

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
FREDERICK P. IPPOLITO	:	DECISION
	:	DTA 823187
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 December 1, 2004 through	:	
May 31, 2006.	:	

Petitioner, Frederick P. Ippolito, filed an exception to the determination of the Administrative Law Judge issued on November 23, 2011. Petitioner appeared by Frank M. Scalera, Esq. The Division of Taxation appeared by Mark Volk, Esq. (David Gannon, Esq., of counsel).

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

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

ISSUE

I. Whether petitioner was personally liable for the sales and use taxes due on behalf of CAI Restaurant, Inc., as a person required to collect and pay such taxes under Tax Law § 1131 (1) and § 1133 (a).

II. Whether the Division of Taxation issued a timely Notice of Determination.

FINDINGS OF FACT

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

CAI Restaurant, Inc. (CAI), did business as Christiano's, an Italian restaurant, pizzeria and steakhouse located in Syosset, New York.

Following an audit, the Division of Taxation (Division) issued to CAI, a notice of determination, dated February 25, 2008, assessing tax due in the amount of \$122,608.03, plus interest, for the period September 1, 2003 through May 31, 2006.

On February 25, 2008, the Division issued to petitioner, a Notice of Determination (assessment number L-029748996) of sales and use taxes due in the amount of \$66,620.28, plus interest, for the period December 1, 2004 through May 31, 2006. The Notice indicated that petitioner was being assessed as an officer or responsible person of CAI Restaurant, Inc., pursuant to sections 1131(1) and 1133 of the Tax Law.

On July 24, 2006, the Division received from CAI a power of attorney in which the corporation appointed Gus Mavroudis, EA, to represent it in the sales tax audit. The power of attorney was dated July 21, 2006 and signed by petitioner as CAI's Vice-President.

On October 15, 2006, Mr. Mavroudis completed a Sales Tax Examination Questionnaire, form DO-1632, on behalf of CAI, in which he indicated that during the three previous years, petitioner was the only officer of the corporation and held the title of President.

On the same date, Mr. Mavroudis completed a Responsible Person Questionnaire on behalf of petitioner, listing petitioner's title as President of CAI. The questionnaire stated that petitioner: was the person responsible for preparing or supervising the preparation of sales tax returns and ensuring the remittance of tax; participated in making significant business decisions;

was responsible for maintaining and managing the business; and, owned both corporate and voting stock.¹ The questionnaire further stated that petitioner had the authority to: manage the business with knowledge and control over financial affairs; pay or direct payments of credits; sign checks; act, on behalf of the business, with the Tax Department; sign consents extending periods of limitation; sign powers of attorney for the business; sign consents fixing tax; sign deferred payment agreements; hire and fire employees; and negotiate loans, borrow money for business or guarantee business loans.

The New York State Department of State Division of Corporations web site states that CAI's initial filing date was June 25, 1996, and its Chairman or Chief Executive officer was petitioner.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that the Tax Law imposes personal liability for taxes required to be collected under Article 28 of the Tax Law upon a person required to collect such tax. For purposes of Article 28, a person required to collect such tax includes, among others, 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]). Based on a review of the evidence in the record, the Administrative Law Judge determined that petitioner was a responsible officer who was required to collect and remit sales tax for CAI, and as such, had personal liability for the taxes not collected or paid.

The Administrative Law Judge noted that petitioner correctly points out that the record lacks evidence establishing that he signed tax returns or paid any tax due on behalf of CAI during

¹ The questionnaire used by the Division's Audit Department asks parties if they own: (1) corporate stock and (2) voting stock. Because of the wording of the questionnaire, it is unclear whether petitioner owned just voting stock or also owned non-voting stock.

the period at issue. However, the only evidence in the record that details petitioner's duties and responsibilities with regard to CAI, is the Responsible Person Questionnaire. The Administrative Law Judge determined that absent any documentary evidence or sworn testimony, the questionnaire established that petitioner was a responsible person.

The Administrative Law Judge rejected petitioner's argument that certain circumstances surrounding his involvement in the business should limit his liability. The Administrative Law Judge determined that absent neither contemporaneous documentary evidence, or sworn statements, these allegations were insufficient. The Administrative Law Judge concluded that the focus is on petitioner's authority, and having the authority but electing not to use it, is not a valid defense.

The Administrative Law Judge determined that the Notice of Determination issued on February 25, 2008 for the return to be filed by March 21, 2005, was within three years from the date of the filing of the return for the initial period assessed.

ARGUMENTS ON EXCEPTION

On exception, petitioner did not challenge the Administrative Law Judge's determination with regard to the timeliness of the Notice of Determination. Petitioner argues that he was not a responsible officer for the relevant periods and did not sign checks. Petitioner further argues that the record lacks any evidence that he signed tax returns, or paid any tax due on behalf of CAI during the periods at issue. Petitioner asserts that because an individual is an officer of the corporation, this does not mean that a person is also a responsible officer. Petitioner argues that the Division did not produce any sales tax or corporate tax returns signed by him, which indicates that he did not have the power to sign tax returns. Petitioner argues that his wife, Christine Ippolito, signed all of the returns. Petitioner further states that the Division submitted no

evidence that he was authorized to hire and fire employees, or that he had knowledge and control over financial matters of the corporation, or had authorization to write checks on behalf of the corporation.

The Division argues that the Administrative Law Judge correctly decided the relevant issues and that the determination should be affirmed. The Division also argues that the relevant Form DO-1632, Sales Tax Examination Questionnaire, indicated that petitioner was a principal officer of CAI during the period at issue and the Responsible Person Questionnaire indicated the same. Such was in conformity with the New York State Department of State Division of Corporations information regarding the restaurant.

OPINION

Tax Law § 1133 (a) imposes upon any person required to collect the tax imposed by Article 28 of the Tax Law personal liability for the tax imposed, collected or required to be collected. A person required to collect tax is defined to include, among others, 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 question to be resolved 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 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 of New York*, 82 Misc2d 181 [1975]; *Matter of Chevlowe v Koerner*, 95 Misc2d 388 [1978]; *Matter of Hall*, Tax Appeals Tribunal, March 22, 1990, *sub nom. Matter of Hall v Tax Appeals Trib. of State of N.Y.* 176 AD2d 1006 [1991]; *Matter of Martin*, Tax Appeals Tribunal, July 20, 1989, *sub nom. Martin v*

Commissioner of Taxation & Fin. 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*).”

The evidence in the record shows that petitioner was an individual who had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee for CAI. The Responsible Person Questionnaire submitted by petitioner's representative listed petitioner's title as President of CAI. The questionnaire also indicated that petitioner was a person responsible for preparing or supervising the preparation of sales tax returns, participated in making significant business decisions, was responsible for maintaining and managing the business and owned corporate voting stock. The questionnaire indicated that petitioner had the authority to manage the business with knowledge and control over the financial affairs of the business; pay or direct payments of liability; sign checks; act on

behalf of the business; sign consents extending periods of limitation; sign powers of attorney for the business; hire and fire employees; negotiate loans; borrow money or guarantee business loans.

We reject petitioner's argument that he was not a responsible officer because he asserts that he stepped into his wife's shoes through a power of attorney during her illness. The focus of the inquiry is on petitioner's authority; having the authority, but choosing not to exercise it is not a valid defense (*Matter of Ragonesi v New York State Tax Commn.*, 88 AD2d 707 [1982]).

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 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 New York State Tax Commn.*, 124 AD2d 437 [1986], *appeal dismissed* 69 NY2d 822 [1987]; *Matter of LaPenna*, Tax Appeals Tribunal, March 14, 1991).

Further, petitioner sought to introduce additional evidence with his letter brief in reply, which was rejected. We have held that a fair and efficient hearing process must be defined and

final, and that the acceptance of evidence after the record is closed is not conducive to that end and does not provide an opportunity for the adversary to question the evidence on the record (*see Matter of Purvin*, Tax Appeals Tribunal, October 9, 1997; *see also Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991). As a result, we do not consider as facts matters that were not made part of the record below.

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

DATED: Albany, New York
August 23, 2012

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

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