

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
DAVID STEINBERG : DECISION
for Revision of a Determination or for Refund of : DTA NO. 822971
Sales and Use Taxes under Articles 28 and 29 of :
the Tax Law for the Period June 1, 2003 through :
November 30, 2005. :
:

Petitioner, David Steinberg, filed an exception to the determination of the Administrative Law Judge issued on September 9, 2010. Petitioner appeared by Meltzer, Lippe, Goldstein & Breitston, LLP (Laura E. Blasberg, Esq. and Michael H. Masri, Esq., of counsel). The Division of Taxation appeared by Mark Volk, Esq. (Robert A. Maslyn, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a brief in opposition. Petitioner filed a letter brief in lieu of a formal reply brief. Oral argument, at petitioner's request, was heard on September 14, 2011 in New York, New York.

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

ISSUE

Whether petitioner was properly held personally liable for the unpaid sales and use taxes owed by InPhonic, Inc., for the period June 1, 2003 through November 30, 2005 pursuant to Tax Law § 1131(1) and § 1133(a).

FINDINGS OF FACT

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

On February 25, 2008, the Division of Taxation (Division) issued to petitioner, David Steinberg, a Notice of Determination assessing sales and use taxes due in the amount of \$18,503.70 for the sales tax quarterly periods spanning June 1, 2003 through November 30, 2005, plus interest. This Notice indicated that petitioner was being held liable as an officer or person responsible to collect and remit sales and use taxes on behalf of InPhonic, Inc. (InPhonic). Petitioner does not challenge the dollar amount of tax assessed, or the audit methodology by which such amount was determined, but instead disputes only the Division's claim that he was an officer or person responsible to collect and remit taxes on behalf of InPhonic.¹

Petitioner was the founder of InPhonic, an online entity that sold wireless phone devices and accessories, and which managed branded portals on behalf of major telephone carriers such as AT&T, Cingular, Verizon and T-Mobile, providing network access activation of the devices it sold pursuant to service contracts with the major carriers. Petitioner described InPhonic's revenues as resulting from fees from millions of small dollar activations and sales of devices and accessories.

InPhonic was a private company until its initial public offering in November 2004. Prior to InPhonic becoming a publicly traded company, petitioner owned or controlled 25 percent or

¹ The underlying assessment against InPhonic, from which the assessment against petitioner is derived, stemmed from an audit of InPhonic, that entity's execution of a Voluntary Disclosure Agreement with the Division and payment of tax pursuant to that agreement. Upon audit review of the agreement, the Division determined that a relatively small amount of additional tax (\$1,483.34) remained due and unpaid based on InPhonic's collection but failure to remit tax and its failure to collect tax where required to do so, as well as additional tax (\$16,878.71) due on InPhonic's receipts from shipping charges. The record does not specify or explain the \$141.65 difference between the sum of the foregoing amounts (\$18,362.05) and the amount of tax assessed against petitioner (\$18,503.70) on the Notice of Determination.

more of its stock. After InPhonic became publically traded, petitioner's stock ownership or control level decreased to approximately 15 percent and later to approximately 10 percent.

Petitioner served as InPhonic's chief executive officer (CEO), chairman of its board of directors, and was a member of InPhonic's mergers and acquisitions committee. Petitioner acknowledged that he had responsibility for the day-to-day management of InPhonic and he received monetary compensation for the services he rendered to InPhonic. In his positions as CEO and chairman of the board, it is undisputed that petitioner had access to InPhonic's books and records and was authorized to make bank deposits on behalf of InPhonic, sign tax returns and checks on its behalf, and hire and fire employees. InPhonic issued thousands of checks during the period in issue. Checks over a certain dollar amount, initially set at \$50,000.00 and later increased to \$100,000.00, required petitioner's signature in addition to that of another InPhonic employee. Under this dual signature protocol, petitioner signed checks that met or exceeded the requisite dollar threshold, including the payments made pursuant to the Voluntary Disclosure Agreement made with the Division.

InPhonic had an in-house tax department and also hired and relied upon outside accountants with regard to tax compliance and other matters. InPhonic's tax personnel reported to its chief financial officer (CFO) who in turn reported to petitioner. Petitioner hired the approximately eight persons at InPhonic who reported directly to him, and he recommended the person who was hired by the board of directors as InPhonic's CFO.

While not disputing that he had authority with respect to the operations of InPhonic, as described, petitioner maintained that given the size of the company and the volume of its transactions, he could not as a practical matter personally oversee all aspects of InPhonic's operations. Instead, petitioner relied upon those who reported to him, including, with regard to

tax matters, InPhonic's CFO and its outside auditors and tax professionals. Petitioner also noted that as the result of the Sarbanes-Oxley Act of 2002 (*see* 15 USC § 7201, et seq., Pub L 107-204 [2002 HR 3763, July 30, 2002], 116 Stat 745), InPhonic's internal audit functions and tax functions were handled by different outside firms (KPMG for audit work and Ernst & Young for tax work, respectively) and that his direct interaction with InPhonic's operating finance employees was discouraged if not prohibited.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In his determination, the Administrative Law Judge noted that Tax Law § 1133(a) places personal liability for the tax imposed, collected or required to be collected by Article 28 upon any "person required to collect any tax imposed by this article." Such a "person" is defined to include corporate officers and employees who are under a duty to act for such corporation in complying with the requirements of Article 28 (Tax Law § 1131[1]).

The Administrative Law Judge recited applicable case law that established the factors to be considered in determining whether a corporate officer is a person required to collect tax on behalf of a corporation. Based on an analysis of these factors, the Administrative Law Judge determined that petitioner was properly held responsible for the sales tax obligations of the corporation. The Administrative Law Judge found that petitioner was CEO, chairman of the board of directors and a major stockholder of InPhonic who had responsibility for the management of the company's operations, access to its books and records, authority to hire and fire employees, and authority to sign documents, including checks and tax returns, on behalf of the company.

The Administrative Law Judge found that petitioner failed to establish by clear and convincing evidence that he lacked authority, that information was deliberately withheld from

him, that he was otherwise misled with respect to InPhonic's tax obligations, or that he was thwarted or precluded from participation in the corporate duties through no fault of his own. As such, the Administrative Law Judge determined that petitioner was a person responsible for the collection and payment of sales tax pursuant to Tax Law §§ 1131(1) and 1133(a) and personally liable for the sales taxes due on behalf of InPhonic.

ARGUMENTS ON EXCEPTION

On exception, petitioner raises the same arguments as made below. Specifically, petitioner argues that: a) his duties at InPhonic did not include remitting sales tax; b) he did not have sufficient access to InPhonic's books and records; c) he did not have the sole authority to hire and fire employees; d) he did not sign New York State tax returns; and e) he did not have supervisory authority over InPhonic's finances and taxes.

The Division argues that there is no evidence that petitioner lacked authority to act on behalf of the corporation. The Division contends that petitioner failed to meet his burden of proof that he was prevented from exercising his fiduciary and legal duties to ensure that sales tax was properly reported and paid. The Division requests that the exception be denied and the statutory notice be sustained.

OPINION

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]).

The determination of whether an individual is a person under a duty to act for a business is based upon a close examination of the particular facts of the case (*see Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022 [1987]; *Matter of Stacy v. State*, 82 Misc2d 181 [1975]; *Matter of Chevlowe v. Koerner*, 95 Misc2d 388 [1978]; *Matter of Hall*, Tax Appeals Tribunal, March 22, 1990, *confirmed* 176 AD2d 1006 [1991]; *Matter of Martin*, Tax Appeals Tribunal, July 20, 1989, *confirmed* 162 AD2d 890 [1990]; *Matter of Autex Corp.*, Tax Appeals Tribunal, November 23, 1988). Factors to be considered, as set forth in the Commissioner's regulations, include whether the person was authorized to sign the corporate tax return, was responsible for managing or maintaining the corporate books or was permitted to generally manage the corporation (*see* 20 NYCRR 526.11[b][2]). As we summarized previously in *Matter of Constantino* (Tax Appeals Tribunal, September 27, 1990):

[t]he question to be resolved in any 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. The case law and the decisions of this Tribunal have identified a variety of factors as indicia of responsibility: the individual's status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual's knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; the individual's economic interest in the corporation (*Cohen v. State Tax Commn.*, *supra*, 513 NYS2d 564, 565; *Blodnick v. State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536, 538, *appeal dismissed* 69 NY2d 822, 513 NYS2d 1027; *Vogel v. New York State Dept. of Taxation & Fin.*, *supra*, 413 NYS2d 862, 865; *Chevlowe v. Koerner*, 95 Misc2d 388, 407 NYS2d 427, 429; *Matter of William D. Barton*, *supra*; *Matter of William F. Martin*, *supra*; *Matter of Autex Corp.*, *supra*).

We find, as did the Administrative Law Judge, that during the period in question, petitioner was a responsible officer of InPhonic. Petitioner acknowledged that he had responsibility for the day-to-day management of InPhonic and that he received monetary compensation for the services he rendered to InPhonic. It is undisputed that petitioner had access

to InPhonic's books and records and was authorized to make bank deposits on behalf of InPhonic, sign tax returns and checks on its behalf, and hire and fire employees. Checks over a certain dollar amount, initially set at \$50,000.00 and later increased to \$100,000.00, required petitioner's signature in addition to that of another InPhonic employee. Under this dual signature protocol, petitioner signed checks that met or exceeded the requisite dollar threshold, including the payments made pursuant to the Voluntary Disclosure Agreement made with the Division.

Petitioner argued that given the size of the company and the volume of its transactions, he could not as a practical matter personally oversee all aspects of InPhonic's operations. Petitioner relied upon those who reported to him, including, with regard to tax matters, InPhonic's CFO and its outside auditors and tax professionals.

We reject petitioner's argument that he was not a responsible officer because he relied upon those who reported to him (including InPhonic's CFO and its outside auditors and tax professionals), whom he claims were responsible to maintain the books and records. Corporate officers responsible as fiduciaries for tax revenues cannot absolve themselves of liability by merely disregarding their duty and leaving it to someone else to discharge (*see Matter of Blodnick v. State Tax Commn., supra; Matter of Ragonesi v. State Tax Commn.*, 88 AD2d 707 [1982]; *Matter of Laschever*, Tax Appeals Tribunal, March 23, 1989). Rather, 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 that he had the necessary authority, but was thwarted by others in carrying out his corporate duties through no fault of his own (*see Matter of Goodfriend*, Tax Appeals Tribunal, January 15, 1998; *Matter of Moschetto*, Tax Appeals Tribunal, March 17, 1994; *Matter of Turiansky*, Tax Appeals Tribunal, January 20, 1994). Petitioner has made no such showing here.

Petitioner cannot prevail by shifting the blame to the CFO, or the outside auditors and tax professionals. Petitioner failed to offer into evidence any corporate documents or corroborating testimony demonstrating any restrictions or limitations on his corporate powers. There is no evidence or specific instance in which the CFO or anyone else hindered petitioner in carrying out his corporate powers.

Petitioner's reliance on *Chevlowe v. Koerner (supra)* is unfounded. In *Chevlowe*, it is clear that the determination of responsible officer status turns on the facts present in each situation. Furthermore, in *Chevlowe*, the taxpayer, at one point, had complete control of the business and sales tax returns; however, after a merger, the taxpayer was not the individual who was in control of the financial affairs of the firm in question. Such is not the case here. Although petitioner relied upon the CFO and InPhonic's outside auditors and tax professionals, he still had complete authority to review the books and records, as well as to monitor the actions of the persons to whom he delegated responsibility, if he chose to do so.

Petitioner has failed to meet his burden of showing that, during the periods at issue, he did not have, or could not have exercised, sufficient authority and control over the 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. State Tax Commn., supra*; *Matter of LaPenna*, Tax Appeals Tribunal, March 14, 1991).

We find that the Administrative Law Judge fully and correctly addressed the arguments raised in this matter and correctly applied the relevant law to the facts of this case. Petitioner has

offered no evidence below, and no argument on exception, to demonstrate that the Administrative Law Judge's determination is incorrect. As a result, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of David Steinberg is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of David Steinberg is denied; and
4. The Notice of Determination dated February 25, 2008, together with interest, is sustained.

DATED: Albany, New York
February 23, 2012

/s/ James H. Tully, Jr.
James H. Tully, Jr.
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner