STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PAUL J. LEDMAN, OFFICER OF BLAZING EAGLES CORP.	:	DETERMINATION DTA NO. 811791
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, 1989 through February 28, 1990.	:	

Petitioner, Paul J. Ledman, officer of Blazing Eagles Corp., 19 Ivy Road, Cape Elizabeth, Maine 04107, 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, 1989 through February 28, 1990.

A hearing was held before Marilyn Mann Faulkner, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on June 24, 1994 at 1:30 P.M., with all documents due by October 13, 1994. Petitioner, represented by Maloney & Porcelli, Esqs. (William P. Maloney, Esq., of counsel), filed a brief on August 18, 1994. The Division of Taxation, represented by William F. Collins, Esq. (Kathleen Church, Esq., of counsel), filed a brief on September 23, 1994. Petitioner filed a reply brief on October 13, 1994.

ISSUE

Whether petitioner is personally liable for sales tax on behalf of Blazing Eagles Corp. as a person required to collect and pay tax under Tax Law §§ 1131 and 1133.

FINDINGS OF FACT

The Division of Taxation ("Division") issued to petitioner, Paul J. Ledman, four notices of determination, dated May 26, 1992, asserting sales tax due from petitioner as an officer of a restaurant, Blazing Eagles Corp., which was located in Manhattan, New York. The four notices

were for the following amounts:

Notice No.	Sales Tax Quarter Ending	Amount	Interest Plus Penalty	Total
L-005693839-6	5/31/89	$4,061.34	$2,930.24	$6,991.58
L-005693837-8	8/31/89	3,949.28	2,682.16	6,631.44
L-005693836-9	11/30/89	295.76	188.70	484.46
L-005693838-7	2/28/90	5,076.67	3,043.35	8,120.02

The amounts of the sales tax deficiencies for the first three quarters ending May 31, 1989, August 31, 1989 and November 30, 1989 were based on sales tax returns filed by Blazing Eagles Corp. without remittance. The sales tax determined for the last quarter ending February 28, 1990 was estimated and subsequently cancelled by the Division inasmuch as the business closed sometime in September of 1989.

Petitioner was a 50% shareholder and vice-president of Blazing Eagles Corp. The president and other 50% shareholder of the corporation was David Feldman, a friend of petitioner since childhood.

At hearing, petitioner testified that, based on his long-term friendship with Mr. Feldman, he entered into an oral agreement with Mr. Feldman concerning their respective interests in the restaurant, Blazing Eagles Corp. In exchange for his 50% interest, petitioner, who was an experienced contractor, was to invest $100,000.00 worth of building supplies and physical labor to build a restaurant which Mr. Feldman, who had 20 years of restaurant experience, would then operate. Petitioner testified that once the construction of the restaurant was completed in October or November of 1987, Mr. Feldman thereafter took charge and managed the restaurant without petitioner's involvement.

Petitioner was not employed by the restaurant, did not receive any salary, dividend or profits, did not design the menu, set prices, hire or fire employees, order food or liquor, prepare tax returns, or in any other way manage or operate the restaurant. Although petitioner visited the restaurant on the average of once a week or every 10 days "to see how things were going" (tr., p. 14), he never asked to look at the restaurant's financial records or meet with the restaurant's accountant because he trusted Mr. Feldman based on Mr. Feldman's restaurant

experience and the length of his friendship with Mr. Feldman. Petitioner testified that he viewed himself as a passive investor and was not familiar with the corporation's by-laws or any duties of a vice-president other than the construction work performed in accordance with their oral agreement. Petitioner signed one sales tax return on behalf of the restaurant for the quarter ending May 31, 1988 at the accountant's request when Mr. Feldman was not available. He also signed a New York subchapter S corporation franchise tax return for the year 1990.

In support of his position that he was not involved in the management of the restaurant, petitioner submitted an affidavit of John Chute stating that, from December 1987 through October 1990, petitioner was a full-time salaried employee of Filequest, a business engaged in the development and marketing of computer software. Petitioner also submitted (1) a 1989 W-2 form indicating that he was employed by Filequest for that year, and (2) an affidavit by Denise Zurlo, the restaurant's accountant. In the affidavit, Ms. Zurlo stated that she dealt exclusively with Mr. Feldman on all financial matters and that her only contact with petitioner occurred when Mr. Feldman was unavailable and Mr. Ledman was "called upon . . . on an emergency basis, in order that the Corporation could meet a filing deadline."

In August of 1989, the restaurant's accountant called petitioner to inform him that the business had problems with the nonpayment of taxes. Petitioner thereafter contacted the Division to inquire about the tax delinquency. Petitioner sent to the Division the following letter, dated August 23, 1989:

> "Thank you for your assistance in our conversation on August 17, 1989. We had just recently become aware that the restaurant management was not paying Sales Tax and would like to resolve the matter as quickly as possible. The business has not been doing well, and we will need to cover the back due amounts by borrowing personally. The owners of the Corporation are Paul J. Ledman, and David S. Feldman.
>
> "We have enclosed $9,000. which is about half of the amount due, and request that the terms of a Deferred Payment Agreement we [sic] agreed to."

Petitioner paid $9,000.00, as indicated in the letter, from his personal funds.

By letter dated October 23, 1989, Mr. Ledman made the following request to the Division:

"I still do not have complete information on what was paid by the restaurant management and what was not. As we discussed, I would appreciate your sending a print-out so that I can put together a complete picture. My accountant has also requested this. Thank you."

After the Division issued the four notices of determination, dated May 26, 1992, to petitioner, a conciliation conference was held. By Conciliation Order dated March 26, 1993, the conferee sustained the statutory notices.

Petitioner thereafter filed a petition, dated April 6, 1993, challenging the assessment against him on the ground that he was not a "person responsible" for the payment of sales taxes within the meaning of the Tax Law.

The Division filed an answer, dated November 17, 1993, noting that notice number L-005693838-7 for the quarter ending February 28, 1990 was cancelled. In the answer, the Division affirmatively stated that petitioner was authorized to sign sales tax and corporation franchise tax returns on behalf of the corporation during the sales tax quarters in question; that petitioner was vice-president and one of the two shareholders of the corporation; that petitioner used personal funds to pay taxes to the Division on behalf of the corporation; and that petitioner was authorized to, and did negotiate with, the Division on behalf of the corporation with regard to the outstanding sales tax obligation.

Petitioner brought a court action against David Feldman to recoup his financial losses with respect to the restaurant. This action was terminated by Stipulation of Settlement, dated February 4, 1993. The stipulation also set forth the duties and obligations that Mr. Ledman and Mr. Feldman had assigned to each other as part of their business agreement. The stipulation contained the following statements:

"WHEREAS, on or about December, 1986, the parties entered into an agreement whereby the parties would construct and operate a restaurant in the premises located at 1135 1st Avenue, New York, New York (the 'subject restaurant'); and

"WHEREAS, pursuant to and as part of the agreement between the parties, plaintiff, who is experienced in construction and property management, was to supervise construction and set-up of the restaurant, and bear costs and expenses associated with the construction and set-up of the restaurant; and

"WHEREAS, pursuant to and as part of the agreement between the parties,

upon completion of construction and set-up of the restaurant, plaintiff's duties and obligations with respect to the restaurant venture were fulfilled and at an end; and

"WHEREAS, pursuant to and as part of the agreement between the parties, upon completion of construction and set-up of the restaurant, defendant, who was an experienced restaurateur, was to oversee the day-to-day management and take charge of all aspects of operation of the restaurant; and

"WHEREAS, on or about December 1987, the subject restaurant was fully constructed, operational and open for business, whereupon plaintiff's duties and obligations with respect to the joint venture were at an end, and defendant commenced performance of his duties with respect to the restaurant venture, including the day-to-day management and operation of the restaurant; and

"WHEREAS, on or about September 1989, after approximately twenty one months of operation, the restaurant closed and ceased operation; and

"WHEREAS, plaintiff fully constructed and completed the set-up of the subject restaurant, and expended substantial monies in the construction and set-up of the subject restaurant; and

"WHEREAS, defendant fulfilled all his obligations in connection with the day-to-day management of the restaurant, including hiring, firing and training of staff, inventory control, purchasing, bookkeeping, as well as all other aspects of operation of the subject restaurant, it is therefore

"STIPULATED AND AGREED that the parties hereto have completely fulfilled their respective obligations under their agreement concerning the restaurant venture, and it is further

"STIPULATED AND AGREED that the within action is settled and hereby discontinued with prejudice."

SUMMARY OF THE PARTIES' POSITIONS

Petitioner argues that he was a passive investor who took no part in the operations of the restaurant during the period in question; that his efforts to protect his investment by paying a portion of the taxes and filing an "S" corporation franchise tax return, subsequent to the closing of the restaurant, cannot be used to impose personal liability for the sales tax owed by the restaurant; and that because of his actual limited involvement in the day-to-day affairs of the restaurant, he cannot be held personally liable. Petitioner further notes that the Division does not indicate how his $9,000.00 payment was applied to the taxes owed and that such amount should be adequate to discharge the corporation's indebtedness.

The Division argues that, under the case law, petitioner is personally liable for the restaurant's sales tax obligations; that the stipulation, which sets forth petitioner's relationship

with respect to the operation of the restaurant, is not controlling with respect to petitioner's tax liability; that because petitioner had the authority to sign tax returns and to negotiate the tax obligations of the restaurant with the Division, he was a person responsible for the collection of sales tax; and that petitioner cannot raise for the first time in a post-hearing brief the application of the $9,000.00 payment to the tax deficiencies stated in the notices of determination.

CONCLUSIONS OF LAW

A. Tax Law § 1133(a) provides that "every person required to collect any tax imposed by [Article 28] shall be personally liable for the tax imposed, collected or required to be collected under this article." Tax Law § 1131(1) defines "persons required to collect tax" 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]."

In determining whether an individual is personally liable under these statutes, consideration must be given to the particular facts in each instance (20 NYCRR 526.11[b][2]; see, Matter of Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564, 565; Vogel v. New York State Dept. of Taxation & Fin., 98 Misc 2d 222, 413 NYS2d 862, 865; Matter of Constantino, Tax Appeals Tribunal, September 27, 1990). The fact that an individual was an officer of the corporation does not in itself make that individual personally liable (Matter of Blodnick v. New York State Tax Commn., 124 AD2d 437, 507 NYS2d 536, 537, appeal dismissed 69 NY2d 822, 513 NYS2d 1027; Vogel v. New York State Dept. of Taxation & Fin., supra; Chevlowe v. Koerner, 95 Misc 2d 388, 407 NYS2d 427; Matter of Constantino, supra). However, contrary to petitioner's assertions, the issue concerns not only actual control over the affairs of a corporation, but also whether the officeholder had a "duty to act" for the corporation or had, or could have had, sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. Thus, a variety of factors are considered such as: the individual's status as an officer; the individual's knowledge of and control over the financial affairs and management of the corporation; the individual's day-to-day responsibilities; the authority to write checks on behalf of the corporation; the authority to hire and fire

employees; whether the individual prepared, filed or signed tax returns for the corporation; and the individual's economic interest in the corporation (Matter of Cohen v. State Tax Commn., supra, 513 NYS2d at 565; Matter of Blodnick v. New York State Tax Commn., supra, 507 NYS2d at 538; Vogel v. New York State Dept. of Taxation & Fin., supra, 413 NYS2d at 865; Matter of Constantino, supra; Matter of Autex, Tax Appeals Tribunal, November 23, 1988). While no one factor is controlling, all must be considered (Matter of Malkin v. Tully, 65 AD2d 228, 412 NYS2d 186). However, the taxpayer has the burden of overcoming the tax assessment (Matter of McHugh v. State Tax Commn., 70 AD2d 987, 417 NYS2d 799; Matter of Malkin v. Tully, supra).

In this case, petitioner relies on his status as a passive investor to shield him from personal responsibility for the collection of sales tax. Relying on his friendship with, and the expertise of, Mr. Feldman, petitioner was not involved with the management or everyday affairs of the restaurant. Although I am sympathetic with petitioner's unfortunate situation, the case law does not support his position.

In cases where the taxpayer was the sole shareholder and officer, it has been held that he or she had the legal authority and duty to act on behalf of the corporation and, therefore, should be held liable for taxes due notwithstanding the fact that the taxpayer may not have exercised actual control over the corporation (Matter of Martin v. Commr. of Taxation & Fin., 162 AD2d 890, 558 NYS2d 239; Matter of Blodnick v. New York State Tax Commn., supra; Matter of Marvin H. Mason, Inc., Tax Appeals Tribunal, July 29, 1993; Matter of LaPenna, Tax Appeals Tribunal, March 14, 1991). Similarly, failure of an officeholder, who is one of several officeholders, to exercise his or her share of the responsibility by leaving such duties for someone else to discharge, does not absolve the taxpayer from tax liability (Matter of Ragonesi v. State Tax Commn., 88 AD2d 707, 451 NYS2d 301; Matter of Baumvoll, Tax Appeals Tribunal, November 22, 1989; Matter of Roberto, Tax Appeals Tribunal, December 1, 1988; compare, Matter of Roncolato, Tax Appeals Tribunal, August 15, 1991). Based on the above case law and the evidence, petitioner is a "person required to collect tax" within the meaning of

Tax Law § 1131(1).

Petitioner's reliance on Chevlowe v. Koerner (supra) and Vogel v. New York State Dept. of Taxation & Fin. (supra) is misplaced. The facts in Chevlowe are distinguishable. In that case, the taxpayer was an officer whose control over the corporate finances was limited after a corporate merger and receiver had been appointed. Moreover, unlike petitioner, there was no finding in Chevlowe that the taxpayer was a shareholder as well as officer. The decision in Vogel is also unpersuasive in light of the more recent case law cited above. Moreover, in Vogel there was no discussion as to whether the taxpayer/officer was prevented from exercising his or her authority to control the corporate finances or whether the taxpayer simply delegated that authority to others. Although petitioner and Mr. Feldman mutually agreed to divide their responsibilities and duties such that petitioner was not involved in the management of the restaurant, there is no evidence in the record that petitioner lacked the authority to intervene in the management or was otherwise misled or prevented from exercising any authority, or taking any action, with respect to the sales tax due (compare, Matter of Moschetto, Tax Appeals Tribunal, March 17, 1994; Matter of Turiansky, Tax Appeals Tribunal, January 20, 1994). Consequently, petitioner cannot avoid tax liability due to his reliance on Mr. Feldman to satisfy all tax obligations of a business where petitioner was both a 50% shareholder and vice-president (see, Matter of Martin v. Commr. of Taxation & Fin., supra; Matter of Blodnick v. New York State Tax Commn., supra; Matter of Marvin H. Mason, Inc., supra; Matter of Roberto, supra).

B. Petitioner's implied argument that the $9,000.00 payment made by petitioner should be applied against the tax deficiencies asserted in the notices of determination is a factual argument that cannot be raised for the first time in a post-hearing brief after the record was closed (see, Matter of Ragozin, Tax Appeals Tribunal, July 22, 1993). Furthermore, it should be noted that the $9,000.00 payment was made in August of 1989, almost three years prior to the issuance of the notices of determination. As noted above, the Division based the amount owed in those notices on the amounts reported in three quarterly sales tax returns, which were filed on behalf of the corporation, without remittances. Petitioner had ample opportunity to

determine whether the $9,000.00 payment had been applied to those amounts and could have produced evidence to show whether it had or had not been so applied. If the payment had not been so applied, petitioner should have raised the issue prior to hearing in order to give the Division an opportunity to refute petitioner's claim that it should have been so applied (see, Matter of Clark, Tax Appeals Tribunal, September 14, 1992).

C. The petition of Paul J. Ledman, officer of Blazing Eagles Corp., is denied, the notices of determination, dated May 26, 1992, for the quarters ending May 31, 1989, August 31, 1989 and November 30, 1989, are sustained, and the notice of determination, dated May 26, 1992, for the quarter ending February 28, 1990 is cancelled (see, Findings of Fact "2" and "11").

DATED: Troy, New York
March 16, 1995

/s/ Marilyn Mann Faulkner
ADMINISTRATIVE LAW JUDGE