STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of MARVIN H. MASON, INC. 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, 1982 through November 30, 1985.	DETERMINATION DTA NOS. 808776 AND 808777
In the Matter of the Petition of MARVIN H. MASON, OFFICER OF MARVIN H. MASON, INC. 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, 1982 through November 30, 1985.	

Petitioners Marvin H. Mason, Inc. and Marvin H. Mason, officer of Marvin H. Mason, Inc., 4775 Sheridan Drive, Williamsville, New York 14221, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1982 through November 30, 1985.

A consolidated hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on November 7, 1991 at 1:15 P.M., with all briefs to be submitted by March 10, 1992. Petitioners filed their briefs on January 15, 1992 and March 10, 1992. The Division of Taxation filed its brief on February 18, 1992. Petitioners appeared by Phillips, Lytle, Hitchcock, Blaine & Huber, Esqs. (David J. McNamara, Esq., and Martha L.Salzman, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Kenneth Schultz, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation correctly determined that sales and use taxes were due from Marvin H. Mason, Inc.

II. Whether petitioner Marvin H. Mason was a person required to collect sales and use taxes on behalf of Marvin H. Mason, Inc. within the meaning and intent of Tax Law §§ 1131(1) and 1133(a) for the period at issue.

FINDINGS OF FACT

On the basis of a field audit, the Division of Taxation ("Division") issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated February 28, 1989, to petitioner Marvin H. Mason, Inc. which assessed sales and use taxes for the period December 1, 1982 through November 30, 1985. The notice assessed sales and use taxes in the amount of $11,067.24, plus penalty of $2,822.80 and interest of $8,643.34, for a total amount due of $22,533.38. The Division also issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated February 28, 1989, to petitioner Marvin H. Mason, officer of Marvin H. Mason, Inc., which assessed the same amount of tax, penalty and interest as was assessed against the corporation. The latter notice explained that petitioner was being held personally liable as a responsible officer of Marvin H. Mason, Inc.

The field audit report in this matter shows that during the audit petitioners were asked to verify that the corporation was a registered vendor for sales tax and that the corporation filed sales and use tax returns. The Division did not receive the requested verification for the audit period. The Division's workpapers also show that the assessment of sales and use taxes was based on the gross sales reported by the corporation on its income tax returns for the years 1983 through 1985.

In 1960, petitioner Marvin H. Mason was admitted to practice law. Since his admission to the bar, he has practiced exclusively in the area of workers' compensation law.

During the period in issue, Mr. Mason was a partner in the law firm of Phillips, Lytle, Hitchcock, Blaine & Huber in Buffalo, New York. In this position, he was in charge of the workers' compensation department which, during the period in issue, consisted of eight

attorneys who specialized in workers' compensation defense. Mr. Mason's duties included managing the workers' compensation practice, billing clients, work assignments and handling hearings.

Mr. Mason's law firm required him to have 1,700 to 1,800 billable hours a year. In addition to meeting the firm's requirement for billable hours, Mr. Mason was also responsible for billing and dealing with clients. This required more than the 1,800 billable hours required by the law firm.

In 1979, Mr. Mason purchased real estate in the Town of Pendleton, which is approximately 20 miles from Buffalo, New York. The real estate included a main building with a hardware store and two buildings which were adjacent to the hardware store.

At the time he purchased the building that housed the hardware store, it was contemplated that Mrs. Mason would run the business. Mr. Mason did not intend to manage the hardware store because his workers' compensation practice required all of his time. At the time he purchased the property, Mr. Mason was usually in his office by 7:00 A.M. and generally did not return home until 8:00 P.M.

Upon the advice of Mr. Mason's attorney, the hardware store was separately incorporated from the balance of the real estate under the name of Marvin H. Mason, Inc. Mr. Mason's attorney also recommended that Mr. Mason should elect to have the corporation taxed under subchapter S of the Internal Revenue Code. Mr. Mason became the president of the corporation and its sole shareholder. Mr. Mason's attorney felt that all of the shares of stock should be held by Mr. Mason because Mrs. Mason's health was uncertain. Mrs. Mason was also appointed to a corporate office, although it was not known at the time of the hearing what office she held.

After Mr. Mason purchased the hardware store, Mrs. Mason took charge of the business which operated under the name of Pendleton Hardware. Mrs. Mason was at the store on a daily basis and managed whatever had to be done.

In late 1981, the operation of the hardware store was taken over by a former employee of

the business. The former employee ran the business for about a year and then stopped. At the time he stopped operating the business, money was due Mr. Mason on a note and for rent.

When the former employee left, Mrs. Mason expressed a desire to resume operating the hardware store. In the discussion which followed, Mr. Mason stated that he felt it was in Mrs. Mason's best interests not to go back into the business. Furthermore, he did not have time to devote to the business. Mrs. Mason's wishes prevailed and, in late 1982, she resumed operating the store. She continued to operate the store until late 1985.

Mr. Mason felt that Mrs. Mason was qualified to manage the hardware store because of her training as a bookkeeper and her prior history of managing the books of a Western Auto store. She had also worked as a bookkeeper for a medium-sized manufacturing company.

During the period in issue, Mr. Mason believed that sales taxes were being paid. This belief was based on the fact that Mrs. Mason was an experienced bookkeeper who would have been familiar with sales taxes from the prior period when she operated the hardware store. In addition, Mr. Mason reasoned that Mrs. Mason would have been acquainted with sales tax requirements from a previous position in which she was responsible for the books of the Western Auto store.

Mr. Mason first learned that there was a problem involving sales tax in June 1988 when he received notice of an audit. The notice was received approximately 2½ years after Mrs. Mason ceased operating the business and approximately 8 months after Mrs. Mason passed away.

When Mr. Mason learned that there was an issue with respect to whether sales tax had been paid, he located certain files which contained copies of letters from his wife to the Department of Taxation and Finance. The letter pertaining to the year 1983 stated as follows:

"January 30, 1984

State of New York
Finance and Taxation
Sales Tax Division
Albany N=Y= [sic] 12201

Subject: Sales Tax 1983
MHM Inc., creditor for Penton Hardware, bankrupt

Gross Sales for year 1983		$64,128
tax exempt		4,298
Net taxable sales		58,830
Sales tax on above	4,188	

Dorothy A. Mason

encl: chk"

Although the amounts differ, the remaining letters reported sales for the years 1984 and 1985 in the same format as the letter for the year 1983. However, the letter which reported sales for the year 1985 also stated that "this is a final report - business sold December 20, 1985." These letters reinforced Mr. Mason's belief that sales tax had been paid. After locating the letters, Mr. Mason attempted, without success, to obtain copies of the checks referred to in the letters.

The hardware store maintained records which were stored in plastic bags and then placed in boxes. The boxes were stored on rafters in a garage which was adjacent to the hardware store. Later, the records were apparently thrown out while Mr. Mason's son and his friends were cleaning the garage in preparation for a new tenant.

Mrs. Mason shared Mr. Mason's understanding that he would not have any involvement in the operation of the business. Mr. Mason never worked at the hardware store and, although he was a signatory of the corporation's checking account, he did not have any recollection of drafting checks to pay any of the business's creditors.

The bookkeeping for the business was performed by Mrs. Mason at an office in the store. Mr. Mason did not keep the books for the business nor did he ever review the books of the business.

Only Mrs. Mason hired and fired employees. In addition, Mrs. Mason held herself out

as the owner of the business and made the decision as to which bills to pay. It was Mrs. Mason's practice to pay larger bills by money order or certified check.

Mr. Mason never attended trade shows or conventions for hardware dealers. However, Mrs. Mason did go to these types of events.

Mr. Mason never received a dividend or any compensation from the business. Moreover, he always paid for the merchandise which he took from the hardware store.

When the corporation began, it took out a small loan. It is Mr. Mason's recollection that he and his wife signed for the loan. On occasion, Mr. Mason loaned money to the corporation. When this occurred, he took back a note. A portion of these loans were repaid.

At the hearing, Mr. Mason stated that he assumed that the corporation filed Federal income tax returns and that either he or his wife would have signed the returns. Also, during the period in issue, Mr. Mason and his wife filed joint personal income tax returns.

During the audit period, the corporation did not pay rent for the use of the business premises.

At the hearing, the Division introduced into evidence an affidavit from a Ms. Barbara Zell. The affidavit stated, in relevant part, that she is employed by the Division and that her duties include the maintenance of the Division's records of registrations for all business taxes including sales tax vendors. The affidavit continues that the affiant conducted a search of the Division's records using the name Marvin H. Mason, Inc. and EIN 16-1127059 to determine whether the corporation was a sales tax vendor. According to Ms. Zell, the search of the Division's records shows that Marvin H. Mason, Inc. has never been registered as a sales tax vendor with the State of New York. The only information which Ms. Zell found on this corporation was a "dummy" account which was created by the Division on its computer system on November 30, 1988 in order to track the assessments at issue herein.

CONCLUSIONS OF LAW

A. Petitioners' first argument is that they paid the tax in issue. Petitioners submit that the corporation mailed letters detailing the sales tax due for each year and enclosed a check or

money order with each letter. It is argued that it is not surprising that the tax allegedly paid was not credited to the corporation's account since the corporation's taxpayer identification number or full name did not appear on the letters. Petitioners also submit that since the auditor and Ms. Zell were not present at the hearing, petitioners' attorney did not have an opportunity to cross-examine them regarding potential miscrediting of the sales tax paid by the corporation and the basis for their statements. Petitioners contend that any weight given to the statements included in the audit report, workpapers and affidavit should reflect the inability to cross-examine the auditor and Ms. Zell.

In response to the foregoing, the Division submits that the letters relied upon by petitioners raise more questions than they answer. The Division notes that there is no evidence that the letters were mailed, that there is no explanation of what the phrase which appears on the letters, "MHM Inc., creditor for Penton Hardware, bankrupt", means, that no checks evidencing payment were produced at the hearing and that the suggestion that payment was made by money order is pure speculation. The Division also notes that it told petitioners' counsel before the hearing that it did not plan on having the auditor appear at the hearing. The Division's representative then states that he was never told there was any objection to not having the auditor present. It is argued that if petitioners needed the auditor's testimony, they could have issued a subpoena to him. Similarly, if it were necessary, petitioners could have requested that the record be left open to secure Ms. Zell's testimony.

Petitioners reply to the Division by reiterating their position that the corporation paid the tax on an annual basis with its cover letters. In addition, the "Subject" heading on each letter refers to the bankruptcy of the former employee who had run the business. Petitioners contend that it is more than mere speculation that payment was made by money order.

Petitioners note that they do not fault the Division for its failure to credit the corporation with the payments which were made because the corporation's full name or identification number do not appear on the letters. However, petitioners submit that they should not be penalized twice.

Finally, petitioners reassert their position that the Division should have called the auditor and Ms. Zell to testify and that because of the Division's failure to do so, the Division's workpapers and Ms. Zell's affidavit are entitled to little weight.

B. The letters submitted by petitioners are not sufficient to establish that the tax in issue has been paid. As noted by the Division, there is no evidence that the letters presented by petitioners were ever mailed. Further, it is mere speculation to assert that checks or money orders were mailed with the letters.

Petitioners' argument that the statements in the audit report are entitled to little weight because the auditor was not present is without merit. It is well established that the facts set forth in an audit report may be considered despite the absence of the auditor at the hearing (see, Matter of Mira Oil Company v. Chu, 114 AD2d 619, 494 NYS2d 458, lv denied 68 NY2d 602, 505 NYS2d 1026). If the auditor's testimony were crucial to petitioners' case, a subpoena could have been issued to secure the auditor's attendance at the hearing. In this regard, it is noted that the burden of proof is on the taxpayers to show that they are entitled to credit for particular remittances since they initiated the proceeding (see, State Administrative Procedure Act § 306.1).

The same reasoning applies to the affidavit of Ms. Zell. If petitioners felt that they needed an opportunity to cross-examine Ms. Zell, they could have requested a continuance in order to secure her attendance. Having declined to do so, their argument that the affidavit is entitled to little weight is unpersuasive.

C. With respect to the second issue, petitioners argue that Mr. Mason is not responsible for the taxes in issue because he neither had nor exercised the right to hire or fire employees, did not derive substantial income from the corporation and that the responsibilities of a corporate president would not include preparing and filing sales tax returns. Petitioners argue that Mr. Mason did not have any daily responsibility for the corporation's financial affairs or management, that Mr. Mason did not believe that he had the authority to draft corporate checks and did not do so, and that Mr. Mason did not prepare the corporation's sales and use tax

returns.

The Division responds that the failure of petitioners to solicit testimony from the attorney who helped set up the business, and who could explain the duties and responsibilities of the corporate offices, reflects negatively on petitioners' case. The Division also contends that, without the corporate records, it is impossible to determine what duties, powers and responsibilities Mr. Mason had. The Division points to the following facts which allegedly support its position: Mr. Mason was the president of the corporation and owned all of the shares of stock; Mr. Mason leased the building in which the corporation conducted its business; Mr. Mason had the authority to sign checks on the corporation's checking account; and Mr. and Mrs. Mason filed joint income tax returns and therefore the income or loss from the hardware business passed through to Mr. Mason.

In reply, petitioners argue that the testimony of the attorney who helped set up the business would have been merely cumulative and that the failure to call him has no implications on petitioners' case. Petitioners then reiterate their prior arguments in support of their position that Mr. Mason is not responsible for the taxes in issue.

D. In general, 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. Tax Law § 1131(1) defines persons required to collect tax to include, among others, corporate officers or employees who are under a duty to act for such corporation in complying with the requirements of Article 28.

The resolution of whether a person is responsible to collect and remit sales tax for a corporation so that the person would have personal liability for the taxes not collected or paid depends on the facts of each case (Matter of Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564; Stacy v. State Tax Commn., 82 Misc 2d 181, 183, 368 NYS2d 448). The relevant factors to consider when determining whether a person has a duty to act for the corporation are whether the person is authorized to sign the corporation's tax returns or is responsible for maintaining the corporate books, or responsible for the corporation's management (20 NYCRR

526.11[b][2]). Other factors which have been examined include: the authority to hire and fire employees, the derivation of substantial income from the corporation or stock ownership, and the authority to write checks on behalf of the corporation (see, Matter of Cohen v. State Tax Commn., supra; Matter of Blodnick v. State Tax Commn., 124 AD2d 437, 507 NYS2d 536, appeal dismissed 69 NY2d 822, 513 NYS2d 1027; Matter of Autex Corp., Tax Appeals Tribunal, November 23, 1988).

In evaluating the foregoing criteria, one should not merely match the taxpayer's activities with the traditional indicia of responsibility (Matter of Taylor, Tax Appeals Tribunal, October 24, 1991). If the corporate official does not have the authority to remit the taxes, he will not be held as a responsible officer under Article 28 of the Tax Law (see, Matter of Taylor, supra; Matter of Constantino, Tax Appeals Tribunal, September 27, 1990). On the other hand, corporate officials will not be absolved of responsibility by disregarding their duty and relying on others to fulfill their obligations (Matter of Blodnick v. State Tax Commn., supra; Matter of Baumvoll, Tax Appeals Tribunal, November 22, 1989).

E. In essence, Mr. Mason argues that although he was the president and sole shareholder of Marvin H. Mason, Inc., he had such little contact with the corporation that he should not be held responsible for the taxes due.

F. The issues presented herein are similar to those presented in Matter of LaPenna (Tax Appeals Tribunal, March 14, 1991). In LaPenna, Mr. and Mrs. LaPenna became involved with the corporation, LaPenna Electric Contractors, Inc., at the request of their son, James LaPenna. As a member of an electrical contractors' union, James LaPenna was barred from involvement with an electrical contracting business. During the year at issue, Mrs. LaPenna was the president and a shareholder of the corporation and Mr. LaPenna was the vice-president, secretary and shareholder of the corporation.

During the periods in issue, neither Mr. LaPenna nor Mrs. LaPenna had any duties with regard to the operation of the corporation. The duties and responsibilities of operating the business were performed by James LaPenna.

After the corporation filed for bankruptcy, the Division issued assessments to Mr. and Mrs. LaPenna which assessed sales and use taxes for the taxes due from the corporation. On review, the Tax Appeals Tribunal, citing Matter of Blodnick v. New York State Tax Commn. (supra), sustained the assessments. In reaching its decision, the Tribunal noted:

> "that petitioners are responsible persons within the meaning and intent of section 1131(1) of the Tax Law because as the only shareholders and officers of the corporation they clearly had actual authority over the corporation. The fact that petitioners failed to exercise such authority is, in our view, irrelevant to the question of their liability."

The Tribunal also noted that Mr. and Mrs. LaPenna had not demonstrated that their son precluded them from exercising their authority. Rather, petitioners only established that they declined to exercise their authority over the corporation. It is also instructive that, in its decision, the Tribunal pointed out that it is not an essential element for individuals to be unable or unwilling to identify who, if not they, was responsible for the taxes in issue in order to be held liable.

G. It is concluded that the principles set forth in LaPenna are applicable herein and require the conclusion that Mr. Mason is responsible for the taxes in issue. As the sole shareholder and president, Mr. Mason clearly had actual authority over the corporation. Therefore, Mr. Mason is a person required to collect sales tax within the meaning and intent of Tax Law § 1131(1). The fact that Mr. Mason did not exercise his authority is irrelevant to the question of his liability.

In reaching this determination, it is observed that this is not a case where Mrs. Mason precluded Mr. Mason from exercising his authority (cf., Matter of Constantino, supra [where a minority shareholder was prevented from acting by another within the corporation]). Rather, this is a case where Mr. Mason chose not to exercise any responsibility over the corporation.

It is also noted that petitioners' reliance upon Vogel v. New York State Dept. of Taxation & Fin. (98 Misc 2d 222, 413 NYS2d 862) and Matter of Sausto (State Tax Commn., January 2, 1980) is misplaced. Neither case presented a situation where the taxpayer was able to act but declined to do so.

H. The petitions of Marvin H. Mason, Inc. and Marvin H. Mason are denied and the notices of determination and demands for payment of sales and use taxes due, dated February 28, 1989, are sustained together with such interest as may be lawfully due.

DATED: Troy, New York
October 8, 1992

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE