

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
STEVEN Y. MOSKOWITZ	:	SMALL CLAIMS DETERMINATION DTA NO. 820444
for Redetermination of a Deficiency or for Refund of New York State and New York City Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Period July 1, 2001 through December 31, 2002 and 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, 2001 through February 28, 2002.	:	

Petitioner, Steven Y. Moskowitz, 350 5th Avenue, Apt. 2204, New York, New York 10118, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the period July 1, 2001 through December 31, 2002 and 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, 2001 through February 28, 2002.

A small claims hearing was held before Timothy J. Alston, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on May 2, 2006 at 1:15 P.M. Petitioner requested and was granted permission to submit additional evidence on June 7, 2006, which date began the three-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Phyllis Jacobowitz).

ISSUES

I. Whether petitioner was a person required to collect, truthfully account for and pay over withholding tax with respect to Romantic Moments, Inc., who willfully failed to do so and is therefore liable for penalties equal to the amount of unpaid withholding taxes due from such corporation pursuant to Tax Law § 685(g) and (n).

II. Whether petitioner was a person responsible for the collection and payment of sales and use taxes on behalf of Romantic Moments, Inc., within the meaning and intent of Tax Law §§ 1131(1) and 1133(a) and is therefore personally liable for the penalty due from such corporation.

FINDINGS OF FACT

1. On October 20, 2003, the Division of Taxation (“Division”) issued to petitioner, Steven Y. Moskowitz, six notices of deficiency which assessed penalty due from petitioner pursuant to Tax Law § 685(g) as follows:

Notice Number	Period	Penalty Assessed
L-023138134	7/1/01-9/30/01	\$842.27
L-023138133	10/1/01-12/31/01	\$2,878.72
L-023138132	1/1/02-3/31/02	\$2,269.33
L-023138131	4/1/02-6/30/02	\$2,061.87
L-023138130	7/1/02-9/30/02	\$2,435.27
L-023138129	10/1/02-12/31/02	\$1,674.05

2. The notices of deficiency informed petitioner that the Division had determined that he was an officer or responsible person of Romantic Moments, Inc. (“the corporation”) and was therefore subject to penalties equal to the unpaid withholding taxes due from the corporation pursuant to Tax Law § 685(g). The penalties asserted in the notices of deficiency were premised

on the corporation's failure to remit to the Division withholding taxes as reported for those periods.

3. Also on October 20, 2003, the Division issued to petitioner a Notice of Estimated Determination which asserted a penalty of \$50.00 for the corporation's failure to timely file its annual sales and use tax return for the year ended February 28, 2002. The notice of determination informed petitioner that the Division had determined that he was a corporate officer or a person responsible for the collection and payment of sales and use taxes due from the corporation and was therefore personally liable for the late filing penalty due from that corporation.

4. The corporation was in the business of manufacturing and selling a line of women's robes at wholesale to various department stores.

5. The record contains seven New York State withholding tax returns (Form NYS-45) of the corporation for the quarterly periods ended June 30, 2001 through December 31, 2002. The withholding tax return for the quarter ended June 30, 2001 bears the signature of Kenneth Hubbard and indicates "CFO" as Mr. Hubbard's title. The return for the quarter ended September 30, 2001 bears the signature of Cathy Rodriguez and indicates "Bookkeeper" as Ms. Rodriguez's title. The five returns for the quarterly periods ended December 31, 2001 through December 31, 2002 each bears the signature of petitioner and each indicates that petitioner was president of the corporation.

6. The record also contains the corporation's annual sales tax return for the year ended February 28, 2003. This return, dated March 21, 2003, bears petitioner's signature and indicates that he was president of the corporation.

7. Petitioner denied that he signed any of the withholding tax returns or the sales tax return in the record which appear to bear his signature. Petitioner conceded that he signed certain other documents in the record. Specifically, petitioner acknowledged his signature on his 2003 New York resident income tax return and a letter dated February 27, 2006 addressed to the Division of Tax Appeals. Additionally, petitioner did not dispute that he signed the petition filed in this matter.

8. Entity information obtained by the Division on May 10, 2004 from the website of the New York State Department of State, Division of Corporations, reports that petitioner was the chairman or chief executive officer of the corporation. Such information also indicates that the corporation initially filed with the Department of State on April 26, 1999.

9. Based on a review of a Waiver of Notice First Meeting of the Board of Directors of Romantic Moments, Inc. and a Unanimous Consent in Lieu of First Meeting of Board of Directors of Romantic Moments, Inc., petitioner was not a director or an officer of the corporation as of June 3, 1998, the date of such first meeting. Richard D. Heller and Alan H. Kaplan were the directors and officers of the corporation as of that date.

10. Petitioner also introduced a two-page document which purports to be, on page one, a “Unanimous Consent in Lieu of Organization Meeting of Incorporators of Romantic Moments, Inc.” The second page is written in a different font than the first and indicates thereon “Romantic Moments, Inc. Shareholders Meeting July 14, 1999.” The second page contains seven signatures, including Kenneth E. Hubbard, Alan H. Kaplan and Jerome Schlanger. Petitioner is not among the signatories. Mr. Schlanger’s signature appears on the document with that of Madeline R. Schlanger as “joint tenants.”

11. Petitioner submitted three letters addressed to him from Richard Heller written on the letterhead of “R.M. Enterprises International, Ltd.” The first such letter, dated December 7, 2001 and in which Mr. Heller is identified as “Shareholder,” states:

Please be advised that due to the events of September 11, 2001, which have caused a devastating slowdown in Romantic Moments business, we are closing the Romantic Moments showroom and offices in New York City and everyone is being let go.

12. The second such Heller letter, in which Heller is identified as “Chairman,” is dated February 4, 2002 and states in relevant part:

I have been informed that due to the ongoing current slow business conditions at Romantic Moments, Norman Feinberg has been retained to help Romantic Moments . . . and will hopefully lead Romantic Moments out of the devastating slowdown caused by 9/11 and create capital to repay the money you loaned to the Company.

13. The third letter from Richard Heller, in which Heller is identified as “Director,” is dated September 8, 2003. This letter advises petitioner that the corporation “can no longer pay the monies owed to you as agreed.”

14. Petitioner also submitted a letter dated January 5, 2004 from Martin Pelman, identified therein as “CFO, Romantic Moments, Inc.” This letter, addressed “To Whom It May Concern,” states that petitioner was let go by the company after September 11, 2001; that he was not authorized to sign checks and was never paid by the corporation. The letter further alleges that Jerome Schlanger and Norman Feinberg forged petitioner’s signature on tax documents and checks.

15. Petitioner submitted a copy of a check dated June 11, 2003 payable to “United States Treasury 940-EZ” in the amount of \$1,008.79. The check is drawn on the account of Flo Weinberg, Inc. and bears the signature of Jerome H. Schlanger. Petitioner also submitted a 2001 Form 940-EZ (Employer’s Annual Federal Unemployment [FUTA] Tax Return) for Romantic

Moments, Inc. dated February 1, 2002 which reported a balance due in FUTA tax of \$1,008.79. This return bears the signature of Jerome H. Schlanger. The return has a handwritten designation "Pres." as Mr. Schlanger's title. The word "Pres." on the return appears to have been written over the designation "Rep."

16. Kenneth Hubbard filed an assumed name certificate for the corporation with the New York State Department of State on September 22, 1999. Mr. Hubbard also received correspondence from the Division dated June 11, 1999 regarding the corporation's tax account information.

17. Romantic Moments, Inc., R.M. Enterprises International, Ltd., and Flo Weinberg, Inc. are related entities. The specific manner in which these corporations are related is not in the record.

18. The corporation never filed its sales and use tax return for the year ended February 28, 2002.

19. By letter dated June 5, 2006, the Internal Revenue Service advised petitioner regarding trust fund recovery penalty taxes in connection with Romantic Moments, Inc. for certain tax periods ended June 30, 2001 through December 31, 2002. The letter indicated that the matter had been resolved and that trust fund recovery taxes previously assessed for the periods at issue would be abated in full and that payments previously allocated toward such assessments would be refunded with interest.

SUMMARY OF PETITIONER'S POSITION

20. Petitioner asserts that he was never an officer, director or shareholder of the corporation and that he was never paid by the corporation. Petitioner contends that he was involved only in sales and that he was let go by the corporation in December 2001. Petitioner

denies that he had check-signing authority and contends that he could hire and fire employees only in sales. Petitioner maintains that his signature was forged on the corporate withholding tax returns and sales tax return in the record.

CONCLUSIONS OF LAW

A. Tax Law § 1133(a) imposes upon any person required to collect sales tax under 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]).

B. Tax Law § 685(g) imposes upon any person required to collect, truthfully account for and pay over withholding taxes who willfully fails to collect and pay over such taxes, “a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.” Tax Law § 685(n) defines “person,” for purposes of Tax Law § 685(g), to include, among others, corporate officers and employees who are under a duty “to perform the act in respect of which the violation occurs.” Whether someone is a “person” under a duty to collect and pay over withholding taxes is similar in scope and analysis to the question of whether one is a responsible individual for sales and use tax purposes (*see, Matter of Picciurro*, Tax Appeals Tribunal, August 11, 1994; *Matter of Chin*, Tax Appeals Tribunal, December 20, 1990).

C. The holding of corporate office does not automatically impose tax liability upon an office holder (*Chevlowe v. Koerner*, 95 Misc 2d 388, 407 NYS2d 427). Rather, the resolution of whether a person is responsible for collecting and remitting 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, 82 Misc 2d 181, 368 NYS2d 448). In *Matter of Constantino* (Tax Appeals Tribunal, September 27, 1990), the Tax Appeals Tribunal stated :

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 interest in the corporation [citations omitted] (*Matter of Constantino, supra*).

D. Petitioner has failed to sustain his burden of proof (*see*, Tax Law § 689[e]; 20 NYCRR 3000.15[d][5]) to show that he was not a responsible officer of the corporation for sales tax purposes or that he was not such an officer for withholding tax purposes who willfully failed to collect and to pay over such taxes.

Petitioner's case rests largely upon his claim that his signature was forged on the withholding tax returns for the quarterly periods ended December 31, 2001 through December 31, 2002 and the annual sales tax return for the period ended February 28, 2003. Petitioner offered his testimony in support of this contention but did not offer any corroborating testimony such as that of an expert or a third party familiar with his signature. I have closely compared the signature on these returns with the known examples of petitioner's signature in the record and, based on such review, I conclude that the returns in question were in fact signed by petitioner. Moreover, the printed name and title ("Pres") next to petitioner's signature on the withholding tax returns for the periods ended December 31, 2001 and March 31, 2002 and the sales tax return clearly matches the printed writing of petitioner on his petition and his letter to the Division of Tax Appeals dated February 27, 2006.

The finding that, contrary to his testimony, petitioner signed the returns in question undermines the credibility of his testimony that he was not an officer of the corporation; that he did not sign any tax returns; that he was involved only in product development and sales; and that he left the corporation in December 2001. It is noted that no witnesses other than petitioner testified at the hearing.

The letters of Richard Heller and Martin Pelman submitted in support of petitioner's position are properly given little weight herein as such letters are unsworn, and neither individual testified, thus their credibility cannot be evaluated. Additionally, it is noted that the content of the Heller letter dated February 4, 2002 does not support petitioner's position. That letter indicates that petitioner loaned money to the corporation and thus indicates a level of involvement greater than that of a sales employee.

Mr. Schlanger's signature on a check in payment of FUTA tax also does not provide support for petitioner's position. The check was drawn on the account of Flo Weinberg, Inc., not that of the Romantic Moments, Inc. Additionally, it is unclear from the record whether the FUTA return as filed indicated that Mr. Schlanger was president of the corporation (*see*, Finding of Fact "15").

I note that certain documents in the record indicate that other individuals, in addition to petitioner, were involved in running the corporation. This fact, however, is insufficient to show that petitioner was not a responsible officer of the corporation. Obviously, a corporation can have more than one responsible officer.

Petitioner also contended that he was never paid by the corporation. If proven, such a fact might support petitioner's position. Petitioner, however, failed to establish this factual

contention, as he submitted only the unsworn letter of Mr. Pelman and an unsworn statement from an accountant as documentary support.

Regarding the June 5, 2006 letter from the Internal Revenue Service to petitioner, I have no knowledge of the evidence which was reviewed by the IRS in reaching the resolution of petitioner's case as outlined in the letter, and thus the resolution of that case is of little significance. In any event, the IRS's decision with respect to a taxpayer's Federal liability as an officer is not binding as to that taxpayer's New York liability.

E. Petitioner also contended that, even if he was a responsible officer of the corporation, the period from the due date of the returns in question to the date of the statutory notices constitutes an unreasonable delay warranting an abatement or reduction of penalties or interest. It is noted that the sales tax deficiency herein was issued about seven months from the due date of the subject return and that the notices of deficiency for failure to remit withholding tax were issued between eleven months and two years from the time the subject withholding tax returns were due.

This contention is without merit. Since the sales tax return in question was never filed by the corporation, any assessment of tax or penalty in respect of such return was permissible "at any time" (*see*, Tax Law 1147[b]). Notices of deficiency issued to responsible officers of a corporation pursuant to Tax Law § 685(g) are not subject to any statute of limitations (*see*, *Matter of Halpern*, Tax Appeals Tribunal, April 9, 1998).

F. The petition of Steven Y. Moskowitz is in all respects denied and the notices of deficiency and the notice of determination dated October 20, 2003 are sustained.

DATED: Troy, New York
August 17, 2006

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE