

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
VINCENT EBHOJIAYE	:	DECISION
	:	DTA NOS. 819155
for Revision of Determinations or for Refund of Motor	:	AND 819156
Fuel Tax, Tax on Petroleum Businesses and Sales and	:	
Use Taxes under Articles 12-A, 13-A, 28 and 29 of the	:	
Tax Law for the Period August 1, 1999 through	:	
August 31, 1999.	:	

Petitioner Vincent Ebhojiaye, 7320 Oakcrest Drive, New Carrollton, Maryland 20784-3646, filed an exception to the determination of the Administrative Law Judge issued on February 26, 2004. Petitioner appeared by James O. Druker, Esq. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Margaret T. Neri, Esq., of counsel).

Petitioner filed a brief in support of his exception and the Division of Taxation filed a letter brief in lieu of a formal brief in opposition. Petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on November 17, 2004 in Troy, New York.

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

ISSUE

Whether petitioner, an officer of United Petroleum Company, Inc. ("UPC"), is liable for motor fuel tax, tax on petroleum businesses and sales and use taxes arising from the sale of

heating oil by a third party using the corporation's New York State heating oil distributor license.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "3," "7" and "8" 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.

On September 7, 2001, the Division of Taxation ("Division") issued to petitioner, Vincent Ebhojiaye, as a responsible person of UPC, two notices of determination assessing a penalty equal to the motor fuel tax and tax on petroleum businesses owed by UPC for the period ended August 31, 1999. The notices indicate motor fuel tax due of \$49,717.16 and tax on petroleum businesses due of \$76,129.41.

On the same date, the Division issued to petitioner, as a responsible person of UPC, a Notice of Determination assessing sales and use taxes due of \$29,820.00, plus penalty and interest, for the period ended August 31, 1999.

Petitioner, Vincent Ebhojiaye, came to the United States from Nigeria in 1979 at the age of 27. He became a naturalized citizen in 1994. Prior to arriving in this country, petitioner had obtained a bachelor of arts degree in accounting and a master's degree in finance. During the year of his arrival in the United States, he became affiliated with UPC, after having met Tony Opabajo. At the time of his introduction to Mr. Opabajo, petitioner was a taxicab driver in the Washington, D.C. area. Mr. Opabajo informed petitioner that he was in the oil business and hired petitioner to work for him. Initially, it was petitioner's understanding that he was to be an

employee of UPC assisting Mr. Opabajo in the operation of the business. However, soon after joining the business operation, petitioner invested money in and became a shareholder of UPC, a business venture involved in the sale and distribution of heating oil and diesel fuel to municipalities in the Washington, DC metropolitan area. UPC was located in Laurel, Maryland.

We modify finding of fact “3” of the Administrative Law Judge’s determination to read as follows:

During 1994, following negotiations in which both petitioner and Mr. Opabajo participated, UPC obtained a contract to supply heating oil to the City of New York for use in buildings for the homeless. However, UPC did not own storage tanks in which to store the product or vehicles registered to transport the product in New York State. In order to fulfill its contractual obligations, UPC entered into a contract with Ark Transportation, Inc. (“Ark”), located in Inwood, New York. Heating oil was to be purchased from a company (variously identified by petitioner as Mobil or Motiva) whose product was stored in a terminal owned by Ark. In turn, Ark would use its facilities to store the product and its vehicles to deliver the product to UPC’s customers in New York City. Ark was not registered as a distributor of motor fuel in the State of New York. Ark was owned by William Nappo, who encouraged Mr. Opabajo and petitioner to register UPC as a vendor and importer of diesel motor fuel in New York State.¹

In July 1994, UPC applied to the New York State Department of Taxation and Finance for registration as a distributor of heating oil only. On the registration application, petitioner appears as the vice-president and 40-percent shareholder of the corporation. UPC filed another application in July 1995 seeking to register as an importer of diesel motor fuel. As before, petitioner appears as the vice-president of the corporation and his duties are listed as the person

¹We modified finding of fact “3” of the Administrative Law Judge’s determination to more accurately reflect the record.

responsible for the filing of tax returns and the remittance of taxes on behalf of UPC. Petitioner also had check-signing authority with the corporation.

At the application interview which was conducted by New York State to determine whether to license UPC as a distributor of diesel motor fuel, petitioner and Mr. Opabajo were accompanied by Mr. Nappo's attorney, Marvin Kramer. Following the granting of the distributor license, and at Mr. Nappo's request, Mr. Opabajo and petitioner provided to Mr. Nappo copies of UPC's financial statements and licenses, including their recently obtained license as a New York distributor of diesel motor fuel.

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

In July 1998, Mr. Nappo purchased 420,000 gallons of heating oil from the George E. Warren Corporation located in Vero Beach, Florida. The purchase by Mr. Nappo was made under the name UPC. An invoice from the George E. Warren Corporation to UPC, dated August 7, 1998, indicated that a transfer of 420,000 gallons of heating oil occurred on July 12, 1998 by pipeline to a terminal located in Inwood, New York. The fax number on the invoice, purporting to be that of UPC, was actually that of Mr. Nappo's business office in Inwood, New York. The check used to pay for the 420,000 gallons of heating oil was issued on a Citibank checking account bearing the payor name of UPC; however, the address on the check is the business office of Mr. Nappo, 1 Sheridan Blvd., Inwood, New York. UPC has never had a business address or checking account in New York, and was not in any way involved in the receipt or subsequent sale of the 420,000 gallons of heating oil shipped by George E. Warren Corporation to the terminal in Inwood, New York. When contacted, Mr. Nappo continued to inform UPC that the product remained in storage in the Inwood terminal.²

²We modified finding of fact "7" of the Administrative Law Judge's determination to more accurately reflect the record.

We modify finding of fact “8” of the Administrative Law Judge’s determination to read as follows:

During February 1999, in an effort to protect the corporation’s distributor registration and to ensure that all New York State taxes were properly collected and paid on the fuel purchased by William Nappo in the name of UPC, Mr. Opabajo instructed petitioner to report the 420,000 gallons of heating oil as part of its inventory on UPC’s petroleum business tax and diesel motor fuel tax returns. The 420,000 gallons were reported on UPC’s returns from February 1999 through August 1999. On the August 1999 returns, UPC reported a sale of 420,000 gallons of heating oil to Ark. William Nappo falsely represented to UPC that Ark was a registered distributor of motor fuel in New York and UPC, relying on this representation, reported a sale to Ark as such. All of these returns were signed by petitioner as vice-president of UPC.³

We find the following additional finding of fact.

At no time did UPC ever transact business with George E. Warren Corporation nor did UPC ever own or control the disposition of the 420,000 gallons of heating oil at issue. William Nappo’s only relationship with UPC was to have his corporation, Ark, store and transport heating oil in order for UPC to fulfill its contract obligations with the City of New York. Neither UPC nor petitioner ever authorized William Nappo to purchase heating oil on UPC’s behalf from George E. Warren Corporation. Until such time as George E. Warren Corporation contacted UPC in February 1999, neither UPC nor petitioner had any knowledge of the purchase of heating oil by William Nappo in the name of UPC.

In February 2000, the Division commenced an audit of UPC by sending to the corporation an appointment letter requesting that it make available its books and records for review. A second appointment letter was sent in April 2000. Over several days during June 2000, the auditor reviewed the available tax returns, books, records and invoices. A review of the

³We modified finding of fact “8” of the Administrative Law Judge’s determination to more accurately reflect the record.

petroleum business tax returns and the diesel motor fuel returns filed monthly by UPC during the course of 1999 revealed that beginning with the returns of February 1999, UPC reported 420,000 gallons of diesel motor fuel in its inventory. In its August 1999 returns, UPC reported a sale of 420,000 gallons of diesel motor fuel to Ark. As previously noted, all of the monthly tax returns filed by UPC in 1999 were signed by petitioner as vice-president of the corporation.

As Ark was not registered as a distributor in New York State, and no documentation was produced which established that the sale of the 420,000 gallons to Ark in August 1999 was an exempt sale, a statement of audit changes, and later notices of determination, were issued to UPC indicating that motor fuel tax, petroleum business tax and sales and use taxes were due on the transaction.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge noted the provisions of Tax Law § 282-a(1), which impose an excise tax upon sales of diesel motor fuel sold in New York State, and prohibit any person from engaging in the sale of diesel motor fuel in the State unless registered as a distributor. Further, he pointed out that Tax Law, Article 12-A, § 282-a(2), provides, *inter alia*, for the issuance of a registration as a distributor of diesel motor fuel, under which a registrant is allowed to enhance diesel motor fuel, sell or use diesel motor fuel, import diesel motor fuel into the State or produce, refine, manufacture or compound diesel motor fuel within the State. The Administrative Law Judge recited the factors which must be considered by the Division upon its review of an application for registration as a motor fuel distributor as well as certain acts which are grounds upon which the Division may cancel the registration of a diesel motor fuel distributor, including the registration of a retailer of heating oil only.

The Administrative Law Judge observed that in order to try to eliminate the evasion of motor fuel taxes in New York, the Legislature imposed an elaborate system of registration, licensing and record keeping on all persons engaged in manufacturing, importing, selling, distributing and transporting motor fuel and diesel motor fuel in New York State. The licensing and registration provisions, he concluded, are necessary parts of this scheme, and are not mere legal technicalities to be ignored without consequence.

The Administrative Law Judge found that the actions of petitioner and Mr. Opabajo, shareholders and operators of UPC, in providing Mr. Nappo with their registration as a distributor and financial statements allowed Mr. Nappo to completely circumvent the statutory and regulatory scheme put in place by the Legislature and the Division which authorizes a thorough review of the applicants attempting to obtain registration as motor fuel distributors. The Administrative Law Judge stated that by providing such information to Mr. Nappo, "United Petroleum actively contributed to the undermining of the Division's ability to regulate which entities would be granted registration and also contributed to Mr. Nappo's avoidance of the taxes due on the transfer of the 420,000 gallons of product from George E. Warren Corporation to Ark Transportation" (Determination, conclusion of law "H").

The Administrative Law Judge held that even though the owners of UPC were not aware of the transaction until after it had occurred, and they were not aware of Mr. Nappo's intentions when he requested their registration, UPC was not relieved of the responsibilities attached to the use of its registration which it voluntarily gave to a person or entity not registered as a distributor of diesel motor fuel. The Administrative Law Judge concluded that based on his position and

authority within UPC, petitioner was a person responsible for the collection and remittance of taxes on behalf of UPC.

The Administrative Law Judge determined that by providing Mr. Nappo with its registration as a motor fuel distributor, UPC caused 420,000 gallons of heating oil to be imported into New York State and is, therefore, liable for the taxes due under Articles 12-A, 13-A, 28 and 29 of the Tax Law. As a responsible person of UPC, the Administrative Law Judge concluded that petitioner was liable for the taxes and the penalties due.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that the uncontroverted evidence at the hearing established that UPC and petitioner were victims of identity theft. Petitioner points out that the check utilized to pay the supplier of the 420,000 gallons of diesel fuel bore the address used by William Nappo's Ark Transportation and was apparently signed by Mr. Nappo. Further, petitioner asserts that UPC never maintained an account at any bank in New York State. Petitioner argues that internal UPC memoranda indicate that the purchase of the 420,000 gallons was without knowledge or authorization of UPC. Finally, petitioner maintains that he provided affidavits corroborating his testimony.

Petitioner alleges that both he and UPC were innocent victims of a fraud perpetrated by William Nappo, a convicted con man. When UPC provided Mr. Nappo with photocopies of its motor fuel licenses, petitioner insists that Mr. Nappo used these licenses without petitioner's knowledge to purchase 420,000 gallons of home heating oil from George E. Warren Corporation in Florida and had all transaction documents faxed to his Long Island office. Petitioner claims

that it was only when George E. Warren requested petitioner's tax identification number that UPC and petitioner first learned of the transaction.

Petitioner asserts that UPC carried the fuel in its inventory only to ensure that the tax was paid when the fuel was sold and it was removed from UPC's books when Mr. Nappo's intention to sell the product and properly report it became suspect.

In opposition, the Division argues that the Administrative Law Judge correctly found that petitioner was a person responsible for the collection and remittance of taxes on behalf of UPC. Further, the Division agrees with the Administrative Law Judge that it was the actions of petitioner and his partner, Mr. Opabajo, in voluntarily giving William Nappo a copy of UPC's New York registration as a distributor of motor fuel which allowed Mr. Nappo to circumvent the statutory and regulatory scheme of registration of motor fuel distributors. The Division equates petitioner's providing a copy of the UPC registration to Mr. Nappo as a transfer of registration which, if done without permission of the Division, is grounds for cancellation of such registration (*see*, Division's letter brief, p. 2).

Petitioner, in reply, emphasizes that neither UPC nor petitioner ever transferred the motor fuel registration of UPC to Mr. Nappo or anyone else. Rather, UPC provided Mr. Nappo with a copy of its registration, financial statement and contract with New York State as a response to what petitioner believed was a reasonable request from Mr. Nappo for an assurance that UPC was licensed to do business in New York State. Petitioner asserts that it had no reason to believe or expect that Mr. Nappo would create fraudulent letterheads, open a bank account in UPC's name and order heating fuel from an entity in Florida in UPC's name without approval or authority from petitioner to do so. Petitioner maintains that there was no agency relationship

between Mr. Nappo and UPC and, as a result, neither UPC nor petitioner are liable for the fraudulent actions of Mr. Nappo. Rather than aiding and abetting Mr. Nappo, petitioner claims he is a victim of the actions of Mr. Nappo.

OPINION

Tax Law §§ 282-a(1), 301-a(a) and 1102 impose diesel motor fuel, petroleum business and sales taxes, respectively, on diesel motor fuel sold or used in New York State. Tax Law §§ 289-f and 1142(11) provide that the Division has the authority to make regulations for the joint administration of taxes imposed under Articles 12-A, 28 and 29 upon the sale of automotive fuel (which includes both motor fuel and diesel motor fuel) including the reporting, assessment, determination, collection and refunding of such taxes. Section 315(a) of Article 13-A of the Tax Law provides that the provisions of Article 12-A shall apply to the administration of and procedure with respect to the tax imposed under Article 13-A.

Tax Law § 289-b(2) provides for the imposition of a penalty against any “officer, director, shareholder or employee of a corporation . . . who as such officer, director, shareholder or employee is under a duty to act for such corporation . . . in complying with any requirement of [Article 12-A] . . . which fails to pay the taxes imposed by or pursuant to [Article 12-A].”

Section 315(a) of Article 13-A of the Tax Law provides, in relevant part, that “[t]he provisions of . . . article twelve-A of this chapter, including those provisions of such article twelve-A relating to penalty and interest, shall apply to the administration of and procedure with respect to the tax imposed under this article.”

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, which 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 (*see, 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 (*see, Matter of Blodnick v. New York State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536); the individual's day-to-day responsibilities, involvement with, knowledge of and control over the financial affairs and management of the corporation (*see, Vogel v. New York State Dept. of Taxation & Fin.*, 98 Misc 2d 222, 413 NYS2d 862; *see also, 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 (*see, 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 (*see, Matter of Martin v. Commissioner of Taxation & Fin.*, 162 AD2d 890, 558 NYS2d 239); and 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 (*see, Chevlowe v. Koerner*, 95 Misc 2d 388, 407 NYS2d 427). Another factor is the individual's simultaneous status as an officer, director and shareholder (*see, 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 (*see, Vogel v. New York State Dept. of Taxation & Fin., supra; see also, 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 (*see, Matter of Meskouris Bros. v. Chu*, 139 AD2d 813, 526 NYS2d 679; *see also, Matter of Surface Line Operators Fraternal Org. v. Tully*, 85 AD2d 858, 446 NYS2d 451; *see also, Matter of Tivolacci 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).

We find, as the Administrative Law Judge did, that during the period in question, petitioner was indeed a responsible officer of UPC. We disagree with the Administrative Law Judge, however, that UPC was responsible for the payment of tax on the sale of the heating oil at issue. Based on the evidence in the record, it is unquestioned that it was William Nappo and not UPC that arranged for the purchase of the heating oil at issue. Further, there is no evidence that UPC sold or in any way controlled the disposition of this heating oil once it was obtained by

William Nappo and stored in Ark's terminal. Rather, based on the testimony presented, it is clear that the heating oil was obtained from George E. Warren Corporation by William Nappo posing as an agent or representative of UPC. However, William Nappo was never authorized to act as an agent or representative of UPC and he had no authority to purchase heating oil in its name.

While UPC did, for a period of time, carry the fuel in its inventory, it is clear from the record that this was not done to ratify the fraudulent actions of William Nappo in using the name and license of UPC in order to purchase the fuel. Rather, it was an attempt by UPC to ensure that it was not held liable for the unauthorized actions of William Nappo in failing to report and pay the tax due on his purchase and ultimate sale of the fuel. At no time does it appear, prior to being contacted by George E. Warren Corporation and being informed of the fuel purchase, that UPC ever knew of the actions of William Nappo nor did it ever acquiesce in his actions.

The single incident on which the Division seeks to base petitioner's liability is the furnishing of a copy of UPC's licenses as a distributor of heating oil and of motor fuel to William Nappo. Ark was not licensed as a distributor of motor fuel. The record does not indicate whether Ark was licensed as a transporter of motor fuel. However, it appears that if Ark were acting as a legitimate transporter of heating oil for UPC, it would have been prudent for Ark to obtain documentation establishing that an out-of-state seller of heating oil such as UPC was licensed to legally dispose of its product in New York State.

In this case, however, William Nappo did more than just obtain copies of UPC's licenses. He also established a checking account in UPC's name, and purported to establish a branch office of UPC in Long Island, all without the knowledge or authorization of the principals of

UPC, who maintained the single office of that entity in a state not contiguous to New York.

UPC could hardly have anticipated in mid-1995, when it provided the copies of its licenses to William Nappo, that three years later William Nappo would have: established a bank account in New York State in UPC's name, created a faux business office for UPC at his Inwood, Long Island headquarters and used a facsimile of UPC's motor fuel or heating oil distributor's license to make an unauthorized purchase of heating oil from a company in Florida. Possessing a facsimile copy of UPC's license did not legitimize Mr. Nappo's fraudulent activities nor did it, in any manner, serve to bestow on him the status of an authorized agent of UPC.

In *Matter of Allegheny Petroleum Corp.* (Tax Appeals Tribunal, January 2, 1997), we considered a situation in which the petitioner, a licensed motor fuel distributor, actually volunteered the use of its motor fuel distributor's license to an unlicensed entity in order for that entity to import motor fuel into the State. As we stated therein:

Regardless of the apparent deceitful nature of the relationship, its structure clearly indicates that petitioner was being paid to purchase and import product into New York State, using its status as a registered motor fuel distributor to do so. Its filing of tax returns certifying the importation of motor fuel confirms this interpretation. Petitioner profited mightily from its status as a registered motor fuel distributor and to allow it to deny its status now and the fact that it used its status to import or cause fuel to be imported into the State would be in error.

Significantly, and unlike the petitioner in *Allegheny Petroleum*, there is no evidence that UPC volunteered the use of its distributor licenses nor that it profited from Mr. Nappo's fraudulent actions. As UPC neither purchased the heating oil at issue nor sold such heating oil in New York State, UPC has no tax liability to New York State regarding the purchase and sale of such heating oil. As a result, we reverse the determination of the Administrative Law Judge in this

matter and conclude that petitioner, as an officer responsible for the tax compliance of UPC, has no liability for the tax asserted due in this matter.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Vincent Ebhojiaye is granted;
2. The determination of the Administrative Law Judge is reversed;
3. The petition of Vincent Ebhojiaye is granted; and
4. The three notices of determination, dated September 7, 2001, are canceled.

DATED: Troy, New York
February 3, 2005

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner