

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petitions :
of :
PETER PAPPAS : DECISION
for Revision of Determinations or for Refund of : DTA NOS. 822124
Sales and Use Taxes under Articles 28 and 29 of : AND 822125
the Tax Law for the Periods March 1, 2004 through :
May 31, 2004, March 1, 2005 through August 31, :
2005, June 1, 2004 through February 28, 2005 and :
September 1, 2005 through November 30, 2005. :

Petitioner, Peter Pappas, filed an exception to the determination of the Administrative Law Judge issued on August 21, 2014. Petitioner appeared by Kestenbaum & Mark (Bernard S. Mark, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Leo Gabovich).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on June 11, 2015, in New York, New York, which date began the six-month period for issuance of this decision.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether petitioner was properly held personally liable, pursuant to Tax Law §§ 1131 (1) and 1133 (a), for the unpaid sales and use taxes owed by W. Pappas, Inc., and by Double Papas, Inc., for the periods March 1, 2004 through May 31, 2004, March 1, 2005 through August 31,

2005, June 1, 2004 through February 28, 2005 and September 1, 2005 through November 30, 2005.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge, except findings of fact 9, 10 and 11, which we have modified to more accurately reflect the record. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

1. The Division of Taxation (Division) issued to petitioner, Peter Pappas, 11 notices of determination assessing sales and use taxes due, plus interest and penalty. The notices are predicated on the position that petitioner is liable as an officer or person responsible to collect and remit sales and use taxes on behalf of two corporate entities, W. Pappas, Inc., and Double Papas, Inc. Petitioner does not challenge the dollar amounts of tax, interest or penalty assessed. Rather, and as stipulated by the parties, petitioner disputes only the Division's claim that he was an officer or person responsible to collect and remit taxes on behalf of the two corporations. The following tables set forth information concerning the individual notices at issue herein:

TABLE ONE

CORPORATE ENTITY	SALES TAX PERIOD	NOTICE NUMBER	AMOUNT
W. Pappas, Inc.	06/01/04 - 08/31/04	L-026982270	\$5,438.92
W. Pappas, Inc.	09/01/04 - 11/30/04	L-026982269	\$5,438.92
W. Pappas, Inc.	12/01/04 - 02/28/05	L-026982268	\$5,438.92
W. Pappas, Inc.	09/01/05 - 11/30/05	L-026982265	\$2,911.79

TABLE TWO

CORPORATE ENTITY	SALES TAX PERIOD	NOTICE NUMBER	AMOUNT
W. Pappas, Inc.	03/01/04 - 05/31/04	L-026982271	\$5,438.93
W. Pappas, Inc.	03/01/05 - 05/31/05	L-026982267	\$2,911.80
W. Pappas, Inc.	06/01/05 - 08/31/05	L-026982266	\$2,507.89

TABLE THREE

CORPORATE ENTITY	SALES TAX PERIOD	NOTICE NUMBER	AMOUNT
Double Papas, Inc.	12/01/04 - 02/28/05	L-027023908	\$6,378.95
Double Papas, Inc.	09/01/05 - 11/30/05	L-027023905	\$4,153.96
Double Papas, Inc.	03/01/05 - 05/31/05	L-027023907	\$4,153.97 ¹
Double Papas, Inc.	06/01/05 - 08/31/05	L-027023906	\$3,780.64

2. The dollar amounts set forth above represent tax only. In addition:

a) For the sales tax periods pertaining to the four assessments set forth in Table One and to the first two assessment set forth in Table Three, the respective corporate entities did not file sales tax returns. Each of the assessments set forth for these periods is a notice of estimated determination and for each, interest plus statutory penalty based upon failure to file are assessed.

b) For the sales tax periods pertaining to the first two assessments set forth in Table Two and to the third assessment set forth in Table Three, the corporate entities did not file sales tax returns in a timely manner and did not pay the taxes stated to be due thereon. Each of the assessments for these periods is a notice of determination and for each, interest plus penalty for late filing and failure to pay are assessed.

c) For the sales tax periods pertaining to the third assessment set forth in Table Two and to the fourth assessment set forth in Table Three, the corporate entities failed to pay the tax stated to be due on the returns filed for such periods. Each of the assessments for these periods is a notice of determination and for each, interest plus penalty for failure to pay are assessed.

¹ The parties agreed that the assessment for this period has been paid in full.

3. Petitioner, Peter Pappas, received a degree in computer engineering from Stony Brook University. He has been involved in the import and export food business continuously since 1985. Prior to, during and after the periods at issue herein, he devoted 100% of his working time to, and earned 100% of his income in connection with, this import and export business and the sales associated therewith.

4. Petitioner was a long-time friend of one Nicholas Papamichael, from the time that the two were in their mid-twenties. Mr. Papamichael was described by petitioner as being a “Wall Street guy.” In or about 2003, petitioner was invited by Mr. Papamichael to invest in two donut shop franchises, known as Twin Donuts, to be located in the Bronx. Petitioner described this invitation as “[Mr. Papamichael] was a Wall Street guy and . . . I don’t know what happened, . . . but he came out of being a Wall Street guy and he came to me and asked me if I wanted to open up a couple of donut shops, invest with him.”

5. On September 22, 2003, Mr. Papamichael formed the two corporations known as Double Papas, Inc., and W. Pappas, Inc. The address listed for each entity is the same as Mr. Papamichael’s home address. These entities were used to secure the Twin Donut franchises. Petitioner invested approximately \$250,000.00 and also contributed a lease he held to premises located at 402 Hunts Point Avenue, Bronx, New York, which had been given to him in 2003 by a friend upon the closing of that friend’s business at that location. At inception, the Hunts Point donut shop franchise was operated by W. Pappas, Inc., while the other donut shop franchise, located at 140-03 Fordham Road, Bronx, New York, was operated by Double Papas, Inc.

6. Petitioner owned 45% (90 shares) of each corporation. Mr. Papamichael’s wife, Kathleen, also owned 45% (90 shares) of each corporation. According to petitioner, “[Mr. Papamichael] couldn’t sign his name on things, I guess, so he put his wife instead.”

Approximately three months after the venture commenced, one Angela Pirsos became a minority owner of each of the corporations, investing \$50,000.00 in exchange for her 10% (20 shares) stake in each corporation.² In connection with securing the Twin Donut franchises, petitioner signed the franchise agreements as well as a personal guarantee of liability in favor of the franchisor (Twin Donuts/Spartan Built, Ltd.).

7. Petitioner did not involve himself in the day-to-day operation of either of the donut shops. He had no direct involvement with the employees, suppliers, purchasers, attorneys, accountants or creditors of either of the corporations, and Mr. Papamichael, as opposed to petitioner, dealt with the franchisors, and with the daily operations of the two donut shops. Petitioner admitted having signature authority on the corporations' bank accounts and, at the request of Mr. Papamichael, petitioner occasionally signed a corporate check or a tax return as described hereinafter. In this regard, petitioner explained that he stopped at the store locations on occasion for coffee or a donut, or stopped in if Mr. Papamichael told him something needed to be signed.

8. Petitioner hoped to receive payments from the operation of the donut shops as a return on his investment. In this regard, he received checks during the first four or five months that the businesses were in operation, but received nothing thereafter. The amounts he received were not specified in the record. Thereafter, and in response to his inquiries to Mr. Papamichael about receiving further payments, petitioner was told that there was no money. Petitioner did not attempt to review the books and records of the corporations, but he assumed the same existed and

² Angela Pirsos is the spouse of Milton Pirsos, an accountant who prepared petitioner's personal income tax returns. There is no indication that either Angela or Milton Pirsos were acquainted with Mr. Papamichael, other than through knowing petitioner.

were being kept as required. Petitioner stated that he viewed such matters, including the filing of tax returns and payment of bills and taxes, as “Nick’s responsibility.”

9. Review of the signatures affixed to the tax returns and checks included in evidence discloses the following:

Double Papas, Inc.

- a) Petitioner’s name is listed under the title of president and he confirmed that the signature on the New York State and local quarterly sales tax return (form ST-100) filed for the quarterly period ended May 31, 2004 was his. He denied that the signature on the check associated with such return was his.
- b) The form ST-100 filed for the period ended November 30, 2004 again lists petitioner’s title as president. This return is unsigned.
- c) The general business corporation franchise tax return short form (form CT-4) for the year 2003 and the New York S corporation franchise tax return short form (form CT-4-S) for the year 2004 each bear an illegible signature next to the title president. Petitioner denied that the illegible signature on these returns was his.
- d) The signature box for petitioner’s signature on the resident income tax return (form IT-201) filed by petitioner (and his spouse) for the year 2004 bears an illegible signature. This signature, though illegible, is similar to the signature appearing on the tax return described in finding of fact 9 (a) and is dissimilar to the signature on the check described in finding of fact 9 (a) and the tax returns described in finding of fact 9 (c).

W. Pappas, Inc.

- e) Petitioner is listed under the title of president on the form ST-100 for the period ended May 31, 2004. Petitioner denied that the signature on such return was his. He confirmed that the signature on the check associated with this return was his.
- f) Form CT-5 (request for six-month extension to file) for the year 2003 (dated 3/13/04) bears an illegible signature next to the title president. The check associated with that return also bears an illegible signature. The signatures on the CT-5 and the check associated therewith are similar to the signatures appearing on the sales tax return described above in finding of fact 9 (a), the income tax return described in finding of fact 9 (d), and the check described in finding of fact 9 (e).
- g) Form CT-4-S for the year 2004 (dated 5/10/05) and the check associated therewith also bear illegible signatures. The signatures on the CT-4-S, the check

associated therewith, and the sales tax return described in finding of fact 9 (e) are similar to the signatures on the returns described in finding of fact 9 (c).

10. The check drawn on the account of Double Pappas, Inc., which does not appear to have petitioner's signature in payment of sales tax liability for the period ended May 31, 2004, as described above (*see* finding of fact 9 [a]), is dated June 20, 2004. The check drawn on the account of W. Pappas, Inc., which appears to have petitioner's signature in payment of sales tax liability for the period ended May 31, 2004, as described above (*see* finding of fact 9 [e]), is dated June 21, 2004. The check drawn on the account of W. Pappas, Inc., which appears to have petitioner's signature in payment of corporation tax liability for the year 2003, as described above (*see* finding of fact 9 [f]), is dated March 10, 2004. The check drawn on the account of W. Pappas, Inc., which does not appear to have petitioner's signature in payment of corporation tax liability for the year 2004, as described above (*see* finding of fact 9 [g]), is dated March 14, 2005.

11. Petitioner claims to have had no contact with Mr. Papamichael after the middle of 2004. According to petitioner, Mr. Papamichael physically changed the locks on the doors and gates at each of the corporations' premises at some point in or about mid-2004. Mr. Papamichael's apparent signature appears alone on the sales tax returns for both Double Pappas, Inc., and W. Pappas, Inc., for the periods March 1, 2005 to May 31, 2005 and June 1, 2005, to August 31, 2005.

12. On November 26, 2003, Mr. Papamichael formed Feel the Steel Corp., and on December 9, 2003 he formed Hellenic Donut, Inc. The address listed for each of these entities is the same as Mr. Papamichael's home address. At some point in 2004, and allegedly in connection with petitioner being locked out of the premises, these entities took over the operations of the two donut franchise locations, with Hellenic Donut, Inc., replacing Double

Pappas, Inc., as the operator at the Fordham Road location, and Feel the Steel Corp. replacing W. Pappas, Inc., as the operator at the Hunts Point location. These entities operated under the name “Sugar Ray’s Coffee Shop.”

13. On March 16, 2006, i.e., after the periods at issue herein, Mr. Papamichael formed an additional corporation known as Bag Guyz, Inc. The address listed for this entity was, again, the same as Mr. Papamichael’s home address. In addition, one Nick Kapelonis is listed as the registered agent for this entity. In or about March 2006, the operation of Hellenic Donut, Inc., at Fordham Road closed. Mr. Papamichael removed all of the equipment and opened a pizzeria (using the same equipment) operating under the name “Sugar Ray’s Pizza” at 1119 Longwood Street, Bronx, New York. Petitioner stated that Mr. Kapelonis was brought in “as a partner” by Mr. Papamichael.

14. In or about November 2005, petitioner retained an attorney to commence legal action against Mr. Papamichael and others, and to defend against a lawsuit filed by the franchisor against petitioner under the personal guarantee signed by petitioner at the time of his initial involvement (*see* finding of fact 6). Petitioner proposed to sell his shares in W. Pappas, Inc., and Double Papas, Inc., to Mr. Papamichael. An agreement memorializing this proposal was prepared, including the admission by Mr. Papamichael that he was the sole operator of the businesses from their inception and indemnifying petitioner from liability in connection with the operation of the businesses. This agreement was signed by petitioner but was never signed by Mr. Papamichael.

15. On May 31, 2007, petitioner, together with Milton and Angela Pirsos, filed a summons and verified complaint in Supreme Court, Nassau County, New York, against a number of named defendants including Nick and Kathleen Papamichael, Anthony Tsaros,

Nicholas Marchese, Feel the Steel, Inc., Kayzee Realty Corp., Hellenic Donut, Inc., Twin Donut, Inc., TDS Leasing, LLC, and Spartan Built, Ltd. The complaint alleged, among other items, that petitioner was fraudulently induced to enter into the agreement upon the promise of an equal share of the profits of the two donut shops, but in fact he received no information regarding the shops' operations and no profits save for the initial checks (*see* finding of fact 8).

16. By affidavit filed in connection with an action commenced against petitioner by the franchisor,³ petitioner stated, among other items, that he was fraudulently induced to execute the personal guarantee of liability when the franchisor had knowledge that petitioner was not a working partner but rather was merely an outside investor with little knowledge of the business.

17. The record does not disclose any specifics concerning resolution of the lawsuits described above. W. Pappas, Inc., and Double Pappas, Inc., were dissolved by proclamation on January 27, 2010. Petitioner eventually filed for bankruptcy protection and was discharged.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge reviewed the relevant criteria for determining whether an individual is a person required to collect tax on behalf of a corporation and therefore personally liable for the sales tax obligations of that corporation. Applying such criteria to the present matter, the Administrative Law Judge determined that petitioner was a person required to collect tax on behalf of the Double Papas, Inc. and W. Pappas, Inc. and, therefore, was personally liable for their sales tax obligations. The Administrative Law Judge interpreted petitioner's lack of involvement in the corporations' affairs as a disregard or a delegation of responsibility and not as a lack of authority or control. The Administrative Law Judge also noted that, while it appeared likely that, at some point, Mr. Papamichael deliberately withheld information from

³ In this action, the franchisor/plaintiffs were Twin Donut, Inc., and Spartan Built, Ltd.

petitioner and misled petitioner with respect to the corporations' tax obligations, the time that such actions may have occurred was not in the record.

ARGUMENTS ON EXCEPTION

Petitioner argues that the relevant case law suggests consideration of indicia other than status as an officer to indicate whether an individual is a responsible officer. He contends that such other indicia shows he was not a responsible officer. He notes that he did not derive substantial income from the corporation and had no involvement in the corporations' management or financial affairs. Petitioner asserts that the actions of Mr. Papamichael in operating the two stores, denying petitioner access by changing the locks, and placing the operations of the businesses under two corporations that he owned and controlled, show that petitioner was not in control and should not be held as a responsible officer.

The Division argues that petitioner has not established by clear and convincing evidence that he was not an officer having a duty to act on behalf of the corporations, i.e., that he lacked authority or that he was thwarted or prevented from any participation in the corporate duties through no fault of his own. The Division notes that petitioner was a major stockholder and always listed as president.

OPINION

Tax Law § 1133 (a) imposes personal liability upon any person required to collect the tax imposed by Article 28 of the Tax Law 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 any requirement of Article 28 (Tax Law § 1131 [1]). Petitioner bears the burden of proof to show, by clear and convincing evidence, that he was not a person required to collect tax under Tax Law § 1131 (1)

(*Matter of Goodfriend*, Tax Appeals Tribunal, January 15, 1998). The personal liability imposed on individuals pursuant to Tax Law § 1133 (a) is joint and several (*see Matter of Tafeen*, Tax Appeals Tribunal, January 3, 2002).

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 [1987]). We look to various factors in making this factual determination. The holding of corporate office is one such factor, but personal liability under Tax Law § 1131 (1) is not limited to individuals holding official titles (*see Matter of Ianniello*, Tax Appeals Tribunal, November 25, 1992, confirmed 209 AD2d 740 [1994]; *see also Chevlowe v Koerner*, 95 Misc 2d 388 [1978]). Other relevant factors include the individual's authority to sign corporate checks; the individual's economic interest in the corporation; and the individual's knowledge of and control over the financial affairs of the corporation (*see Matter of Constantino*, Tax Appeals Tribunal, September 27, 1990). The relevant consideration is "petitioner's authority and responsibility to exercise control over the corporation . . . not [her] actual assertion of such authority (citations omitted)" (*Matter of Coppola v Tax Appeals Trib. of State of N.Y.*, 37 AD3d 901 [2007]).

Upon review of the facts in the present matter, viewed in light of these factors, we agree with the Administrative Law Judge's initial conclusion that petitioner was a person required to collect tax under Tax Law § 1131 (1) during the periods at issue. As noted by the Administrative Law Judge:

"[T]he evidence shows that petitioner invested a significant amount of money and also contributed a leasehold to premises used as the business location for one of the corporate entities. He signed the franchise agreements and also a guarantee of personal liability to the franchisors in connection therewith. He was also listed as holding the title of president, and was one of two majority stockholders of each of the corporations. He admitted having signature authority over the corporations'

bank accounts and authority to sign [and did sign] documents including checks and tax returns on behalf of the corporations.”

As did the Administrative Law Judge, we find such evidence sufficient under the circumstances to establish that petitioner was a person required to collect tax pursuant to Tax Law § 1131 (1) (*see Matter of Sacher*, Tax Appeals Tribunal, July 2, 2015 [corporate officer with check-signing authority and who signed a personal guaranty for corporate indebtedness determined to be a responsible officer]).

As noted, in reaching the conclusion that petitioner was a responsible officer of the corporations, the Administrative Law Judge acknowledged that “[i]t is likely that, at some point in time . . . [petitioner] was affirmatively precluded from participation in the corporate duties by the actions of Mr. Papamichael.” The Administrative Law Judge found, however, that “the time frame after which petitioner was unable to exercise the foregoing authority . . . is not clearly specified in the record.”

We disagree with the Administrative Law Judge on this point and find that, as of 2005, petitioner no longer had sufficient authority or responsibility over the corporations to be responsible for the collection and payment of the sales taxes at issue. This conclusion is premised on the Administrative Law Judge’s finding that Hellenic Donut, Inc. and Feel the Steel Corp. took over the operation of the donut shops at some point in 2004 (*see* finding of fact 12). These entities were formed (and apparently controlled) by Mr. Papamichael without petitioner’s involvement. Accordingly, even though sales tax returns continued to be filed by W. Pappas, Inc., and Double Papas, Inc., petitioner was in no way associated with the entities that were actually making taxable sales in 2005. Additionally, although petitioner’s signature appears on sales tax returns and checks in the record that were signed before 2005, his signature does not appear on any such documents signed in 2005 (*see* findings of fact 9 and 10). In our view, these

unusual facts and circumstances corroborate petitioner's claim that he was "locked out" by Mr. Papamichael. We thus conclude that petitioner lacked the necessary authority to be considered a responsible officer of W. Pappas, Inc., and Double Papas, Inc., for the sales tax periods at issue commencing in 2005.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Peter Pappas is granted to the extent indicated in paragraph 4 below, but is otherwise denied;
2. The determination of the Administrative Law Judge is reversed to the extent indicated in paragraph 4 below, but is otherwise affirmed;
3. The petition of Peter Pappas is granted to the extent indicated in paragraph 4 below, but is otherwise denied;
4. The notices of determination L-026982265, L-026982267, L-026982266, L-027023905, L-027023907, and L-027023906 are canceled; and
5. The notices of determination L-026982270, L-026982269, L-026982268, L-026982271 and L-027023908 are sustained.

DATED: Albany, New York
December 11, 2015

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner

/s/ James H. Tully, Jr.
James H. Tully, Jr.
Commissioner