

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions :

of :

EUGENE DININO :

For Revision of Determinations or for Refund of
Sales and Use Taxes under Articles 28 and 29 of the
Tax Law for the Periods June 1, 2006 through August 31,
2006 and March 1, 2007 through February 29, 2008.

DETERMINATION
DTA NOS. 822605, 822606
822607, 822608, 822609
AND 822610

In the Matter of the Petition :

of :

EUGENE DININO :

For Redetermination of a Deficiency or for Refund of
New York State and City Personal Income Taxes under
Article 22 of the Tax Law and the New York City
Administrative Code for the Year 2007.

Petitioner, Eugene Dinino, 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 periods June 1, 2006 through August 31, 2006 and March 1, 2007 through February 29, 2008.

Petitioner, Eugene Dinino, filed a petition for redetermination of a deficiency or for refund of New York State and City personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the year 2007.

A consolidated hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 633 Third Avenue, New York, New York, on

September 23, 2009 at 10:30 A.M., with all briefs to be submitted by January 8, 2010, which date began the six-month period for the issuance of this determination. Petitioner appeared by Wormser, Kiely, Galef & Jacobs, LLP (Stefi N. Kaplan, Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (Osborne K. Jack, Esq., of counsel).

ISSUES

I. Whether petitioner was personally liable for the sales and use taxes due on behalf of 2427 Restaurant Corporation, as a person required to collect and pay such taxes under Tax Law § 1131(1) and § 1133(a).

II. Whether petitioner was a person required to collect, truthfully account for and pay over withholding taxes with respect to 2427 Restaurant Corporation, for the tax period ended December 31, 2007 and willfully failed to do so, thereby becoming liable for a penalty imposed pursuant to Tax Law § 685(g).

FINDINGS OF FACT

1. Petitioner, Eugene Dinino, during the period in issue, was the owner and sole shareholder of 2427 Restaurant Corporation, which operated a restaurant and club doing business as Eugene's. The restaurant commenced business operations in October 1999 and was located at 27 West 24th Street, New York, New York. The liquor license of the restaurant and club was in the name of the corporation. The lease for the premises of the business was in the name of petitioner.

2. On October 16, 2005, the corporation filed in the United States Bankruptcy Court for the Southern District of New York a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. Mr. Dinino, with the assistance of counsel, caused the filing of the voluntary petition to avoid eviction from the premises as the rent was in arrears.

3. On July 24, 2007, the corporation entered into an Interim Management Agreement with 27 West 24th Street Management LLC (the Manager) to manage the day-to-day operations of the corporation. Pursuant to the agreement, the Manager was to arrange for funding a minimum distribution to creditors of \$52,000.00 per month for a period of 12 months. In addition, the agreement provided that the Manager would provide temporary staff to consist of the corporation's chief operating officer, responsible for overseeing all aspects of marketing, advertising, public relations and promotion; the corporation's general manager, responsible for general day-to-day management operations; and, the corporation's special events director. The latter two individuals were to report to the chief operating officer, and all were generally under the supervision of the board of directors. The Manager was also given the authority to hire additional temporary staff as it deemed appropriate.

The chief operating officer's, general manager's and special effects director's duties included developing, implementing and overseeing an operating business plan to be used in managing the corporation through the effective date and subsequent to the plan approved by the Bankruptcy Court; managing the corporation's sales, marketing, advertising and promotion; hiring and firing employees, and managing the corporation's financial and treasury functions. The agreement stated that petitioner could not be terminated except for cause and was to be entitled to a salary of \$3,000.00 per week.

The agreement provided that the Manager was to retain complete and exclusive day-to-day control of the management and operation of the corporation, and had exclusive authority to designate signatories for all corporation bank accounts. Pursuant to the agreement, the Manager was responsible to cause the corporation to pay all trust fund and sales taxes collected during its operation of the restaurant and club or payable with respect to the period of operations under its

control, to the extent of available corporation funds. Petitioner retained the right to hire and fire security personnel, as well as approval over events booked at the club.

For its services, the Manager's fee was \$5,000.00 per week, plus 50% of the net profit. The Manager's fee was to be subordinated to the payment of the weekly salaries of petitioner and the temporary staff.

4. Under the agreement, the corporation's responsibilities included providing reliable, accurate and detailed information, materials and documentation, making decisions and taking future actions considering the recommendations of the Manager and advising the Manager of any third-party agreements in which the corporation or any principal had an interest.

5. The termination provisions of the agreement provided that the Manager might terminate its engagement at any time by 15 days' written notice to the corporation. The corporation could also terminate the agreement, on 15 days' prior written notice, but only in the event the Manager breached a material provision of the agreement, provided the Manager be given a reasonable opportunity to cure such breach that was capable of being cured within a reasonable time so long as the corporation provided written notice of such breach.

6. On August 10, 2007, the Bankruptcy Court approved, effective as of July 24, 2007, the Management Agreement entered into between 27 West 24th Street Management LLC and 2427 Restaurant Corporation. The order of the Bankruptcy Court stated that the Management Agreement was to terminate, among other contingencies, when the Court issued a final order confirming a plan of reorganization for the corporate debtor, incorporating an alternative plan, denying confirmation of the debtor's second amended plan of reorganization, appointing a Chapter 11 trustee or dismissing the case. The order amended the agreement and further

provided that the corporation, as debtor in possession, would retain the authority to exercise its duties as a fiduciary of its estate.

7. On June 30, 2008, the Bankruptcy Court issued an Order dismissing the case of the 2427 Restaurant Corporation.

8. Petitioner signed the New York state and local sales and use tax returns for the quarters ended August 31, 2006, May 31, 2007 and February 29, 2008. The sales tax returns for the quarters ended August 31, 2007 and November 30, 2007 were signed by the chief operating officer and the corporation's certified public accountant, respectively.

9. Petitioner signed a check of 2427 Restaurant Corporation D.I.P., dated September 5, 2007, payable to 27 West 24th Street Corporation in the amount of \$35,000.00. The memo portion of the check indicates payment for "September 2007 Rent." Petitioner signed a check of 2427 Restaurant Corporation D.I.P., dated September 6, 2007, payable to Cash in the amount of \$580.00. The memo portion of the check indicates payment for "Tech Serv Replacing Ck# 2653 & 2690."

10. On August 4, 2008, the Division of Taxation (Division) issued to petitioner, Eugene Dinino, five notices of determination for the quarters ended August 31, 2006, May 31, 2007, August 31, 2007, November 30, 2007 and February 29, 2008, assessing sales tax due in the amounts of \$0.00, \$45,321.90, \$64,139.95, \$65,521.56 and \$59,545.26, respectively, plus interest and penalty. The notices were based upon the corporation's failure to timely remit to the Division the total amount of sales tax due as shown on the returns, and the determination by the Division that petitioner was an officer or responsible person of the corporation for the periods at issue.

11. Petitioner conceded that he was personally liable for the sales and use taxes due on behalf of 2427 Restaurant Corporation, as a person required to collect and pay such taxes for the quarters ended August 31, 2006 and May 31, 2007. Prior to the execution of the interim management agreement, petitioner hired and fired employees, signed tax returns, signed checks and generally operated the business. Petitioner delegated responsibility for the filing of tax returns and remitting the tax due to his accounting department.

12. On April 1, 2008, the corporation, 2427 Restaurant Corporation, filed with the Division a Quarterly Combined Withholding, Wage Reporting, and Unemployment Insurance Return, form NYS-45-MN, for the period October 1, 2007 through December 31, 2007, indicating New York State and City withholding tax withheld in the amount of \$7,613.78. The withholding tax amount was not remitted with the filing of the return. On August 4, 2008, the Division issued to petitioner, Eugene Dinino, a Notice of Deficiency asserting a penalty in the amount of \$7,613.78, on the basis that petitioner was an officer or responsible person of 2427 Restaurant Corporation.

13. The corporation's general business corporation franchise tax returns, form CT-4, for the fiscal years ended June 30, 2006 and June 30, 2007, indicated that petitioner, as an officer, received compensation each year in the amount of \$41,600.00. Petitioner's tax year 2007 Resident Income Tax Return, form IT-201, and the wage and tax statement attached, indicated petitioner received as an employee of 2427 Restaurant Corporation wages in the amount of \$65,000.00. No other income was reported on petitioner's income tax return for the tax year 2007.

CONCLUSIONS OF LAW

A. 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. 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. The mere holding of corporate office does not, per se, impose tax liability upon an office holder (*see Vogel v. New York State Dept. of Taxation & Fin.*, 98 Misc 2d 222, 413 NYS2d 862 [1979]; *Cheylowe v. Koerner*, 95 Misc 2d 388, 407 NYS2d 427 [1978]; *Matter of Unger*, Tax Appeals Tribunal, March 24, 1994, *confirmed* 214 AD2d 857, 625 NYS2d 343 [1995], *lv denied* 86 NY2d 705, 632 NYS2d 498 [1995]). Rather, whether a person is an officer or employee liable for tax must be determined upon the particular facts of each case (*Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022, 513 NYS2d 564 [1987]; *Matter of Hall*, Tax Appeals Tribunal, March 22, 1990, *confirmed* 176 AD2d 1006, 574 NYS2d 862 [1991]; *Matter of Martin*, Tax Appeals Tribunal, July 20, 1989, *confirmed* 162 AD2d 890, 558 NYS2d 239 [1990]; *Matter of Autex Corp.*, Tax Appeals Tribunal, November 23, 1988). Factors to be considered, as set forth in the Commissioner's regulations, include whether a person is authorized to sign the corporation's tax returns, was responsible for managing or maintaining the corporate books or was permitted to generally manage the corporation (*Matter of Taylor*, Tax Appeals Tribunal, October 24, 1991; 20 NYCRR 526.11[b][2]). As summarized in *Matter of Constantino* (Tax Appeals Tribunal, September 27, 1990):

[t]he 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 (*Cohen v. State Tax Commn.*, *supra*, 513 NYS2d 565; *Blodnick v. State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536, 538, *appeal dismissed* 69 NY2d 822, 513 NYS2d 1027; *Vogel v. New York State Dept. of Taxation & Fin.*, *supra*, 413 NYS2d at 865; *Chevlowe v. Koerner*, *supra*, 407 NYS2d at 429; *Matter of William Barton*, [Tax Appeals Tribunal, July 20, 1989]; *Matter of William F. Martin*, *supra*; *Matter of Autex*, *supra*).

C. With regard to the withholding tax penalty asserted against petitioner, Tax Law § 685(g) provides:

Willful failure to collect or pay over tax.—Any person required to collect, truthfully account for, and pay over the tax imposed by this article who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat the tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

D. Tax Law § 685(n), in turn, furnishes the following definition of “person” subject to the section 685(g) penalty:

The term person includes an individual, corporation or partnership or limited liability company or an officer or employee of any corporation (including a dissolved corporation), or a member or employee of any partnership, or a member, manager or employee of a limited liability company, who as such officer, employee, manager or member is under a duty to perform the act in respect of which the violation occurs.

E. The determination of whether an individual qualifies as a “person” is factual in nature (*Matter of Hopper v. Commr. of Taxation and Finance*, 224 AD2d 733, 637 NYS2d 494 [1996], *lv denied* 88 NY2d 1065, 651 NYS2d 409 [1996]). The relevant factors to be considered include the following: whether the taxpayer signed or had the authority to sign tax returns, owned stock or served as an officer or employee of the corporation, derived a substantial portion of

income from the company, possessed a financial interest in the company, possessed the right to hire and fire employees or had authority to pay the corporate obligations (*Matter of Capoccia v. New York State Tax Commn.*, 105 AD2d 528, 481 NYS2d 476 [1984]; *Matter of Amengual v. State Tax Commn.*, 95 AD2d 949, 464 NYS2d 272 [1983]; *Matter of Shah*, Tax Appeals Tribunal, February 25, 1999).

F. Summarized in terms of a general proposition, the issue to be resolved is whether petitioner had, or could have had, sufficient authority and control over the affairs of the corporation to be considered a person under a duty to collect and remit the unpaid taxes in question (*Matter of Constantino; Matter of Chin*, Tax Appeals Tribunal, December 20, 1990). In addition, with respect to withholding tax, and unlike the sales and use tax situation, if petitioner is held to be a person under a duty as described, it must then be decided whether his failure to withhold and pay over such taxes was willful. The question of willfulness is related directly to the question of whether petitioner was a person under a duty, since clearly a person under a duty to collect and pay over the taxes is the one who can consciously and voluntarily decide not to do so. However, merely because one is determined to be a person under a duty, it does not automatically follow that a failure to withhold and pay over income taxes is “willful” within the meaning of that term as used in Tax Law § 685(g). As the Court of Appeals indicated in *Matter of Levin v. Gallman* (42 NY2d 32, 396 NYS2d 623), the test is:

whether the act, default, or conduct is consciously and voluntarily done with knowledge that as a result, trust funds belonging to the Government will not be paid over but will be used for other purposes No showing of intent to deprive the Government of its money is necessary but only something more than accidental non-payment is required (*id.*, 396 NYS2d at 624-625; *see Matter of Lyon*, Tax Appeals Tribunal, June 3, 1988).

Finally, “corporate officials responsible as fiduciaries for tax revenues cannot absolve themselves merely by disregarding their duty and leaving it for someone else to discharge”

(Matter of Ragonesi v. State Tax Commn. 88 AD2d 707, 451 NYS2d 301).

G. In order to prevail, petitioner, Eugene Dinino, “was required to establish by clear and convincing evidence that he was not an officer having a duty to act on behalf of the corporation, i.e., that he lacked the necessary authority or he had the necessary authority, but he was thwarted by others in carrying out his corporate duties through no fault of his own (citations omitted)” *(Matter of Goodfriend*, Tax Appeals Tribunal, January 15, 1998). In addition, with regard to the withholding tax, if it is determined that petitioner did have a duty to act on behalf of the corporation, petitioner was required to establish that the failure to withhold and pay over such taxes was not willful.

H. Petitioner’s main arguments advanced in support of his position that he was not a responsible person are that he did not exercise any authority over the business and was in fact precluded from doing so by virtue of the terms of the interim management agreement. Mr. Dinino argues that the management team operated the business on an ongoing daily basis and was responsible for carrying out the duty of collecting and remitting sales taxes and remitting withholding taxes. He argues that the interim management agreement was approved by the Bankruptcy Court, and that he was prevented from exercising any control over or having any direct involvement in the daily operations of the business. Mr. Dinino asserts that although he once held a position of management and financial authority for the corporation, such authority ceased pursuant to the interim management agreement, which designated others as responsible persons.

I. Pursuant to section 541 of the Bankruptcy Code, on the filing of a petition in bankruptcy, all property of the debtor becomes property of the estate (11 USC § 541). A debtor in possession has the same responsibilities as a trustee pursuant to section 1107 of the Bankruptcy Code. The duties of a trustee include filing returns for pre-petition periods (11 USC § 1106[a][6]) and filing returns and paying state and local tax liabilities for post-petition periods on behalf of the debtor (11 USC § 346[c][2], 346[f]). Thus, the corporation, as a debtor in possession, had a responsibility to file sales and withholding tax returns and pay sales tax collected and the withholding tax liability for all periods subsequent to the filing of its bankruptcy petition.

J. It is true that Mr. Dinino did not physically carry out those actions which would traditionally be viewed as indicative of the duties of one charged with the responsibility to collect or withhold and remit taxes. However, the fact that Mr. Dinino voluntarily entered into the interim management agreement, which placed responsibility for the filing of returns and paying the tax due, does not absolve him of the responsibility of assuring that the taxes due were remitted. Rather, the critical question is whether Mr. Dinino had, or could have had, the ability to control the affairs of the corporation. It is not a defense to petitioner's position that another party (in this case the management team) may also be liable for taxes due from the corporation. Tax Law § 1133(a) and Tax Law § 685(g) create joint and several liability for unpaid sales tax (*Matter of Martin v. Commissioner of Taxation*, 162 AD2d 890, 558 NYS2d 239 [1990]; *Matter of Bailey*, Tax Appeals Tribunal, November 24, 1993) and unpaid withholding tax (*Matter of Muffoletto*, Tax Appeals Tribunal, June 19, 1997).

K. Mr. Dinino has admitted that prior to the interim management agreement, he was responsible for the management and financial affairs of the corporation, of which he was the

100% shareholder. Mr. Dinino hired and fired employees, oversaw the promotions in the club and considered himself the manager who supervised the staff to insure the club was operating properly. It was he who caused the corporation to file in the United States Bankruptcy Court for the Southern District of New York a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. Following the execution of the interim management agreement, he remained 100% shareholder, had authority over the security personnel as well as the events booked at the club. Petitioner's yearly salary (\$156,000.00) after the signing of the agreement was nearly four times as great as the amount he received as compensation prior to the agreement (\$41,600.00). Mr. Dinino voluntarily entered into and requested the Bankruptcy Court to approve the interim management agreement.

Mr. Dinino claims that the terms of the management agreement precluded him from exercising any control over or having any involvement in the operational aspects of the business, yet the terms of the agreement provide otherwise. Although the agreement places the responsibility for filing tax returns and paying the taxes due on the management team, it also required the corporation to provide detailed information to the management team, including, presumably, information such as financial records. More importantly, the agreement gave the corporation the right to terminate the agreement where it was determined that the Manager breached a material provision of the contract, such as failing to pay the sales and withholding taxes when due. Rather than excluding petitioner from the management of the business, the agreement provided petitioner the right to determine whether the Manager was carrying out its responsibilities, which included paying taxes when due, and to terminate the agreement if such responsibilities were not being met. Beginning with the sales and use tax return for the quarter ended August 31, 2007, and continuing with the returns for the quarters ended November 30,

2007 and February 29, 2008, the management team failed to remit the sales tax due to the Division, and also failed to remit the withholding taxes due for the period October 1, 2007 through December 31, 2007. Had Mr. Dinino inquired as to the status of the sales and withholding tax returns, he would have become aware of the failure of the management team to pay the taxes due and would have had the right to insist that the taxes be paid, and if not paid, to terminate the agreement. Instead, Mr. Dinino, as he had done prior to the execution of the interim management agreement with his own accounting department, continued to ignore the financial obligations of the corporation, including its tax obligations, when he failed to determine if the responsibilities of the management team were being carried out. Although the Bankruptcy Court approved the interim management agreement, it specifically amended the agreement to provide that the corporation, of which Mr. Dinino was the 100% shareholder, as debtor in possession, retained the authority to exercise its duties as a fiduciary of its estate. Mr. Dinino was the 100% shareholder of the corporation, and as such, was responsible to insure that the management team was abiding by its obligations under the interim management agreement, including the obligation to report and pay the taxes due. Under these circumstances, it was not reasonable for Mr. Dinino to fail to inquire of the management team whether all tax liabilities were being paid.

Mr. Dinino's signing of the sales tax return for the quarter ended February 29, 2008 and the two checks dated September 5 and 6, 2007 may have been, as claimed, insignificant ministerial acts of no significance. However, the fact that he signed such return and the two checks at the beginning and end of the period of which the agreement was in effect, and during the time period at issue herein, is inconsistent with the claim that he was precluded from having any involvement with the business under the terms of the management agreement. The

management agreement provided for its termination should the Manager not fulfill its obligations under the agreement, including the reporting and paying the taxes due, Mr. Dinino failed to inquire as to the reporting and paying of the taxes due, and the corporation retained the authority to exercise its duties as a fiduciary of its estate. In sum, the evidence simply does not bear out the claim that petitioner was not one with the ability and under a duty to carry out the tax payment obligations of the restaurant/club.

L. Petitioner contends that his failure to pay the withholding tax due was not “willful,” in that he did not know that the taxes were not being paid, and the agreement specifically placed the responsibility for paying the taxes due with the Manager. However, lack of actual knowledge does not preclude a finding of willfulness if it is determined that one with a duty to act recklessly disregarded that duty (*Matter of Capoccia v. State Tax Commn.*; *Matter of Ragonesi v. State Tax Commn.*; *Matter of Goodman*, Tax Appeals Tribunal, November 15, 2007; *Matter of Hussain*, Tax Appeals Tribunal, December 6, 1990). Although the Manager had the responsibility to pay the taxes due under the agreement, petitioner had the right to cancel the agreement if its provisions were not being carried out, the corporation remained the fiduciary of its estate and petitioner never inquired as to whether the withholding taxes were actually being paid. Under these circumstances, petitioner cannot absolve himself merely by disregarding his duty and leaving it to someone else to discharge (*Matter of Capoccia v. State Tax Commn.*; *Matter of Ragonesi v. State Tax Commn.*).

M. Petitioner mistakenly cited two determinations of administrative law judges, which is specifically prohibited by Tax Law § 2010(5) and will not be considered herein. Petitioner’s reliance on *Matter of Taylor* (Tax Appeals Tribunal, October 24, 1991) is misplaced, as the factual circumstances involved therein differ greatly from those found in the present matter. In

Taylor, the taxpayer was not a shareholder of the corporation that operated a restaurant. The restaurant was managed by an individual who was under the direction and control of two other individuals, one of which was the 100% shareholder of the corporation. Mr. Taylor was made an officer of the corporation as a condition of his employment and was instructed by the three individuals to hold himself out as the owner of the business.

Eventually, the three individuals were indicted and convicted of various acts of racketeering, including controlling various clubs and restaurants, failing to reveal their interests to the State Liquor Authority and “skimming” gross receipts from the businesses. They were also indicted for filing false and fraudulent sales tax returns to evade tax.

The Tribunal found that Mr. Taylor had no actual control over the business affairs of the corporation at issue, but was acting under the direction of others. In contrast, Mr. Dinino had the right to terminate the interim management agreement if the Manager was not fulfilling its obligations, including the paying of the taxes due. The facts herein are clearly distinguishable from the facts in *Taylor*, as Mr. Dinino had both the right and the opportunity to insure the payment of the corporation’s tax liabilities, but elected to ignore those responsibilities.

N. The petitions of Eugene Dinino are denied and the notices of determination and the notice of deficiency, all dated August 4, 2008, are sustained.

DATED: Troy, New York
June 24, 2010

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE