

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GERALD J. RONCOLATO, OFFICER OF ROBLIN INDUSTRIES, INC.	:	DETERMINATION
	:	
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 1983 through February 28, 1986.	:	

Petitioner, Gerald J. Roncolato, officer of Roblin Industries, Inc., 21 Clark Court, Elma, New York 14059, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1983 through February 28, 1986 (File No. 806017).

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 462 Washington Street, Buffalo, New York, on December 7, 1989 at 9:15 A.M., with all briefs to be submitted by March 19, 1990. Petitioner appeared by Jaeckle, Fleischmann & Mugal (Paul A. Battaglia, Esq.). The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUES

I. Whether petitioner was a person required to collect sales and use taxes on behalf of Roblin Industries, Inc. within the meaning of Tax Law §§ 1131(1) and 1133(a) for the period at issue herein.

II. Whether petitioner is properly liable pursuant to Tax Law §§ 1131(1) and 1133(a) for Roblin Industries, Inc.'s failure to pay sales taxes on its purchases.

FINDINGS OF FACT

On March 27, 1987 following an audit, the Division of Taxation issued to petitioner, Gerald J. Roncolato, officer of Roblin Industries, Inc., a Notice of Determination and Demand

for Payment of Sales and Use Taxes Due which assessed \$118,535.04 in tax due, plus penalty and interest, for the period March 1, 1983 through February 28, 1986.

Roblin Industries, Inc., a New York corporation ("Roblin Industries" or the "corporation"), is a publicly-held company having approximately 3,750,000 shares of common stock issued and outstanding. The corporation has approximately 4,200 shareholders. Shares of Roblin Industries were traded on the American Stock Exchange and in the over-the-counter market.

Roblin Industries, over the years, engaged in a number of lines of business either directly through unincorporated divisions or indirectly through subsidiary corporations. At one time, the corporation was engaged in the manufacture of steel, the manufacture of shopping carts, the fabrication of steel and aluminum architectural windows, the manufacture of steel fire proof doors, the manufacture of steel ceiling grid systems, and the processing of scrap steel. Operations were located in various parts of the United States and, for a time, in Canada and England.

In 1979, Roblin Industries had sales in excess of \$132,000,000, approximately 1800 employees, assets in excess of \$91,500,000 and a shareholders' equity of approximately \$25,000,000. Business and other conditions required the corporation to scale back its operations, however, so, one by one, lines of business were either sold off or discontinued. Roblin Industries eventually filed a petition for protection under Chapter 11 of the Bankruptcy Code on July 1, 1985. That proceeding was converted to one under Chapter 7 of the Bankruptcy Code on August 13, 1987 and the corporation is now in the process of liquidation. Even at the time operations completely ceased in 1986, Roblin Industries was a substantial company, having in its last full year of operations sales of approximately \$35,000,000 and approximately 350 employees.

During the period covered by the audit, the corporation was directly engaged in two principal lines of business: a scrap metal business conducted under the name "Roblin Scrap Products Company", which business was discontinued in February 1986; and the manufacture

of steel under the name "Roblin Steel Company" ("Roblin Steel"), which business continued until the manufacturing plant closed in November 1986 and the corporation completely ceased operations in December 1986. Both businesses were conducted as unincorporated divisions of Roblin Industries.

Petitioner joined Roblin Industries in 1974 as vice president, finance and administration, and treasurer. Daniel A. Roblin, Jr., the corporation's founder and long-time president resigned as president of Roblin Industries effective October 31, 1985. Petitioner became president of Roblin Industries on November 1, 1985. When petitioner became president, he also became a member of the board of directors. Petitioner held those positions and the office of treasurer until his resignation on December 31, 1986. Mr. Roblin remained chairman of the board of the corporation throughout that time.

Petitioner was a full-time, salaried employee of Roblin Industries. Petitioner's salary was set by Mr. Roblin. During the years in question his salary was as follows: 1983 - \$57,500.00; 1984 - \$118,446.00; 1985 - \$115,378.00; and 1986 - \$95,500.00. Petitioner's salary was dependent to a significant degree upon the earnings of the corporation. His salary was reduced in 1985 and 1986 because of the corporation's deteriorating earnings. In 1984, \$50,000.00 of petitioner's salary was a bonus paid to him as a participant in the corporation's bonus program. The other corporate officers also participated in this bonus program. In 1984, the secretary of the corporation was paid a bonus of \$17,500.00.

With respect to the years in question, except for 1984 when Mr. Roblin was the highest compensated officer, petitioner was the highest compensated employee or officer of the corporation.

Mr. Roblin's compensation during the years at issue was as follows: 1983 - \$42,001.00; 1984 - \$218,868.00; and 1985 - \$91,808.00. There is no evidence in the record that Mr. Roblin received a salary in 1986.

Petitioner owned a small amount of the common stock of the corporation. Petitioner's stock holdings amounted to less than one percent of the total number of shares issued and

outstanding. Mr. Roblin was the largest single shareholder of the corporation during the audit period. His holdings amounted to about one percent of the total number of shares issued and outstanding.

During the period in question, Roblin Industries operated three cost centers, Corporate Headquarters, Roblin Steel and Roblin Scrap. Roblin Scrap maintained its operations in Lackawanna, New York. Roblin Steel maintained its offices at 101 East Avenue, North Tonawanda, New York. Corporate Headquarters maintained offices at 241 Main Street, Buffalo, New York, until August 1985, when Corporate Headquarters moved to the North Tonawanda site. While Corporate Headquarters was a cost center, it was not an operating unit.

The entire assessment herein results from a Division determination, following an audit, that Roblin Industries improperly failed to pay sales and use taxes upon certain of its purchases. The vast majority of the purchases in question were made by Roblin Industries' steel manufacturing business, Roblin Steel.

Throughout the audit period, Roblin Industries had a decentralized corporate structure. Under that structure, Roblin Steel operated as an autonomous unit. It had its own offices; its own Division president through October 1985; its own vice-president and controller; its own administrative and accounting personnel; its own payroll; it maintained its own books and records; it prepared and filed its own sales tax returns. Roblin Steel was responsible for paying its own bills. In addition, Roblin Steel was responsible for purchasing its own materials, and manufacturing and marketing its product.

Petitioner was employed at Corporate Headquarters throughout the period at issue. As vice-president, finance and administration, and treasurer of Roblin Industries, Inc., petitioner was responsible to and reported directly to Mr. Roblin, the corporation's president. Petitioner's day-to-day responsibilities involved the overall administration of the corporation. He reviewed monthly operations reports supplied to him by the divisions. These reports included profit-and-loss statements, balance sheets and cash flow reports. The reports from the divisions were not intended to advise petitioner of whether the divisions were meeting their sales tax obligations.

Indeed, the reports contained insufficient information from which petitioner could make such a determination. Petitioner analyzed the division reports in one consolidated report and presented his consolidated report to the corporation's management committee and its board of directors. (The management committee set corporate policy. Petitioner, along with the other corporate officers, was a member of this committee.) Petitioner's consolidated reports were intended to provide a picture of the corporation's overall financial position and to point out potential problems or areas of concern. Division heads also reported on operations directly to the board and management committee.

Petitioner's responsibilities also included negotiating loans and rescheduling or restructuring loan repayments with various banks on behalf of the corporation. Petitioner did not have authority to bind the corporation in such matters, but would present whatever arrangement had been negotiated to the board for its approval.

Petitioner was also involved in the corporation's sale of various lines of businesses. He consulted with the corporation's outside attorneys and its in-house counsel when necessary and he consulted with the corporation's outside accountants when necessary. The accountants kept petitioner advised of investment tax credits available to the corporation. Petitioner, in turn, advised the president and the board. He signed the corporation's Federal income tax returns and its New York franchise tax reports, both of which were prepared by the corporation's outside accountants.

Petitioner's reports to the corporation's board of directors during the audit period, in addition to reports on general business conditions and banking matters, included reports on investment tax credits, a Canadian tax matter, the status of the corporation's payments of salaries, withholding taxes, utilities and an IRS settlement. Petitioner also reported on the corporation's cash flow problems, and sales of its business lines.

In July 1983 petitioner, on behalf of the corporation, reported to the Division of Taxation changes in the corporation's taxable income following an audit by the Internal Revenue Service with respect to the years 1976 through 1980. Petitioner signed reports in

respect of such changes which were required to be filed with the Division under Article 9-A.

Petitioner did not have responsibility for division operations. The heads of those divisions reported to the executive vice president of operations who, in turn, reported to the president. Petitioner, as vice-president, finance and administration, was responsible for advising the unit managers, and had access to division personnel and records to carry out that function. Petitioner had no authority to give direction to division management, but was responsible to meet the divisions' cash requirements, which were based upon the division heads' projections.

As noted previously, throughout the audit period Roblin Steel prepared and filed its own sales tax returns. These returns were prepared under the corporate name, Roblin Industries, and were signed by the manager of general accounting of Roblin Steel. If this manager required advice with respect to the preparation of these returns, he consulted directly with the corporation's outside accountants. To the extent that such returns were reviewed, they were reviewed by Roblin Steel personnel only. An employee of Roblin Steel was responsible for the payment of sales and use taxes resulting from its purchases.

Petitioner was not involved in the preparation of Roblin Steel sales tax returns; nor did petitioner sign any such returns.

Throughout the audit period, Roblin Steel maintained its own checking accounts. Those accounts were maintained at the Marine Midland Bank. At all times relevant hereto the accounts required two signatures to withdraw funds. There were five authorized signatories on the Roblin Steel account. Petitioner was one of those authorized signatories.

Checks relating to the operations of Roblin Steel, including checks in payment of sales taxes, were drawn upon the accounts of Roblin Steel and were prepared and issued by, and at the direction of, personnel of Roblin Steel and not petitioner. Generally those checks bore facsimile plate signatures and were not manually signed. The facsimile plate was not in the control of petitioner; rather, it was in the control of Roblin Steel personnel.

Petitioner's signature was among those reproduced on the facsimile plate and

occasionally appeared on Roblin Steel checks, including those for payment of sales taxes.

Petitioner would manually sign checks of Roblin Steel only in those limited instances where a manual signature was required, e.g., in cases of checks which were to be certified, and where other authorized signatories were not available. When petitioner did manually sign checks of Roblin Steel, he did so at the request of Roblin Steel personnel.

On March 14, 1986, petitioner signed a Consent Extending Period of Limitation for Assessment of Sales and Use Taxes under Articles 28 and 29 of the Tax Law (Form AU-2.10) extending the period for assessment against Roblin Industries for the period at issue in the instant proceeding until December 20, 1986. Petitioner executed this consent at the request of the personnel of Roblin Steel involved in the sales tax audit because the consent required the signature of a corporate officer. At that time the corporation had only two officers. The other officer, Ruby E. Tresch, also signed a Consent Extending Period of Limitation for Assessment of Sales and Use Taxes at the request of Roblin Steel personnel.

Petitioner did not deal with the sales tax auditors who conducted the audit in question. A. Robert Wolf, a former employee of Roblin Steel, represented Roblin Steel in the audit, having been retained for that purpose as an independent consultant. Mr. Wolf was retained on behalf of Roblin Steel by Frank C. Simpson, who was then the controller of Roblin Steel. The Audit Method Election for the audit in question was signed by Mr. Simpson.

Petitioner's day-to-day responsibilities did not change when he became president of Roblin Industries on November 1, 1985. At that point he was heavily involved with working with banks in order to have enough cash available to keep the divisions operational. This responsibility consumed most of petitioner's time during his tenure as president.

CONCLUSIONS OF LAW

A. Tax Law § 1133(a) imposes personal liability for taxes imposed, collected or required to be collected under Article 28 of the Tax Law upon a person required to collect such tax. A person required to collect such tax is defined as "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 compliance with the requirements of Article 28 so that the individual would have personal liability for the taxes not collected or paid depends on the particular facts (Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564; Vogel v. New York State Dept. of Taxation & Fin., 98 Misc 2d 222, 413 NYS2d 862).

B. "The 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 interests 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 427, 429; Chevlowe v. Koerner, 95 Misc 2d 388, 407 NYS2d 427, 429; Matter of William D. Barton, *supra*; Matter of William F. Martin, *supra*). The holding of corporate office does not in and of itself impose liability (Chevlowe v. Koerner, *supra*)." (Matter of Frank S. Constantino, Officer of Jordan Elevator, Co., Inc., Tax Appeals Tribunal, September 27, 1990.)

C. Under the facts and circumstances herein, it must be concluded that petitioner had or could have had sufficient authority and control over the affairs of Roblin Industries, Inc., such that he was under a duty to act for Roblin Industries in complying with the requirements of Article 28 of the Tax Law. The Division's assessment against petitioner must therefore be sustained.

Petitioner was actively and heavily involved in the overall management of Roblin Industries. He sat on the management committee that set corporate policy. He reviewed operations reports supplied to him by the steel manufacturing and scrap units. He analyzed these reports with an eye toward the bottom line, reporting on overall unit activity, the corporation's financial position and potential problems and concerns. He was actively involved with the major financial matters affecting the corporation. He worked with banks and was involved in the corporation's sale of its various lines of businesses. He reported to the

corporation's board of directors on a variety of serious matters, including status of payments, tax matters, and cash flow problems. Petitioner signed the corporation's franchise tax reports and was an authorized signatory on bank accounts. His facsimile signature appeared on checks in payment of sales taxes. Although not referred to as such, petitioner was clearly the chief financial officer of the corporation and was compensated accordingly.

The foregoing facts compel the conclusion that petitioner did have sufficient authority and control over the affairs of Roblin Industries such that he was under a duty to act, and, in fact, could have acted for the corporation in respect of its sales tax obligations.

Petitioner contended that given the corporation's decentralized structure, the fact that the division heads were responsible for their operations, and the fact that sales taxes were prepared at the division level, he was not under a duty to act for the corporation in complying with its sales tax obligations. Petitioner's contention, however ignores the fact that petitioner had access to the returns themselves and the books and records from which the returns were prepared. Petitioner clearly had authority to review both the returns and the records. He was thus more than a mere subordinate in the corporation. As the chief financial officer of the corporation he was ultimately responsible for the corporation's compliance with the sales tax law. That the preparation of sales tax returns was delegated to an employee at the division level does not relieve petitioner of this duty.

It should be noted that when he became president of Roblin Industries, petitioner not only continued in his duties as vice-president, finance and administration, but also assumed the top of the corporation's chain of command. The division heads thus reported to him through the executive vice-president. Thus petitioner's argument that he was a subordinate is no longer even available with respect to the period he was president of the corporation. That, as president, petitioner may have reported to Mr. Roblin as chairman of the board, does not alter the fact that, as president, petitioner was the person to whom the division heads reported.

D. With respect to Issue II, the Tax Appeals Tribunal considered this issue in two companion cases, Matter of Martin Laschever, Officer of Winston Limousine Service, Inc. (Tax

Appeals Tribunal, March 23, 1989) and Matter of Martin Laschever, Officer of Winston Coach Corporation (Tax Appeals Tribunal, March 23, 1989). In these cases, the Tribunal reached a conclusion opposite to that urged by petitioner herein. The Tribunal concluded, in both of the above-noted cases, that:

"[P]etitioner, as a responsible officer of [the corporation], is clearly liable for the sales tax deficiency asserted against [the corporation] by the Division since he was under a duty to act for the corporation with respect to compliance with any provision of Article 28 of the Tax Law." (Matter of Martin Laschever, Officer of Winston Limousine Service, Inc., supra; Matter of Martin Laschever, Officer of Winston Coach Corporation, supra.)

E. The petition of Gerald J. Roncolato, Officer of Roblin Industries, Inc. is in all respects denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated March 27, 1987, is sustained.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE