

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
GREGG M. REUBEN	:	DECISION DTA NO. 827340
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, 2012 through August 31, 2012 and June 1, 2013 through February 28, 2015.	:	

Petitioner, Gregg M. Reuben, filed an exception to the determination of the Administrative Law Judge on February 15, 2018. Petitioner appeared by Ballon, Stoll, Bader & Nadler, PC (Norman R. Berkowitz, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Jessica DiFiore, Esq., and David Gannon, Esq., of counsel).

Petitioner filed a letter brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner filed a reply brief. Oral argument was heard on February 28, 2019, in Albany, 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.

ISSUES

I. Whether petitioner was properly determined to be a person under a duty to collect and remit sales and use taxes, pursuant to Tax Law §§ 1131 (1) and 1133 (a), on behalf of 12 limited liability companies.

II. Whether, if so, petitioner has nonetheless established facts and circumstances sufficient to negate his liability for failing to have collected and remitted taxes, or to warrant reduction or abatement of penalties.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

1. In January 2007, petitioner, Gregg M. Reuben, established Alliance Parking Services, LLC (Alliance). During the periods at issue herein, petitioner, via Alliance, was engaged in the business of operating 25 to 30 parking lots and parking garages in the New York City metropolitan area through, as relevant here, the following 12 different limited liability companies (the 12 LLCs):

Saint Nicholas Parking Mgmt, LLC.
Atlantic Parking Mgmt, LLC.
150th Parking Leasehold, LLC.
Element Parking Mgmt, LLC.
Grosvenor Parking, LLC.
162 Parking Leasehold, LLC.
Key Parking Mgmt, LLC.
Schermerhorn Parking Mgmt, LLC.
Corinthian Parking Management, LLC.
Alliance E. 69th Parking, LLC.
Alliance Impala Parking, LLC.
222 Riverside Management, LLC.

2. Alliance was the sole member of each of the foregoing 12 LLCs. Petitioner, in turn, owned 99% of Alliance. Another entity, Gregg M. Reuben, Inc., owned the remaining 1% of Alliance. Gregg M. Reuben, Inc., was an S corporation, and petitioner was the sole shareholder of Gregg M. Reuben, Inc.

3. For 25 years prior to establishing Alliance, petitioner had been employed by large and mid-sized companies that were engaged in the business of operating parking lots and parking garages. Petitioner stated that he clearly understood how the parking facilities needed to be managed, including setting up the operating controls, the appropriate levels of staffing, pricing strategies, marketing and all of the facility-level operational matters.

4. Alliance began operations in January 2007, managing one parking facility. By the end of 2007, Alliance had grown to operating over 10 parking facilities. By the end of 2008, Alliance operated 20 such facilities. As of 2010, Alliance operated over 30 parking facilities, had over 100 employees, and operating revenues in excess of ten million dollars.

5. As Alliance grew, petitioner hired administrative staff to perform accounting services, including accounts payable and accounts receivable functions. In 2009, petitioner hired Kwesi Bovell as comptroller and chief financial officer (CFO). Mr. Bovell was tasked by petitioner with developing accounting systems for Alliance. Mr. Bovell's duties also included paying vendors and managing the payroll. During its early years, Alliance had utilized a payroll service (ADT). However, in or about 2013, payroll processing was changed so as to be handled in-house, at the request and under the direction of Mr. Bovell. Petitioner stated that he was "concerned" about this move, but that he agreed to Mr. Bovell's request.

6. An outside accounting firm was retained to prepare annual financial statements and income tax returns for Alliance and the 12 LLCs, and in connection therewith to provide a review, but not an audit-level examination, of Alliance's business. While income tax preparation and filing matters were handled by the accounting firm, sales tax accounting, reporting and payment functions were kept in-house, under the direction of Mr. Bovell.

7. Petitioner stated that Mr. Bovell was directly in charge of preparing and filing the sales tax returns, and paying the tax due thereon. Petitioner was the sole authorized signatory on the bank accounts of Alliance and the 12 LLCs. However, Mr. Bovell was authorized to use petitioner's electronic signature, and did so for sales tax filings and payments, as well as for other payments. Petitioner admitted to signing sales tax returns for certain periods, specifically after Mr. Bovell's employment with Alliance had been terminated (*see* finding of fact 10).

8. Petitioner relied upon Mr. Bovell to handle financial matters for Alliance. In contrast, petitioner was fully engaged in operational matters, including "growing the business," by obtaining new operating locations and "engaging in strategic partnerships." Petitioner did not open or review bank statements, and testified that "I never looked at the mail unless somebody specifically brought it to my attention." Petitioner further stated, with regard to tax and other financial matters, that:

"So far as I was concerned, the I's were being dotted, the T's were being crossed. The landlords were getting paid, our employees were paid, our vendors were getting paid, and that was my litmus test;I knew if there were problems, I would get calls from landlords or from our clients with whom we need to make remittances to, or vendors. Because those are all people I had relationships with."

9. Near the end of December 2013, petitioner began to receive calls from parking facility landlords advising that rent payments had not been made. In response, petitioner testified that he began opening and reviewing bank statements, and he spoke to Mr. Bovell about the financial situation of Alliance and the 12 LLCs. He stated that Mr. Bovell advised him that "cash was very tight . . . and he was having trouble making those payments." Petitioner told Mr. Bovell it was his responsibility to report the financial condition of the companies to petitioner, and that "if the company needed money, that was [petitioner's] responsibility."

10. In April 2014, after determining that there were serious problems with Alliance’s business, and being unsatisfied with Mr. Bovell’s attempts to explain the reasons for the problems, petitioner discharged Mr. Bovell. After discovering sales tax filing and payment issues with regard to the 12 LLCs, petitioner filed returns on behalf of those entities, though he did not have the financial means to make all of the payments due thereon.

11. Petitioner continued his own attempts to discern the reasons for the financial difficulties facing Alliance. Ultimately, however, Alliance and petitioner did not have the financial means to remain in business, and in late 2014, Alliance ceased its business operations.

12. Petitioner hired an accounting firm, WeiserMazars, LLP, to perform a forensic accounting of Alliance’s business. In a letter dated July 27, 2015, WeiserMazars stated that:

“It is our understanding that during a period of about one and a half (1½) years, [Mr. Bovell] prepared sales and use tax returns and issued tax-payment checks for the [12 LLCs]. Unbeknownst to [petitioner], . . . many of those returns and/or payments were never remitted and the funds for the taxes are missing.”

13. Petitioner did not have the funds to complete the forensic accounting process and terminated the engagement with WeiserMazars.

14. The Division of Taxation (Division) issued to petitioner a total of 44 notices of determination, assessing sales and use taxes due, in the amounts and for the specified sales tax quarterly periods identified below, plus interest and penalty, as follows:

Entity	Notice Number	Notice Date	Period Ended	Amount¹
St. Nicholas Parking Mgmt., LLC	L-042442539	01/30/15	02/28/14	\$23,528.44
	L-042442540	01/30/15	11/30/13	\$1,082.65
	L-042442541	01/30/15	08/31/13	\$1,002.38
	L-042442542	01/30/15	08/31/12	\$2,679.88

¹ The amounts shown do not reflect amounts of penalty and/or interest that are also assessed, or any payments or credits made or applied against the listed assessments.

Atlantic Parking Mgmt., LLC	L-042563525	03/10/15	08/31/14	\$11,285.51
	L-042563526	03/10/15	05/31/14	\$10,337.44
	L-042563527	03/10/15	02/28/14	\$8,638.54
	L-042563528	03/10/15	11/30/13	\$828.96
	L-042563529	03/10/15	08/31/13	\$869.43
	L-042892004	06/19/15	11/30/14	\$11,285.51
150th Parking Leasehold, LLC	L-042551728	03/03/15	08/31/14	\$9,614.97
	L-042551729	03/03/15	05/31/14	\$8,472.74
	L-042551730	03/03/15	02/28/14	\$8,796.39
	L-042551731	03/03/15	11/30/13	\$771.90
	L-042551732	03/03/15	08/31/13	\$714.65
Element Parking Mgmt., LLC	L-042519700	02/20/15	08/31/13	\$572.82
	L-042519701	02/20/15	05/31/14	\$11,051.88
	L-042519702	02/20/15	02/28/14	\$10,953.80
Grosvenor Parking LLC	L-042370290	01/14/15	08/31/14	\$136.14
	L-042370291	01/14/15	08/31/13	\$400.79
	L-042370292	01/14/15	05/31/14	\$2,551.01
	L-042370293	01/14/15	02/28/14	\$467.50
	L-042370294	01/14/15	11/30/13	\$432.85
162 Parking Mgmt., LLC	L-042519805	02/20/15	08/31/14	\$21,177.53
	L-042519806	02/20/15	05/31/14	\$20,609.34
Key Parking Mgmt., LLC	L-043493083	08/17/15	05/31/14	\$1,998.83
	L-043493084	08/17/15	02/28/14	\$2,569.62
	L-043493085	08/17/15	11/30/13	\$3,950.87
Schermerhorn Parking Mgmt., LLC	L-043171571	06/17/15	05/31/14	\$4,147.20
	L-043171572	06/17/15	02/28/14	\$4,725.40
Corinthian Parking Mgmt., LLC	L-043202067	06/19/15	11/30/14	\$36,369.03
	L-043202068	06/19/15	08/31/14	\$200.00
	L-043202069	06/19/15	08/31/13	\$1,996.20
	L-043202070	06/19/15	05/31/14	\$30,542.85
Alliance E 69th Parking, LLC	L-042258454	03/16/15	08/31/13	\$884.86
	L-042258455	03/16/15	02/28/14	\$1,510.15
	L-042258456	03/16/15	11/30/13	\$955.81

Alliance Impala Parking, LLC	L-042519748	02/20/15	08/31/14	\$11,133.96
	L-042519749	02/20/15	05/31/14	\$8,976.30
	L-042519750	02/20/15	02/28/14	\$10,724.81
	L-042519751	02/20/15	11/30/13	\$800.36
	L-042519752	02/20/15	08/31/13	\$1,997.26
222 Riverside Management, LLC	L-043421831	07/28/15	02/28/15	\$9,382.34
	L-043421832	07/28/15	11/30/14	\$9,382.34

15. Each of the foregoing notices indicates that petitioner was being held liable as an officer or person under a duty to collect and remit sales and use taxes on behalf of the various entities identified on the notices, and who failed to do so by either a) failing to file sales tax returns; b) filing sales tax returns late and failing to remit the taxes due thereon; and/or c) filing sales tax returns with respect to which additional tax was due but was not remitted. Petitioner does not challenge the dollar amounts of tax assessed, or the methodology by which such amounts were determined. Instead, he disputes only the Division's claim that he was an officer or person under a duty to collect and remit taxes on behalf of the named entities, and maintains that even if he was under a duty, he should be excused from liability because he was thwarted in carrying out his obligations to collect and remit by the actions of Mr. Bovell.

16. Petitioner retained an attorney who conducted his own examination into the operations of Alliance, including specifically Mr. Bovell's role therein. Testimony at hearing, and allegations set forth in a complaint filed in a civil action brought on behalf of petitioner and Alliance against Mr. Bovell, on April 17, 2017, in New York County Supreme Court (Index No. 652049/2017), essentially set forth a scenario where Mr. Bovell diverted or siphoned money from Alliance to himself. The methods described and allegedly employed by Mr. Bovell included:

a) opening multiple bank accounts, unbeknownst to petitioner, in Alliance's name, or in the name of other entities, to which merchant services accounts (essentially credit card payment terminals located at various parking facilities) were linked, such that customers' credit card payments for parking were deposited to the linked bank accounts and thus diverted to Mr. Bovell;

b) setting up false accounts, including hiring fictitious employees, such that the number of employees was inflated and by which wages and other payments to such phantom employees could be diverted to Mr. Bovell; and

c) preparing tax returns, including sales and use tax returns, but not filing and/or remitting the amounts due thereon.

17. None of the financial statements or reports prepared by the outside accounting firm hired by Alliance (*see* finding of fact 6) have been offered into evidence in this matter. In addition, the civil complaint filed against Mr. Bovell (*see* finding of fact 16) had not been answered as of the date of the hearing held herein, and none of the documentation allegedly supporting the causes of action listed in the complaint has been included in the record in this matter. Further, there is no claim or evidence that law enforcement has been contacted to pursue criminal prosecution against Mr. Bovell.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge began his determination by reviewing the Tax Law provisions relating to the liability for sales tax due and the definition of persons responsible to collect sales tax. He found that petitioner owned 99% of Alliance, individually, and 1% of Alliance as the sole shareholder of Gregg M. Reuben, Inc., the only other member of Alliance. The Administrative Law Judge determined that petitioner, consequently, was per se personally liable for the sales and use taxes due herein by virtue of his status as a member of Alliance, which was the sole member of each of the 12 LLCs subject to assessment. He determined that

petitioner was also liable for the sales and use taxes due herein as a person under a duty to act by virtue of his ownership and active management of Alliance and, in turn, of the 12 LLCs.

The Administrative Law Judge rejected petitioner's argument that even if he had the authority to act, his failure to have done so resulted from the actions of Mr. Bovell and should be excused. The Administrative Law Judge found that petitioner delegated the responsibility to file sales and use tax returns and remit the taxes due to Mr. Bovell, but that he failed to take appropriate steps to determine whether the required sales tax returns were being filed, or whether the taxes due were being paid. Further, he found no evidence that petitioner lacked authority to access the records of the business, himself, or was otherwise precluded from ensuring that the taxes in question were remitted. The Administrative Law Judge determined that it was petitioner's choice to focus his attention on other business matters and that he could not absolve himself of his duty to act, or of the consequences of his failure to have done so.

The Administrative Law Judge also determined that the facts in this matter do not support abatement of penalties. Specifically, he found that it was not reasonable for petitioner to delegate to Mr. Bovell the responsibilities to file sales and use tax returns and remit the taxes due and, then, rely entirely upon Mr. Bovell to execute those responsibilities without exercising any oversight or having appropriate mechanisms in place to ensure that such responsibilities were being carried out. The Administrative Law Judge denied the petition and sustained the notices of determination, together with interest and penalties.

ARGUMENTS ON EXCEPTION

Petitioner claims that he was not a member of any of the 12 LLCs subject to assessment, and, therefore, cannot be held strictly liable for the taxes due. He further maintains that, even if it is determined that he had the authority to act, he cannot be deemed a responsible person under

a duty to act standard because he was thwarted in carrying out his obligations to collect and remit by the actions of Mr. Bovell and through no fault of his own. Petitioner contends that the evidence shows that he took the proper steps to determine that the required returns were being filed and that the taxes due were being paid by retaining a certified public accounting firm to prepare financial statements and provide reports, none of which disclosed unfiled sales tax returns or unpaid sales taxes. Petitioner claims that there is reasonable cause to abate penalties. He contends that his delegation of responsibilities was reasonable. He maintains that he was acting in good faith and that he reasonably relied on his accountant's advice, but that the massive embezzlement of the funds of Alliance and its related entities kept the accountants and himself from uncovering the sales tax irregularities.

The Division asserts that the Administrative Law Judge correctly determined that petitioner is personally liable for the sales and use taxes due from each of the 12 LLCs and correctly upheld the imposition of penalties against petitioner. The Division claims that petitioner failed to provide any evidence, regardless of the alleged deceitful actions of his employee, that he was thwarted from carrying out his financial obligations. It contends that petitioner's alleged reliance upon the advice of its accountant is not reasonable cause to waive penalties.

OPINION

We affirm the determination of the Administrative Law Judge.

Tax Law § 1133 (a) imposes personal liability for sales and use taxes upon all individuals that may be considered persons required to collect such taxes (*see Matter of Franklin*, Tax Appeals Tribunal, May 14, 2015).

Tax Law § 1131 (1) defines "persons required to collect tax" to include, *inter alia*:

“every vendor of tangible personal property or services; . . . any officer, director or employee of a corporation or of a dissolved corporation, any employee of a partnership, any employee or manager of a limited liability company, or any employee of an individual proprietorship who as such officer, director, employee or manager is under a duty to act for such corporation, partnership, limited liability company or individual proprietorship in complying with any requirement of this article; *and any member of a partnership or limited liability company*” (emphasis added).

Thus, as correctly noted by the Administrative Law Judge, Tax Law § 1131 (1) imposes strict or per se liability for the collection of taxes on members of partnerships and members of LLCs (*see Matter of Franklin; see also Matter of Santo*, Tax Appeals Tribunal, December 23, 2009). The critical question is whether the sales and use tax liabilities of each of the 12 LLCs are liabilities of Alliance, as the sole member of each of them and, if so, whether petitioner, as a member and 99% owner of Alliance, is personally liable for the sales and use tax due. Petitioner contends that he cannot be held strictly liable for the tax due because he was not a member of any of the 12 LLCs subject to assessment.

The record in this matter shows that petitioner was engaged in the business of operating parking lots and garages in the New York City area through the subject 12 LLCs. Each parking facility was operated as a separate LLC. Accordingly, each of the 12 LLCs was a “vendor” as defined by Tax Law § 1101 (b) (8) ² and was therefore a person required to collect tax under Tax Law § 1131 (1). As plainly stated in the statute, the term “persons required to collect tax” also includes any member of a limited liability company. Alliance was the sole member of each of the 12 LLCs. Accordingly, it follows that Alliance is also, by statutory definition, such a person

² Tax Law § 1101 (b) (8) (i) defines “vendor” to include:

“(A) A person making sales of tangible personal property or services, the receipts from which are taxed by this article;

“(B) A person maintaining a place of business in the state and making sales, whether at such place of business or elsewhere, to persons within the state of tangible personal property or services, the use of which is taxed by this article,”

and is, therefore, liable for the tax due on behalf of each of the 12 LLCs (*see* Tax Law §§ 1131 (1) and 1133 (a); *Matter of Franklin; Matter of Santo*). Continuing with the analysis, Alliance had two members: petitioner, who owned a 99% share of Alliance, individually, and Gregg M. Reuben, Inc., an S corporation with petitioner as its sole shareholder, which owned the remaining 1% share (*see* finding of fact 2). Consequently, by virtue of their status as members of an LLC, petitioner and Gregg M. Reuben, Inc., are also “persons required to collect tax” and, therefore, share joint and several liability for the tax due herein pursuant to Tax Law §§ 1131 (1) and 1133 (a) (*see Matter of Santo; Matter of Franklin; see also Matter of Marchello*, Tax Appeals Tribunal, April 14, 2011 [Tax Law § 1133 (a) creates joint and several liability for unpaid sales tax]; *see also Matter of Hammerman*, Tax Appeals Tribunal, August 17, 1995 [finding that sole shareholder and president of corporation is personally liable for tax due from partnership where corporation was a member of the partnership]).

We disagree with petitioner’s argument on exception that a finding of strict liability would be the contrary to the intention of the Legislature when it created the limited liability company statute in 1994. When presented with questions of statutory interpretation, the courts have held that the statutory text is the clearest indicator of legislative intent and unambiguous language should be construed to give effect to its plain meaning (*Matter of DaimlerChrysler Corp. v Spitzer*, 7 NY3d 653, 660 [2006]). The text of Tax Law § 1131 (1) unambiguously includes “any member of a partnership or limited liability company” within the definition of “persons required to collect sales tax” (*see Matter of Boissiere and Krystal*, Tax Appeals Tribunal, July 28, 2015). The Legislature amended the definition of persons required to collect tax in Tax Law § 1131 (1) to specifically include any member of an LLC at the same time that it created the limited liability company statute (L 1994, ch 576; *Matter of Boissiere and Krystal*). At that time, it also

amended Tax Law § 1131 (1) to impose responsible person liability under the “duty to act” standard upon any employees or managers of an LLC. We note that the Legislature could have made LLC members responsible persons under the “duty to act” standard, as it did with LLC managers and employees, but it chose not to. That legislative choice supports the legislative intent reflected in the statute’s unambiguous language (*Matter of Boissiere and Krystal*).

Although it is not necessary for the purposes of determining petitioner’s liability for the tax due given our conclusion above, we agree with the determination of the Administrative Law Judge that petitioner is also a person responsible under the duty to act standard of Tax Law § 1131 (1). As the Administrative Law Judge noted, the factors relevant in reaching a determination as to whether an individual is a person under a duty to act are well established:

“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 is not determinative (*see Chevlowe v Koerner*, 95 Misc 2d 388 [1978]). ‘Generally, a person who is authorized to sign a corporation’s tax returns or who is responsible for maintaining the corporate books, or who is responsible for the corporation’s management, is under a duty to act’ (20 NYCRR 526.11 [b] [2]). Other relevant factors include authority to hire and fire employees, authority to sign corporate checks and status as a stockholder (*see, e.g., Matter of Ippolito v Commissioner of N.Y. Dept. of Taxation and Fin.*, 116 AD3d 1176 [2014]; *Matter of Constantino* (Tax Appeals Tribunal, September 27, 1990). ‘What must be considered is petitioner’s authority and responsibility to exercise control over the corporation, not his actual assertion of such authority (citations omitted)’ (*Matter of Coppola v Tax Appeals Trib. of State of N.Y.*, 37 AD3d 901 [2007])” (*Matter of Kieran*, Tax Appeals Tribunal, November 13, 2014).

The facts here reveal that petitioner owned and managed Alliance, which, as the sole member, owned and managed the affairs of each of the 12 operating LLCs. Petitioner established the individual LLCs as his business was expanding and, at all times, he played a significant, active and ongoing role in the business. He signed the certificates of authority and is listed as the

organizer for each of the 12 LLCs. He filed the certificates of authority to register as a sales tax vendor for each of the six LLCs that filed applications therefor and listed himself as the sole responsible person.

In addition, petitioner was responsible for maintaining the financial books and records of Alliance; he was the sole authorized signatory on the bank accounts for Alliance and the 12 LLCs, although Mr. Bovell was authorized to use petitioner's electronic signature (*see* finding of fact 7); he signed or had authority to sign checks for Alliance; he signed or had authority to sign sales and use tax returns for Alliance and the 12 LLCs; he hired and fired employees; and he hired or engaged outside vendors for goods and services, including retention of an accounting firm. In view of these facts, petitioner clearly was a responsible person who was under a duty to act for Alliance, as well as, each of the 12 LLCs.

Petitioner contends that he cannot be deemed a responsible person under a duty to act because Mr. Bovell thwarted his ability to know, or learn, of the nonfiling of returns and the nonpayment of sales and use taxes, among other liabilities. To prevail on this argument, petitioner was required to establish by clear and convincing evidence that he was not a responsible person under a duty to act, or that he had the necessary authority to act, but was thwarted by others in carrying out his duties through no fault of his own (*see Matter of Goodfriend*, Tax Appeals Tribunal, January 15, 1998). It is well established that one cannot absolve himself of liability by simply delegating authority to a subordinate, or by disregarding his duty and leaving it to someone else to discharge (*see Blodnick v New York State Tax Commn.*, 124 AD2d 437 [3d Dept 1986]). Petitioner thus cannot prevail by simply shifting blame to Mr. Bovell.

The evidence reflects that petitioner delegated all financial responsibilities, including the obligation to file sales and use tax returns and remit the taxes due thereon, to Mr. Bovell, and that he relied entirely upon that subordinate to execute those responsibilities. Petitioner testified that he directed his attention to operating the facilities and expanding the growth of the business (*see* finding of fact 8). There is no evidence that, notwithstanding the assertedly deceitful actions of Mr. Bovell, petitioner lacked authority to affirmatively access the records of the business so as to confirm its financial circumstances, or to institute systems to ensure compliance with requisite financial obligations to which the business was subject. There is no evidence of any specific instance where Mr. Bovell prevented petitioner from asserting his supervisory and oversight authority. Although Mr. Bovell may have attempted to hide his scheme, there is no evidence that it could not have been uncovered with the exercise of ordinary due diligence, which is actually what happened when petitioner began looking into the reasons for the business's cash shortage. We have found exceptions to liability where the corporate officer proved that he was precluded from acting on behalf of the corporation by the acts of another (*see e.g. Matter of Moschetto*, Tax Appeals Tribunal, March 17, 1994; *Matter of Turiansky*, Tax Appeals Tribunal, January 20, 1994). Petitioner, however, has failed to meet his burden of showing such preclusion here. Unfortunately, the fact that petitioner's employee abused his position of trust and allegedly created a scheme to embezzle funds from the business does not lead to a conclusion that petitioner was precluded from assuring that the taxes in question were remitted based on this record.

We also reject petitioner's contention that the Administrative Law Judge erred by sustaining the penalties imposed upon him for the nonfiling of returns and underpayment of tax. Although the Division has the authority to waive penalties, petitioner bears the burden of

establishing that the failure to pay tax “was due to reasonable cause and not due to willful neglect” (Tax Law § 1145 [a] [1] [iii]; *see Matter of Coppola; Matter of MCI Telecommunications Corp.*, Tax Appeals Tribunal, January 16, 1992; *confirmed* 193 AD2d 978 [3d Dept 1993]).

Petitioner contends that the alleged embezzlement occurred through no fault of his own, but we cannot agree. Petitioner hired Mr. Bovell and was responsible for his actions (*see Matter of Marchello*). Petitioner made the choice to focus his attention on other aspects of the business, thereby leaving Mr. Bovell unsupervised and allowing him to perpetuate his seemingly criminal scheme. Although petitioner did retain an accounting firm to prepare financial statements, Mr. Bovell was able to manipulate the books so as to conceal his fraud from the accountants. Mr. Bovell was given near total control over all financial matters. There is no evidence of a system of internal controls being put in place to reduce the risk of improper behavior. Other than questioning Mr. Bovell and receiving his assurances, there is no evidence that petitioner took any affirmative steps to determine whether the required returns were being filed, or whether the taxes due were, in fact, being paid until he became aware of a problem. This is not a situation where petitioner was prevented from exercising his authority to properly supervise his subordinate; rather he trusted his employee and simply neglected to do so. Indeed, petitioner’s actions taken after discovering the embezzlement underscore his ability to assume the financial responsibilities of the business and control his employees; he terminated Mr. Bovell’s employment and either filed sales and use tax returns himself or ensured that they were filed (*see* finding of fact 10).

Finally, petitioner asserts that he relied on the fact that his accountants failed to uncover Mr. Bovell’s wrongdoing. We note that reasonable reliance upon the advice of an accountant or tax professional does not, in and of itself, provide “reasonable cause” for the abatement of

penalties (*see Matter of LT & B Realty Corp. v New York State Tax Commn.*, 141 AD2d 185 [3d Dept 1988]). The outside accountant firm retained by petitioner prepared annual financial statements and handled income tax preparation and filing matters for Alliance and the 12 LLCs. It did not, however, provide an audit-level examination (*see* finding of fact 6). Further, the accounting firm was not responsible for filing sales and use tax returns and ensuring that sales and use taxes were paid. That responsibility remained solely with Mr. Bovell. Finally, we note that petitioner failed to offer in evidence any of the financial statements or reports prepared by the accounting firm in support of his claim of reasonable cause (*see* finding of fact 17). Based on the facts before us, we agree with the Administrative Law Judge that there is no basis for modifying the assertion of penalties.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Gregg M. Reuben is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Gregg M. Reuben is denied; and
4. The notices of determination, as listed and described in finding of fact 14, are sustained.

DATED: Albany, New York
August 27, 2019

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Dierdre K. Scozzafava
Dierdre K. Scozzafava
Commissioner

/s/ Anthony Giardina
Anthony Giardina
Commissioner