

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
UDI SALY	:	DETERMINATION
	:	DTA NO. 820833
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 June 1, 2003 through February 29, 2004.	:	

Petitioner, Udi Saly, 73 Nearwater Lane, Darien, Connecticut 08620, 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 June 1, 2003 through February 29, 2004.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on June 29, 2006 at 10:30 A.M., with all briefs to be submitted by January 30, 2007, which date began the six-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Daniel Smirlock, Esq. (Lori P. Antolick, Esq., of counsel).

ISSUES

I. Whether petitioner was personally liable for the sales and use taxes due on behalf of All American Hauling and Recycling of Westchester, Inc. (“AAHW”) as a person required to collect and pay such taxes under Tax Law §§ 1131(1) and 1133(a).

II. Whether penalties imposed for the late filing of sales tax returns and for failure to pay sales taxes due from AAHW should be abated.

FINDINGS OF FACT

1. On August 16, 2004, the Division of Taxation (“Division”) issued two notices of estimated determination to Udi Saly (“petitioner”) which assessed additional sales and use taxes as follows:

Period Ended	Tax Assessed	Interest	Penalty	Total Due
08-31-03	\$64,215.84	\$9,406.09	\$13,485.25	\$87,107.18
11-30-03	\$64,215.84	\$6,899.83	\$11,558.80	\$82,674.47

On September 2, 2004, the Division issued an additional Notice of Estimated Determination which assessed sales and use taxes in the amount of \$58,763.94, plus interest of \$4,461.35 and penalty of \$9,402.19, for a total amount due of \$72,627.48 for the period ended February 29, 2004.

Each of the notices advised petitioner that he was being assessed based upon a finding by the Division that he was an officer or responsible person of AAHW. Each notice explained that “[t]he estimated assessment on which this notice is based, was issued because a required tax return was not filed by the business named above.”

2. On or about October 12, 2004, AAHW late filed the following nine quarterly or part-quarterly sales tax returns: June 2003, part-quarterly; July 2003, part-quarterly; June 1, 2003 through August 31, 2003, quarterly; September 2003, part-quarterly; October 2003, part-quarterly; September 1, 2003, through November 30, 2003, quarterly; December 2003, part-quarterly; January 2004, part quarterly; and December 1, 2003 through February 29, 2004, quarterly. AAHW failed to remit payment with these returns.

3. Once the sales tax returns were filed by AAHW on October 12, 2004, the assessments against petitioner were adjusted¹ as follows:

a. For the period ended August 31, 2003, tax was assessed in the amount of \$41,486.40 (reduced from \$64,215.84), plus interest of \$22,703.65 and penalty of \$15,263.32;

b. For the period ended November 30, 2003, tax was assessed in the amount of \$40,661.59 (reduced from \$64,215.84), plus interest of \$19,014.15 and penalty of \$13,768.53; and

c. For the period ended February 29, 2004, tax was assessed in the amount \$40,867.73 (reduced from \$58,763.94), plus interest of \$16,016.54 and penalty of \$12,679.88.

4. In 1975, petitioner graduated first in his class as an engineering officer from the Israeli Naval Academy. In 1982, he earned a Bachelor of Science Degree in mechanical engineering and naval architecture from Technion, Israel Institute of Technology, and in 1985 he earned a Masters Degree in ocean systems management (a joint program of Ocean Engineering and Sloan School of Management) from the Massachusetts Institute of Technology (MIT).

From 1985 to 1989, petitioner was the CEO of Alumet Smelting Corporation, a recycling company in Newark, New Jersey. He then founded and became president and CEO of Flexible Environmental Systems, Inc., a Boston based company which developed floating solid waste management systems targeted for New York City and Hong Kong. Petitioner was associated with Flexible Environmental Systems, Inc. from 1989 until 1995.

¹ At the hearing, the Division was asked to clarify a discrepancy between the amounts of tax assessed against petitioner and the amounts assessed against AAHW which were issued to AAHW on July 18, 2005. By letter dated July 5, 2006, the Division detailed the current (pursuant to a computer printout dated July 3, 2006) amounts asserted to be due from petitioner which matched the amounts set forth on the notices of determination issued to AAHW on July 18, 2005.

In 1995 and 1996, he was a consultant to SITA, a \$1.7 billion French waste management company, to identify potential acquisitions for penetrating the United States market. For SITA, petitioner identified acquisition prospects in the New York area and the northeastern United States in solid waste, recycling and landfill businesses.

In 1996, petitioner founded and became the president and chief executive officer (CEO) of City Waste Services, Inc. of New York City (“City Waste”) where he developed and implemented a business plan to acquire a number of family-owned commercial waste carting companies and consolidated the companies into a single operation, City Waste, which became the fourth largest waste company in New York City. When his shares in City Waste became diluted and he was unable to raise funds, he left the company.

5. In January 2001, petitioner was hired by Environmental Asset Management, Inc. (“EVAM”) to work for its wholly-owned subsidiary, All American Hauling and Recycling, Inc., as head of its New York area division. He was hired for his expertise in identifying acquisitions in the New York City market and to help raise funds and lend expertise on growth and integration of acquisitions.

6. In late 2001, petitioner identified an acquisition opportunity, the Westchester based assets of Allied Waste. These assets were to be divested by Allied Waste pursuant to an agreement with the New York State Attorney General’s Office as part of the break up of the waste cartel in Westchester. Robert Geber, CEO of EVAM, entered into an agreement with Allied Waste to acquire its Westchester assets.

To prepare for this acquisition, Mr. Geber formed AAHW as a wholly-owned subsidiary of EVAM. However, in early 2002, EVAM did not have the funds to complete the acquisition. EVAM’s only operating entity, All American Hauling and Recycling, Inc., which operated in

New Jersey and New York City, was operating at a loss, and the acquisition of Allied Waste's assets was considered by management and the board of directors as the only way to continue operating.

7. In his role of assisting EVAM in finding acquisitions, petitioner was introduced in April 2002 to Mercantile Capital Group ("MCG") and its managing partners, Steven Edelson and Nathaniel Kramer. Messrs. Edelson and Kramer then met with EVAM's CEO, Robert Geber, and EVAM's president, Robert Toledo, as well as with members of EVAM's board of directors to discuss MCG's investment in EVAM.

MCG, also operating under the name Mercantile Capital Partners ("MCP"), was to be given a controlling shareholder's vote and was to assume control of the board of directors simultaneously with its initial investment in EVAM.

8. In a meeting held in Chicago, MCG's Steven Edelson placed a condition on MCG/MCP's investment in EVAM that Robert Geber must resign as CEO and that petitioner was to become interim CEO. Petitioner agreed to this condition.

9. On August 21, 2002, petitioner and EVAM entered into an employment agreement whereby petitioner agreed to become the interim chief executive officer of EVAM for an initial term of two years plus, at EVAM's option, two consecutive one-year extensions.

Pursuant to the employment agreement, petitioner was to receive an annual gross base pay of \$150,000.00 and was entitled to participate in EVAM's employee stock option plan and was awarded options to acquire 1,770,000 shares at a purchase price of \$0.17624 per share.

The employment agreement set forth petitioner's job description as follows:

Executive will be responsible for performing the duties commensurate with his position (including, but not limited to, overseeing the day to day operating activities of the Company and its subsidiaries). Executive will

also, in coordination with and assistance of the Board of Directors, plan the Company's growth and implement such growth plan.

10. MCG's managing partners, Steven Edelson and Nathaniel Kramer, informed petitioner that they had an agreement with the Small Business Administration which prevented them from guaranteeing any line of funding to the company. As a result thereof, they required that petitioner sign a personal guarantee to Century Bank, and they assured petitioner that all personal guarantees would be removed within 30 days if he was fired or if he resigned. Petitioner agreed to the terms set forth by Messrs. Edelson and Kramer and also agreed to sign other company documents as a condition of his employment.

11. MCG owned common shares equivalent of 31,038,694, or approximately 56 percent of EVAM stock. Petitioner, along with Robert Toledo and Richard Waldron, was granted an option to purchase approximately 3.24 percent of EVAM stock. It must be noted that as of March 31, 2004, only 50 percent, or 885,000 shares were vested. Petitioner, therefore, owned 885,000 shares or approximately 1.6 percent of EVAM stock.

12. Petitioner did not invest money in EVAM nor did he loan any money to the company.

13. A schedule of financings made for the year 2003 presented by MCG to the Small Business Administration indicates that the five members of the board of directors of EVAM were: Udi Saly, CEO; Steven Edelson; Michael Reinsdorf; Nathaniel Kramer and Robert Vanecko. The schedule also indicates that Messrs. Edelson, Reinsdorf and Kramer were affiliated with MCG.

14. Richard Waldron met petitioner in 1998 or 1999 when both were associated with City Waste. It was petitioner who brought Mr. Waldron to All American Hauling and Recycling, Inc. in early 2001 "for a better opportunity." Mr. Waldron's position with AAHW was operating manager of the AAHW's Westchester Division. The Westchester operation began in mid-2002.

As operating manager, Mr. Waldron supervised the routing of trucks, how much garbage the trucks were picking up, where the garbage was dumped and the price paid by AAHW for dumping. He was also in charge of union matters. When Mr. Waldron first joined All American Hauling and Recycling, Inc., EVAM owned the company.

Richard Waldron was in contact with petitioner on a daily basis, either by telephone or in person. Mr. Waldron sought advice from petitioner on such matters as which dumps he could utilize and the price to be paid for dumping.

15. In 2002, Mr. Waldron was summoned to Chicago to meet Steven Edelson who was interested in investing money in a waste management company. Approximately one month later, Mr. Edelson came to New Jersey to meet the people who were involved with EVAM and All American Hauling and Recycling, Inc. Mr. Edelson informed Mr. Waldron and other company personnel that he would be investing in EVAM and would become the chairman of the board, Robert Geber would no longer be the CEO of EVAM, petitioner would be the interim CEO, Robert Toledo would be the vice president and chief operating officer and Mr. Waldron would be the operations manager. Mr. Edelson also stated at that time that he would be bringing in someone to take care of the finances of the company.

16. EVAM, a public company, owned 100 percent of the shares of AAHW which operated in Westchester, New York and New York City and also owned 100 percent of the shares of All American Hauling and Recycling, Inc. which operated in New Jersey.

17. After MCP's investment, Steven Edelson was rarely present in New York or New Jersey; however, he called company personnel from Chicago every day. Nathaniel Kramer, who was a partner of Mr. Edelson in MCP, was located in New York; therefore, he was frequently in the company's New Jersey location.

18. Amit Bhatnagar was the person brought in by Steven Edelson to handle all of the financial aspects of EVAM. He was present in New Jersey on a daily basis. Mr. Bhatnagar flew in from Chicago every Monday and returned to Chicago at the end of the week. When AAHW was formed, Richard Waldron became its operations manager and Amit Bhatnagar handled the finances. Mr. Bhatnagar devised the company's billing system.

19. Prior to MCP's investment in the company, approximately 200 shareholders owned 100 percent of the corporate stock. After MCP invested its money, it became the owner of approximately 77 percent of EVAM's shares.

20. Richard Waldron indicated that petitioner could not hire a truck driver without the approval of the company's vice president and chief operating officer, Robert Toledo. If petitioner wished to hire a sales executive, he could not do so without the consent of either Amit Bhatnagar or Steven Edelson. If petitioner wished to fire Richard Waldron, he could not do so without the approval of Messrs. Kramer and Edelson. At some point during petitioner's tenure with EVAM, he decided to fire William Boyer² but was overruled by Steven Edelson.

In March 2004, EVAM decided to hire a temporary accountant to replace the controller who had resigned. The employment agency presented the qualifications of various candidates to Amit Bhatnagar who then E-mailed Steven Edelson for approval. Petitioner was never consulted on this matter.

21. Richard Waldron stated that petitioner had no authority to liquidate any of the company's assets (to pay its sales tax liabilities) without the permission of Steven Edelson. He observed that Amit Bhatnagar had to approve any and all financial expenditures made by

² William Boyer owned a roll-off company which was ultimately purchased by EVAM. Mr. Boyer "came on board" with petitioner in Westchester. An incident occurred which resulted in petitioner's firing Mr. Boyer. However, the next day he was back at work, and he told petitioner that he had called Steven Edelson who stated that petitioner could not fire him.

EVAM. Even though petitioner signed the company's checks, all checks had to be approved by MCG or by Mr. Bhatnagar.

22. When the company collected cash or checks from its customers, the cash or checks went directly to a lock box in favor of the company's lender, Century Business Credit Corporation. Funds were removed from the lock box daily by Century Business Credit Corporation. Petitioner had no access to the funds collected.

23. On each of the sales tax returns filed by AAHW for the periods at issue, the address listed on the returns was 500 Executive Blvd., Suite 304, Ossining, New York 10562. According to Richard Waldron, petitioner never worked at that address nor was he ever physically present at that location. None of the sales tax returns bore petitioner's signature. The sales tax returns for the periods at issue were filed in October 2004, when petitioner was no longer with the company. The Ossining premises were utilized by the company in October or November 2004, after David Fuselier became CEO.

24. Richard Waldron stated that having known and worked with petitioner, he was familiar with his handwriting. A form ST-809, New York State and Local Sales and Use Tax Return for Part-Quarterly Filers, filed by AAHW for the period April 1 - April 30, 2003 and two forms MT-903, Highway Use Tax Return, filed by AAHW for the periods July 1 - September 30, 2003 and October 1 - December 31, 2003, each bore petitioner's signature with his title of CEO. However, Mr. Waldron indicated that the numbers set forth on the returns were not in the handwriting of petitioner. Petitioner, while he did sign some tax returns on behalf of AAHW, never prepared any of the returns.

25. Sharon Carlitz who, according to Richard Waldron, was "like a controller" was in the Accounting and Human Resources Department and supervised three people. Richard Waldron

stated that Sharon Carlitz, who reported to petitioner, was likely in charge of the preparation of the sales tax returns.

26. Damaris Saldivar was employed by EVAM from early 2001 through August 2004 as the accounts receivable clerk. She was also in charge of the company's human resources and collections. When she joined EVAM, petitioner's title was vice president for mergers and acquisitions, and petitioner was in charge of the New York City operations.

In June or July 2002, Ms. Saldivar attended a meeting at EVAM's New Jersey offices where Mr. Steven Edelson of MCG from Chicago advised the shareholders of EVAM that he and his group (MCG) had decided to invest in EVAM and also announced that petitioner would become interim CEO in charge of operations. Mr. Edelson stated that he would become chairman of the board and that he and MCG would manage the financial aspects of the company and set up a line of credit with banks with which MCG was affiliated. He also indicated that MCG had committed to invest in excess of \$5,000,000.00 in EVAM. With the completion of the investment, Mr. Edelson stated that MCG would own approximately 80 percent of EVAM.

In late July 2002, Ms. Saldivar met Amit Bhatnagar who worked for MCG. Mr. Bhatnagar was in charge of all financial due diligence with respect to the pending acquisition of Allied Waste's Westchester operation. From mid December 2003 until a change in management in August 2004, Mr. Bhatnagar was physically present at the company's headquarters in New Jersey on a daily basis and he was to approve any and all financial expenditures made by EVAM. According to Ms. Saldivar, while petitioner signed EVAM's checks, no checks were written unless approved by MCG or by Mr. Bhatnagar.

27. Petitioner signed check number 2971, dated June 12, 2003, drawn on the account of EVAM, paid to the order of the Commissioner of Taxation & Finance in the amount of \$2,081.87 for payment of a tax liability of EVAM.³

Petitioner signed check number 3851, dated October 17, 2003, drawn on the account of EVAM, paid to the order of New York State Sales Tax in the amount of \$39,139.08 for payment of a sales tax liability of EVAM.⁴

In both instances, petitioner signed the checks and after his signature placed the title “CEO.”

28. In mid 2004, EVAM decided to sell AAHW. At the time of the negotiations, Richard Waldron suggested that in order to effectuate the sale, the selling price should be dropped from \$1,200,000.00 to \$600,000.00. However, he was told by Amit Bhatnagar that Steven Edelson would not agree to such a reduction because of the company’s sales tax liabilities.

29. Prior to the attempted sale, petitioner attempted to resign his position and conveyed this desire in a letter to Steven Edelson of MCG dated March 2, 2004. In the letter, petitioner stated, in part, as follows:

1. As I am not advised of nor am I involved with the overall strategic handling of the company, I request to be immediately relieved of my position as CEO and will no longer be an officer or a Director of the corporation.

* * *

³ It is unclear for what periods this payment was made. However, since the assessment identification number does not match any of the numbers for the assessments at issue in this matter, no credit shall be given herein.

⁴ Attached to petitioner’s petition is a Notice of Determination for the period ended May 31, 2003, a period which is not at issue in this proceeding. The Notice of Determination lists a late payment in the amount of \$39,139.08, the amount of the check dated October 17, 2003. Accordingly, since the payment was for a period not at issue herein, no credit shall be given on the assessments at issue in this matter.

5. At the end of my service⁵ as CEO I will request that MCG will enter into mutual release agreements with me on all operational issues.

However, petitioner was informed by Steven Edelson in a March 10, 2004 E-mail that he could not resign because he had personal liabilities and personal responsibilities and therefore, “[u]ntil we as a company choose a direction, you are the acting CEO of the company.” Messrs. Edelson and Kramer decided to hold off on paying the sales tax liabilities and, instead, pay the liabilities from the proceeds of the sale.

In or about July 2004, petitioner was told to leave and David Fuselier was appointed as CEO. After Mr. Fuselier became CEO, Amit Bhatnagar continued to be in charge of the company’s finances. Richard Waldron continued his employment with AAHW after petitioner left the company.

30. Richard Waldron stated that “you couldn’t do anything unless you talked to Amit and Amit wouldn’t do anything unless he went into another room and called Mr. Edelson.”

31. An E-mail from Steven Edelson of MCP to petitioner dated February 23, 2004 stated as follows: “I would like to caal [sic] the lawyers with you in the morning to discuss repositioning the company to give the company the greatest flexibility [sic] thus trying to protect shareholder value.”

An E-mail from Nathaniel Kramer to petitioner and Amit Bhatnagar dated April 15, 2004, stated as follows: “Please forward me the line items for our accrued liabilities (discussed yesterday).”

An E-mail from Alan G. Badey, CPA, of Citrin Cooperman & Co., LLP, dated April 22, 2004, was sent to Steven Edelson at MCP and to petitioner at AAHW and stated as follows:

⁵ In the letter, petitioner agreed to continue to stay on as an advisor to company on certain matters, for up to three days per week, until April 15, 2004.

“Pursuant to our conversation yesterday, attached is the revised proposal and list of items needed to begin the audit.”

32. On July 21, 2004, control of EVAM was acquired by EVAM Acquisition, LLC (“EAL”) which agreed to pay all operating debt of EVAM and AAHW, including current sales tax and other corporate liabilities in an amount not to exceed \$1,000,000.00. In addition, EAL was to provide the operating capital needed to reactivate AAHW’s operating assets. David Fuselier assumed the position of CEO. Pursuant to the written term sheet, petitioner was to be retained for a period of at least 30 days following closing to provide transition and other related services. The term sheet also stated as follows:

With respect to the outstanding sales tax liability, EAL shall pay a down payment of at least \$50,000 within seven days after execution of this term sheet, a further payment, to make a total of at least \$100,000, within 30 days after execution of this term sheet, and pay, or shall cause EVAM to pay, such liabilities in full or settle such liabilities and obtain a release within one hundred and eighty calendar days of the execution of this term sheet.

33. Petitioner introduced into evidence a series of E-mails which circulated among petitioner, Nathaniel Kramer, Steven Edelson, Amit Bhatnagar and the new CEO, David Fuselier. The dates of these E-mails ranged from July 16, 2004 through December 4, 2004. In the E-mails, references are made to the outstanding sales tax liabilities of EVAM and the attempt by petitioner and the directors (Nathaniel Kramer, Michael Reinsdorf and Steven Edelson) to be absolved from personal liability for such taxes. The dates of the E-mails were after the periods at issue although references are made to the liabilities which likely related to the periods at issue.

34. On July 27, 2004, Gregory Guida of the Division’s Tax Compliance Division - Field Services Bureau made a field visit to the business premises of AAHW located at 2 Bayview Road, Cortlandt Manor, New York. According to Mr. Guida’s affidavit which was sworn to on

June 23, 2006, at the time of his field visit, he spoke with petitioner who identified himself as the CEO of AAHW and as the person responsible for the day-to-day operations of AAHW.

The Division, in its brief, in referring to petitioner's employment agreement with EVAM, states that "[i]t is important to note that this Agreement was signed on August 21, 2002 and Petitioner's position as CEO terminated on July 22, 2004." This termination is five days prior to Mr. Guida's field visit.

35. On November 19, 2004, petitioner filed a demand for arbitration with the American Arbitration Association alleging that his former employer, EVAM, breached his employment agreement, dated August 21, 2002, by failing to pay salary owed and severance required to be paid and to indemnify him for potential tax liabilities of EVAM. A Final Opinion and Award was issued by the arbitrator on November 4, 2005 which, in its Findings of Fact, determined that EVAM did not satisfy its commitments under the agreement. As to the tax liability, the arbitrator found as follows:

The New York State taxing authorities have assessed taxes owed by EVAM for a period prior to the acquisition of EVAM by Fuselier in the amount of \$198,473.52. Fuselier testified that he has not been able to negotiate an acceptable lesser settlement sum. Nonetheless, he admitted that Saly should not have to pay any of EVAM's liability. In the absence of an agreement with EVAM, the taxing authorities have assessed the outstanding amount against Saly personally as EVAM's chief executive officer during the relevant period.

Although Fuselier has acknowledged that Saly is entitled to indemnification for any tax indebtedness EVAM may be facing, he also testified that he was not "going to give money to the State (i.e. the taxing authorities) without a fight."

Accordingly, the Arbitrator found that Mr. Saly was entitled to full indemnification by EVAM for all tax liabilities of EVAM as well as for full payment of his attorney's fees incurred in defending himself against the pending tax assessment and related proceedings.

SUMMARY OF THE PARTIES' POSITIONS

36. Petitioner contends as follows:

- a. Petitioner became a director and a shareholder of EVAM as a term of his employment;
- b. He was a very minor shareholder in EVAM, owning less than one tenth of one percent of stock in this public company;
- c. While he had check-signing authority, he could not write checks during the audit period unless they were approved by Amit Bhatnagar, who was placed in charge of the financial aspects of the company, or by the controlling shareholders, Steven Edelson and Nathaniel Kramer;
- d. Petitioner had no authority to decide which vendors would be paid; he could only make recommendations to the controlling shareholders;
- e. While he did have knowledge of the financial state of AAHW and demanded, in December 2003 and January 2004, that the persons in control of the company pay the sales taxes due and owing, he was thwarted and prevented from acting to pay the taxes through no fault of his own;
- f. Although he did sign sales tax returns as a condition of his employment and for the convenience of his employer, he did not prepare the returns and did not know how the figures set forth on the returns were determined;
- g. While he had the title of acting CEO, he could not hire or fire employees without the approval and consent of Messrs. Edelson and Kramer;
- h. In late 2003 and early 2004, the controlling shareholders of EVAM, Messrs. Edelson and Kramer decided to stop funding EVAM's operations and to sell control of the

company. As part of their plan, they decided to defer sales tax payments and use the funds to continue operation until a sale or transfer of control could be effectuated. Messrs. Edelson and Kramer then entered into an agreement with David Fuselier who became CEO of EVAM. Mr. Fuselier agreed in writing that he would pay the taxes deferred by Messrs. Edelson and Kramer. Petitioner had no say or control over any of these actions; and

i. New York State has been informed by petitioner as to the names, addresses, social security numbers, etc., of the persons who are personally responsible for the sales taxes due and owing for the periods at issue.

37. In response, the Division asserts:

a. Petitioner was an employee of AAHW who was authorized to and, in fact, did sign documents (including tax returns) on behalf of the company;

b. Petitioner signed documents as EVAM's CEO and was bound by the terms of his employment agreement with the company;

c. Petitioner had control over a number of EVAM's employees including those in accounting and human resources. He also directed Richard Waldron in his day-to-day activities;

d. Numerous documents presented by petitioner indicate that he participated in significant business decisions on behalf of the company;

e. Petitioner was a shareholder in EVAM;

f. Petitioner had the authority to and did, in fact, sign checks on behalf of EVAM; and

g. Penalties should not be abated because petitioner has provided no explanation (other than to claim that he was not the one responsible for payment) why the quarterly tax returns for the period at issue were filed late and remitted without payment.

CONCLUSIONS OF LAW

A. Tax Law § 1133(a) imposes personal liability for taxes 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]).

B. Whether an individual is under a duty to act for a corporation with regard to its tax collection responsibilities so that the individual would have personal liability for the taxes not collected or paid depends on the particular facts of the case (*Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022, 513 NYS2d 564).

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 the Tax Appeals Tribunal have identified a variety of factors as indicia of responsibility: the individual’s knowledge of and control over the financial affairs of the corporation; authorization to write checks on behalf of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; and the individual’s economic interests in the corporation (*Matter of Martin v. Commr. of Tax & Fin.*, 162 AD2d 890, 558 NYS2d 239; *Matter of Cohen v. State Tax Commn.*, *supra*, 513 NYS2d 565; *Matter of Blodnick v. State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536, 538, *appeal dismissed* 69 NY2d 822, 513 NYS2d 1027; *Matter of 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; *Matter of Baumvoll*, Tax Appeals Tribunal, November 22, 1989).

C. It is well settled that the holding of corporate office is not in itself a sufficient basis upon which to impose personal liability for sales tax found owing by a corporation (*Matter of Blodnick v. State Tax Commn.*, *supra*; *Matter of Vogel v. New York State Dept. of Taxation & Fin.*, *supra*). Likewise, the existence of one or more of the factors enumerated above does not definitively resolve the issue of personal liability for sales taxes.

Rather, the various factors provide a framework for determining whether the individual had a duty to act for the corporation. In the present matter, petitioner was the acting CEO of the corporation and held himself out as such. He had the authority to and did, in fact, sign corporate documents, checks and tax returns. He was a member of the board of directors and was a shareholder, although clearly the holder of a very small percentage of corporate stock. He received a salary from the corporation. A number of employees reported directly to him. While it is true that, in some cases, these factors could subject him to personal liability for the sales taxes due and owing from the corporation, a careful examination and consideration of the totality of the circumstances present herein lead to the conclusion that petitioner should not be held personally liable for these taxes.

Unlike the facts in *Matter of Hall* (Tax Appeals Tribunal, March 22, 1990), this petitioner clearly did not have the authority to hire and fire those employees (including independent contractors such as the corporate accountant) who were directly involved with the financial affairs of the corporation, nor did he have unrestricted ability to sign corporate checks or to determine which creditors were to be paid and in what order.

The credible testimony of the operations manager, Richard Waldron, as well as the affidavit of another employee, Damaris Saldivar, confirm petitioner's assertion that, for the periods at issue in this matter, the financial decisions were made by Steven Edelson and Nathaniel Kramer of MCG or, in some cases, by their agent, Amit Bhatnagar, who was present at the business premises on a daily basis and who handled the financial affairs of AAHW.

This matter more clearly resembles the facts in *Matter of Constantino (supra)*, where the Tax Appeals Tribunal noted that: "petitioner's role was essentially that of a . . . supervising employee who was precluded from taking actions with regard to the financial and management activities of the corporation."

Pursuant to a written employment agreement, petitioner was hired by EVAM as its interim CEO. He did not lend money to the corporation nor did he invest in it. While a reasonably well-paid employee and the owner of a very small percentage of corporate stock, petitioner's interest in the corporation was really that of an employee who performed the tasks assigned to him.

The Tribunal in *Matter of Pessa* (Tax Appeals Tribunal, May 1, 1997) concluded that those petitioners were not persons responsible for the sales tax due from the corporation even with their status as officers with check-signing authority. This was true because such status, in *Matter of Pessa*, was offset by the fact that the petitioners' father, the president of the corporation, had overall control of the corporation. Therefore, the Tribunal held that petitioners lacked the independent power to exercise authority over collection and payment of sales tax on its behalf.

D. Petitioner asserts that in December 2003 and January 2004, he advised Nathaniel Kramer and Steven Edelson, to whom he reported, that New York State sales tax was due. He contends that he requested that MCG, as the key investor and majority shareholder, provide the

capital for payment of the tax liabilities. However, petitioner maintains that he was informed by Messrs. Kramer and Edelson that the company would be put up for sale and the tax liabilities would be paid from the proceeds of the sale. He further states that after the aforementioned requests for a capital infusion to pay the taxes were made, he was instructed that any funds provided to EVAM by MCG were to be used only to purchase trucks so that the business could continue.

Clearly, if the record contained a letter or E-mail between petitioner and either Steven Edelson, Nathaniel Kramer or Amit Bhatnagar, wherein petitioner specifically requested or demanded that the sales taxes be paid and such request or demand was rebuffed by these individuals, the outcome of this matter would be clear cut. However, as previously noted, the totality of the facts and circumstances must be considered in determining whether a particular person should be held personally liable for the sales tax liability of a corporation.

There is no evidence in this record that petitioner ever declined to exercise his authority (*cf.*, *Matter of LaPenna*, Tax Appeals Tribunal, March 14, 1991; *Matter of Baumvoll, supra*; *Matter of D&W Auto Serv. Center*, Tax Appeals Tribunal, April 20, 1989); instead, the evidence produced through the credible testimony of petitioner and Richard Waldron and the affidavit of Damaris Saldivar shows that he was prevented from having any real authority to exercise (*see, Matter of Taylor*, Tax Appeals Tribunal, October 24, 1991).

Prior to the attempted sale of EVAM, petitioner attempted to resign his position. His dissatisfaction was best expressed in his letter to Steven Edelson, dated March 2, 2004, wherein he stated that “[a]s I am not advised of nor am I involved with the overall strategic handling of the company, I request to be immediately relieved of my position as CEO and will no longer be an officer or a Director of the corporation.” His concern over potential personal liability for the

company's debts (including sales tax) is evidenced in the same letter when he states that "[a]t the end of my service as CEO I will request that MCG will enter into mutual release agreements with me on all operational issues." However, as noted in Finding of Fact "29", Steven Edelson, in an E-mail dated March 10, 2004, informed petitioner that he could not resign and that, "[u]ntil we as a company choose a direction, you are the acting CEO of the company."

Accordingly, it must be found that petitioner was not a person liable for the sales and use taxes due on behalf of AAHW as a person required to collect and pay such taxes pursuant to Tax Law §§ 1131(1) and 1133(a).

E. As a result of Conclusion of Law "D", Issue II is moot.

F. The petition of Udi Saly is granted and the notices of estimated determination issued to petitioner on August 16, 2004 and September 2, 2004, as modified (*see*, Finding of Fact "3"), are hereby canceled.

DATED: Troy, New York
July 19, 2007

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE