax Appeals Tribunal, September 1, 1988); the duties and functions of the officers and directors as outlined in the certificate of incorporation, corporate bylaws and minutes of corporate meetings, and the preparation and filing of sales tax forms and returns (***Vogel v. New York State Dept. of Taxation & Fin., supra***); the individual's economic interest in the corporation and whether he had authority to sign tax returns for the corporation (***Matter of Martin v. Commissioner of Taxation & Fin.***, 162 AD2d 890, 558 NYS2d 239); the payment, including the authorization to write checks on behalf of the corporation, of creditors other than the State of New York and the United States (***Chevlowe v. Koerner***, 95 Misc 2d 388, 407 NYS2d 427). Another factor is the individual's simultaneous status as an officer, director and shareholder (***Matter of Cohen v. State Tax Commn., supra***); and in a closely-held corporation, as in the present matter, the individual's knowledge of the affairs of the firm and the firm's profits (***Vogel v. New York State Dept. of Taxation & Fin., supra; Matter of Blodnick v. New York State Tax Commn***., ***supra***).

In proceedings before the Division of Tax Appeals, the petitioner carries the burden of proof by clear and convincing evidence (***Matter of Meskouris Bros. v. Chu***, 139 AD2d 813, 526 NYS2d 679; ***Matter of Surface Line Operators Fraternal Org. v. Tully***, 85 AD2d 858, 446 NYS2d 451; ***Matter of Tavolacci v. State Tax Commn.***, 77 AD2d 759, 431 NYS2d 174; Tax Law § 689[e]). To prevail in this case, petitioner was required to establish by clear and convincing evidence that he was not an officer having a duty to act on behalf of the corporation, i.e., that he lacked the necessary authority or he had the necessary authority, but he was thwarted by others in carrying out his corporate duties through no fault of his own (***cf., Matter of Moschetto***, Tax Appeals Tribunal, March 17, 1994; ***Matter of Turiansky***, Tax Appeals

Tribunal, January 20, 1994).

Petitioner testified that his involvement with the corporation was limited to his investment and to his services as an accountant. However, documents and records of the corporation supporting this claim were not placed in evidence. Petitioner was the only witness. Petitioner did not offer Joe Lippi, the bookkeeper, or David Poisal, the manager of MAX, as witnesses to corroborate his testimony. Instead of concentrating his efforts on proving by documentary and other evidence that he lacked authority to act on behalf of the corporation, the majority of petitioner's testimony was aimed at showing that others in the corporation, not petitioner, were the responsible officers. In this regard, petitioner described Mr. Paige's role in the corporation emphasizing that Mr. Paige wrote checks on one of the corporate accounts. Petitioner testified that Mr. Paige ran the restaurant and that Mr. Paige, along with the manager, David Poisal, hired and fired employees. Accordingly, petitioner argues that Marvin Paige, president of the corporation, is the officer personally responsible for the sales and withholding tax liabilities here. But this claim, even if true, would not excuse petitioner, for liability with respect to sales taxes, as well as unpaid withholding taxes, is joint and several (***see, Matter of Phillips***, Tax Appeals Tribunal, May 11, 1995; Tax Law §§ 685[g], 1133[a]).

At times, petitioner's testimony appears to contradict itself and other evidence in the record. Petitioner urges that he had no independent authority to act for the corporation. Petitioner states that Mr. Paige exercised complete control over all matters concerning MAX, including what vendors were to be paid.

On the other hand, petitioner was a major shareholder in the corporation, an officer and member of the board of directors. Documents in the record and his own testimony show that petitioner was authorized to write and, in fact, did write checks to vendors and others on the corporate accounts. Further, petitioner prepared the tax returns for the corporation and the record shows that he had authority to sign them. Most importantly, none of the evidence submitted by petitioner showed a single situation where Mr. Paige attempted to restrict or limit the performance of petitioner's duties as an officer or director.

Petitioner cannot prevail by shifting blame to Mr. Paige. Petitioner was an officer and major shareholder of the corporation and, as such, had a fiduciary duty to the corporation in complying with the corporation's tax obligations (***see, Matter of Martin v. Commissioner of Taxation & Fin., supra; Matter of Ross,*** Tax Appeals Tribunal, August 1, 1996). We have found exceptions to liability where the corporate officer proved that he was precluded from acting on behalf of the corporation by the acts of another (***see, e.g., Matter of Moschetto, supra; Matter of Turiansky, supra***). Petitioner has failed to meet his burden of showing such preclusion here. It is noted in this regard that petitioner failed to offer in evidence any corporate documents or corroborating testimony tending to demonstrate any restrictions or limitations on his corporate activities, e.g., the corporation's bylaws, minutes of corporate meetings, corporate records, internal memoranda or the testimony of Mr. Poisal or Mr. Lippi. There is no evidence of any specific instance where Mr. Paige or anyone else hindered petitioner in carrying out his corporate responsibilities. While Mr. Paige may have been responsible for the day-to-day running of the restaurant, the evidence supports the conclusion that petitioner played a major role in the financial aspects of the corporation.

Petitioner has failed to meet his burden of showing that, during the periods in issue, he did not have, or could not have exercised, sufficient authority and control over corporate affairs. Therefore, we conclude that petitioner was under a duty to act for the corporation in complying with Articles 28 and 29 of the Tax Law (***Matter of The Plant Place***, Tax Appeals Tribunal, March 20, 1997; ***Matter of Pais***, Tax Appeals Tribunal, July 18, 1991). The fact that petitioner failed to exercise his fiduciary responsibilities as a corporate officer cannot excuse him from liability (***Matter of Blodnick v. New York State Tax Commn***., ***supra***; ***Matter of LaPenna***, Tax Appeals Tribunal, March 14, 1991).

We come now to the issue of whether petitioner was a responsible person with a duty to act on behalf of the corporation for purposes of the withholding tax. With regard to withholding tax, section 685(g) of the Tax Law provides:

> "Willful failure to collect and pay over tax.--Any person required to collect, truthfully account for, and pay over the tax imposed

> by this article who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat the tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over."

Tax Law § 685(former [n]), in turn, furnishes the following definition of "persons" subject to the section 685(g) penalty:

> "the term person includes an individual, corporation or partnership or an officer or employee of any corporation (including a dissolved corporation), or a member or employee of any partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs."

As we stated in ***Matter of Chin*** (Tax Appeals Tribunal, December 20, 1990):

> "The question of whether someone is a 'person' required to collect and pay over withholding taxes is a factual one. Factors which should be considered are whether the petitioner signed the tax return, derived a substantial part of his income from the corporation, or had the right to hire and fire employees (***Matter of Malkin v. Tully***, 65 AD2d 228, 412 NYS2d 186; ***see, Matter of MacLean v. State Tax Commn***., 69 AD2d 951, 415 NYS2d 492, 494, affd 49 NY2d 920, 428 NYS2d 675). Other pertinent areas of inquiry include the person's official duties, the amount of corporation stock he owned, and his authority to pay corporate obligations (***Matter of Amengual v. State Tax Commn***., 95 AD2d 949, 464 NYS2d 272, 273; ***see, Matter of McHugh v. State Tax Commn***., 70 AD2d 987, 417 NYS2d 799, 801)."

If petitioner is determined to be a person under a duty as described, it must then be decided whether his failure to withhold and pay over such taxes was willful.

We agree with the Administrative Law Judge that, based on the evidence presented, petitioner is a person under a duty to act on behalf of the corporation within the meaning of Tax Law § 685(former [n]) and that his failure was willful within the meaning of Tax Law § 685(g). Accordingly, we affirm the determination of the Administrative Law Judge on this issue for the reasons stated therein.

Finally, we address petitioner's motion to recuse the Administrative Law Judge. Petitioner maintains that the motion for recusal should have been granted and the failure to grant the motion deprived him of an impartial trier of fact. This claim is based on the fact that the same Administrative Law Judge heard the case involving Mr. Paige as a responsible officer

of the corporation.[11] The argument here is that the Administrative Law Judge, having heard the earlier case, would have prior knowledge of certain facts that might somehow damage petitioner's right to a fair and impartial hearing.

An Administrative Law Judge demonstrates a personal bias when he takes some action which indicates that he is not impartial and cannot consider the case with an open mind, but rather has some disposition to find against one of the parties (***Tumminia v. Kuhlmann***, 139 Misc 2d 394, 527 NYS2d 673). We note here that there is no evidence offered by petitioner of any bias or prejudgment by the Administrative Law Judge and in reviewing this matter, we could find none.

In the absence of prejudice or prejudgment, the Administrative Law Judge's hearing of the matter involving another officer (Mr. Paige) did not disqualify her from adjudicating this matter (***see, Matter of Willett v. Dugan***, 161 AD2d 900, 557 NYS2d 465, ***lv denied*** 76 NY2d 708, 560 NYS2d 990 [even though two of the members of the Tax Appeals Tribunal had been involved on the side of the Department against the petitioner in previous disputes before the State Tax Commission, there was no evidence that either member was actually prejudiced or had prejudged the specific facts of petitioner's tax dispute in the instant proceeding]).

For the reasons stated above, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Irwin Goodfriend is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Irwin Goodfriend is denied; and

4. The two notices of deficiency, dated August 5, 1993, and the four notices of determination, dated August 5, 1993, are sustained.

DATED: Troy, New York
January 15, 1997

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[11]At the time of the hearing in this matter, the decision in Mr. Paige's case had not yet been rendered. In the interim, the Administrative Law Judge issued a determination holding Mr. Paige liable as a responsible officer.

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Donald C. DeWitt
President

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Carroll R. Jenkins
Commissioner

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Joseph W. Pinto, Jr.
Commissioner