STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
HERBERT TAYLOR, OFFICER OF MAR JEAR RESTAURANT, INC.	:	DECISION DTA No. 800770
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 September 1, 1979 through April 15, 1981	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on October 18, 1990 with respect to the petition of Herbert Taylor, Officer of Mar Jear Restaurant, Inc. ("Mar Jear"), 12 East 86th Street, New York, New York 10028 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 September 1, 1979 through April 15, 1981. The Division of Taxation appeared by William F. Collins, Esq. (Michael B. Infantino, Esq., of counsel). Petitioner appeared by Mass & Rudin (Joel Rudin, Esq., of counsel).

The Division of Taxation filed a letter brief on exception. Petitioner filed a brief in response. The Division of Taxation's request for oral argument was denied.

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

ISSUE

Whether petitioner was a person responsible for the collection and payment of sales and use taxes owed during the period in question by Mar Jear, in accordance with §§ 1131(1) and 1133(a) of the Tax Law.[1]

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and make additional findings of fact as indicated. The Administrative Law Judge's findings of fact and the additional findings of fact are set forth below.

Pursuant to a field audit of petitioner Mar Jear Restaurant, Inc., which commenced in September 1982, the Division of Taxation, on October 4, 1983, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Mar Jear in the amount of $121,354.76, plus penalty and interest, for a total amount due of $199,691.15 for the period September 1, 1979 through April 15, 1981.

On the same date, the Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner Herbert Taylor, as officer of Mar Jear, in the amount of $115,203.36, plus penalty and interest, for a total amount due of $189,711.46 for the identical audit period.

On May 2, 1983, Herbert Taylor, as president of Mar Jear, executed a consent whereby it was agreed that sales and use taxes due from Mar Jear for the period September 1, 1979 through August 31, 1980 could be assessed at any time on or before December 20, 1983.

---

[1]It should be noted that the Division of Taxation in its exception lists the issue in question as whether "the petitioners prove[d] and establish[ed], by clear and convincing evidence, that the audit was erroneous." However, the conclusions of law to which the Division of Taxation excepts and on which it focuses in the letter brief relate solely to the liability of Herbert Taylor to collect the sales and use taxes due by Mar Jear, rather than to the assessment itself. Furthermore, petitioner notes at footnote two on page six of the brief in opposition that "[n]either party is contesting on appeal the determination by Judge Friedman reducing the assessment[s] against petitioner[s] Mar Jear . . . and . . . Herbert Taylor . . ." In view of all of the above, we have confined our decision in this matter to the issue of Herbert Taylor's liability.

Prior to the audit period, the premises at 128 West 45th Street were leased by Herbert Taylor's stepfather, Abraham Gladstein. Mar Jear was incorporated for the sole purpose of operating a bar at this location. Abraham Gladstein was the sole shareholder of the corporation. Sometime prior to July 1979, Bernard Kurtz approached Herbert Taylor (who, at the time, was employed elsewhere) and asked him to help run the bar because Mr. Gladstein wanted to retire. As an inducement, Kurtz promised to pay Herbert Taylor's stepfather while in retirement if Taylor would act as a host at the bar. Taylor had previously known Bernard Kurtz and Benjamin Cohen who, along with Matthew Ianniello, apparently controlled Kurtz.

In or about July 1979, Herbert Taylor went to work at the bar which, at that time, was known as the Barnum Room. The Barnum Room was a gay disco which featured a cabaret show. Herbert Taylor was made an officer of Mar Jear and, as a condition of his employment, was instructed by Bernard Kurtz, Benjamin Cohen and Matthew Ianniello to hold himself out as the owner of the bar. Kurtz, Cohen and Ianniello were not officers of Mar Jear. Herbert Taylor is not certain whether or not there were other corporate officers nor does he know whether or not he was made a director of Mar Jear. He received a weekly salary from Mar Jear. While ostensibly the president, he had no authority to hire or fire employees.

In or about November 1980, the Barnum Room became a rock-and-roll club known as the Peppermint Lounge. As was the case previously, Bernard Kurtz ran the operation under the direction and control of Benjamin Cohen and Matthew Ianniello. Kurtz brought in his niece's husband, Frank Rocchio, to book rock groups and also hired a club manager, Mario Mannino, who, along with Rocchio, oversaw the day-to-day operation of the club. The Peppermint Lounge existed at the West 45th Street location until April or May 1982 when it moved to 100 Fifth Avenue at 15th Street and became known as the New Peppermint Lounge. The New Peppermint Lounge was operated by a different corporation.

The auditor requested Mar Jear's books and records for the period September 1, 1979 through August 31, 1982. He was informed by Mar Jear's accountant, Sol Goldman, that most of

the records were unavailable due to the fact that they were stored at the West 45th Street location which had been closed after Mar Jear's bankruptcy in May 1982 (a Chapter 11 petition was filed in the U.S. Bankruptcy Court for the Southern District of New York on April 15, 1981 and was converted into a Chapter 7 liquidation proceeding on May 7, 1982). As a result, the only records made available were a cash receipts book, sales tax returns, Federal income tax returns and a few invoices. No cash register tapes, admission stubs, purchase invoices, general ledger or cash disbursements book were provided.

Mar Jear's accountant stated that the corporation was doing business only as a bar and that there was no income from admission charges or from the sale of food. When asked by the auditor if Mar Jear had operated a disco, the accountant replied that it had been a disco for a short time only, no admission was charged and the musical entertainment was provided through the use of tapes.

The auditor thereupon visited the offices of the Village Voice, a weekly publication, to ascertain whether Mar Jear had placed advertisements therein. For the year 1981 and the first four months of 1982, he found weekly ads in the Village Voice which indicated that shows were regularly held, some featuring hit groups, and that admission fees were charged which varied with the day of the week and the group performing at the time. The auditor's group chief obtained the Certificate of Occupancy for the location which revealed that its capacity (two floors) was 540 people. A decision was made to assess tax on the admission charges at full capacity for Fridays, Saturdays and Sundays and one-half capacity for the remaining days of the week. Because the Village Voice ads indicated that admission charges ranged from 1¢ to $10.00 (usually in the $5.00 to $10.00 range), the auditor chose an average admission charge of $5.00. Weekly admissions were, therefore, determined to be in the amount of $13,530.00 (542 x 3 days = 1626 x $5.00 = $8,130.00; 270 x 4 days = 1080 x $5.00 = $5,400.00; $8,130.00 + $5,400.00 = $13,530.00), $703,560.00 annually and $175,890.00 quarterly. Tax assessed at the appropriate rate (8 percent)

resulted in an assessment of $14,071.20 per quarter on admission charges of $91,462.80 for the audit period.

The auditor examined all of the expense purchase invoices made available to him (these invoices totalled $1,851.78). Of this amount, he determined that sales tax should have been paid on invoices of $729.05. A margin of error of 39.4 percent was, therefore, calculated and this margin of error was applied to maintenance charges, equipment and supplies set forth on Mar Jear's Federal income tax returns for the years at issue resulting in an assessment of tax on such purchases in the amount of $6,152.08. It should be noted that no credit for tax reported and/or paid was given to Mar Jear for those portions of the total assessment relating to admission charges and expense purchases since Mar Jear, admittedly, reported, for sales tax purposes, only its bar sales.

With respect to such bar sales, the auditor took Mar Jear's purchases (from its Federal income tax returns) for the period September 1, 1979 through May 31, 1982 which, apparently, was the original audit period at issue. A markup percentage of 400 percent was applied to determine total sales. This percentage was agreed to by Mar Jear's accountant since it was the same markup percentage utilized in a previous audit.

It must be noted that the amounts of the assessments on admission charges and expense purchases referred to above are not the amounts set forth in the audit report, but are, instead, the auditor's total calculations for the period September 1, 1979 through May 31, 1982 minus the final four quarters (June 1, 1981 through May 31, 1982) which are not at issue herein. One-half of the final quarter's (ended May 31, 1981) assessment has also been subtracted since the period at issue herein ends on April 15, 1981). For the assessment on bar sales, however, the utilization of a margin of error based upon purchases and reported sales for the period September 1, 1979 through May 31, 1982 does not result in an accurate assessment and must, therefore, be modified accordingly. Such modifications are as follows:

Audit Report (9/1/79 - 5/31/82)		Audit Period (9/1/79 - 4/15/81)
Purchases $	244,490.00	$ 152,703.00
Markup %	x 4.00	x 4.00
	$ 977,960.00	610,812.00
Cost	+ 244,490.00	+152,703.00
	1,222,450.00	763,515.00
Taxable sales reported	-910,250.00	-608,782.00
	312,200.00	154,733.00
Margin of error	$\frac{312,200.00}{910,250.00} = 34.3\%$	$\frac{154,733.00}{608,782.00} = 25.4\%$

It is this revised margin of error (25.4 percent) rather than the auditor's margin of error which should be utilized to determine additional tax due on bar sales. Applying a 25.4 percent margin of error to reported taxable sales of $563,646.00 (taxable sales reported for each of the first six quarters at issue plus one-half of the taxable sales reported for the quarter ended 5/31/81 since the audit period includes just one-half of this quarter) results in additional tax due on bar sales in the amount of $11,453.29 ($563,646.00 x .254 = $143,166.08 x .08 = $11,453.29).

As a result of the adjustments made above, the assessment against Mar Jear is reduced from $121,354.76 to $109,068.17 and the assessment against Herbert Taylor, as officer of Mar Jear, is reduced from $115,203.36 to $102,916.09 (tax on expense purchases was not assessed against Herbert Taylor).

As indicated above, petitioner Herbert Taylor was the president of Mar Jear. He had sole check signing authority and signed Mar Jear's tax returns. As a condition of his employment, he was to and did, in fact, hold himself out as the owner of the establishments operated by Mar Jear.

Matthew Ianniello, Benjamin Cohen and Bernard Kurtz were indicted and subsequently convicted of various acts of racketeering including, among other things, controlling various clubs and restaurants in New York City (including those owned by Mar Jear), failing to reveal their interests to the State Liquor Authority and "skimming" the gross receipts from these businesses. The above-named individuals along with Sol Goldman, Mar Jear's accountant, were also indicted for evading and defeating a large portion of the sales tax on the gross sales of Mar Jear which was

due and owing to the Department of Taxation and Finance and for filing false and fraudulent sales tax returns in furtherance thereof.

During the trial in the United States District Court for the Southern District of New York, Nancie Martin, an assistant to Frank Rocchio at the Peppermint Lounge testified that, while he was the owner of record, Herbert Taylor had no specific responsibilities at this club.

After conviction on various counts of a 67-count indictment, the defendants appealed their convictions to the United States Court of Appeals for the Second Circuit (the convictions were affirmed). In his brief filed on behalf of the United States of America, United States Attorney for the Southern District of New York, Rudolph W. Giuliani, stated that while ostensibly owned by Herbert Taylor, the Peppermint Lounge was managed by Bernard Kurtz and controlled by Matthew Ianniello and Benjamin Cohen who skimmed cash from its receipts. The brief stated that Bernard Kurtz made the major management decisions, particularly regarding money and expenses and further stated that, while Herbert Taylor was the record owner of the bar, he had no discernible responsibilities.

Petitioner, Herbert Taylor, was not indicted by the Grand Jury, but, instead, was granted immunity in return for his testimony before said Grand Jury.

Petitioners presented the Village Voice advertisements of the Peppermint Lounge which indicate that, for approximately the first six months of its operation, the Peppermint Lounge was only open from Wednesday through Sunday each week. Therefore, for the months of November 1980 through April 1981, the auditor's calculations for tax due on admission charges must be revised accordingly. Weekly admissions determined to be $13,530.00 (see, above) for full-week operation must, for this period, be adjusted as follows:

Full capacity (542) x 3 days = 1626 x $5.00 admission = $ 8,130.00
One-half capacity (270) x 2 days = 540 x $5.00 admission = 2,700.00
$10,830.00

November 1980 - April 1981 (25 weeks) x $10,830.00 = $270,750.00
Tax rate (8 percent) x $270,750.00 = $21,660.00 tax due

25 weeks x $13,530.00 = $338,250.00
Tax rate (8 percent) x $338,250.00 = $27,060.00

$27,060.00 - $21,660.00 = $5,400.00 adjustment

The assessments against petitioners, previously reduced above, are further reduced by $5,400.00. Accordingly, the assessment against petitioner Mar Jear is reduced to $115,954.76 and the assessment against petitioner Herbert Taylor is reduced to $97,516.09.

We find the following additional facts:

> Those in control of Mar Jear did not permit their names to appear on corporate books and records, tax returns, checks, or licenses of the establishments owned by Mar Jear. Herbert Taylor was directed to and did apply for licenses as President and (record) owner of Mar Jear and signed the corporate tax returns and checks, often in blank, to be filled out by those in control later. Mr. Taylor had no control over which creditors were paid, nor did he have any idea of how the figures on the checks were derived. All of Mr. Taylor's actions were done under the supervision and control of Messrs. Kurtz, Cohen, and Ianniello.

OPINION

The Administrative Law Judge determined that petitioner was not a "responsible officer" of the Mar Jear corporation pursuant to Tax Law § 1131(1) because his lack of authority or control over the financial affairs and/or management of the corporation was such that it precluded him from acting on behalf of the corporation as required of a "responsible officer." The Administrative Law Judge determined that whatever traditional indicia of "responsibility" seemed to exist in the case of Herbert Taylor were offset by the circumstances and, therefore, he was not personally liable under Tax Law § 1133(a) for the collection or remittance of taxes as required of the corporation under Article 28.

On exception, the Division of Taxation (hereinafter the "Division") contends that the facts indicate that Herbert Taylor had the requisite indicia of responsibility to be held liable for the collection and remission of sales and use taxes owed by Mar Jear. Specifically, the Division points out that petitioner left other employment to become an officer of Mar Jear and a figurehead owner of the bar, and that he held no other employment while he served in such capacity. In addition, the Division notes that Taylor received a regular, reasonable salary for his work at the corporation, even signing his own payroll checks. The Division further notes that Taylor regularly held himself out as owner of the bar operated by Mar Jear and was the only officer of the corporation while his stepfather was the only shareholder. As regards the financial management of the corporation, the Division asserts that it was petitioner who had sole check signing authority and who "cavalierly" signed blank checks and blank sales tax returns in advance, thus, "recklessly accept[ing] responsibility" for the corporation's tax liabilities (see, Division's letter brief, pp. 2-3). The Division points out that Taylor signed five sales tax returns during the audit period as "President" of Mar Jear. The Division stresses that Herbert Taylor was aware that the corporation was not meeting its tax obligations and notes that it was Taylor who filed a petition with the Division on behalf of Mar Jear and then represented the corporation at the formal hearing. Finally, the Division maintains that while lack of proof of the corporate bylaws made it impossible to determine exactly what the responsibilities of petitioner's office were, petitioner ignored his corporate responsibilities, in complete dereliction of his duties.

In response, petitioner urges that the determination of the Administrative Law Judge be upheld. Petitioner stresses that the Administrative Law Judge found credible petitioner's testimony that his duties were "all form and no substance." Petitioner further asserts that he established that he tried to persuade those in power in the corporation to pay the overdue taxes, but it was to no avail. Finally, petitioner argues that it is the actual degree of authority held rather than one's apparent status which is relevant in determining officer liability, and that any duties he

performed at the corporation establish his total lack of authority, e.g., he signed checks, but he did so in blank, with others filling in the payee and amount.

We affirm the determination of the Administrative Law Judge.

Whether a person is a "responsible officer" under Articles 28 and 29 of the Tax Law is determined by Tax Law §§ 1131(1) and 1133(a), which articulate who may be held personally liable for the collection and remittance of sales tax. Section 1131(1) sets forth, in relevant part, that "any officer, director or employee of a corporation or of a dissolved corporation . . . who . . . is under a duty to act for such corporation . . . in complying with any requirement of [Art. 28]" of the sales tax law is also responsible for collecting and paying over taxes due by the corporation (emphasis added). The responsible officer incurs personal liability through section 1133(a) of the Tax Law which holds that "every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article."

Case law makes clear that the mere holding of a corporate office does not, in and of itself, impose tax liability on a person (see, Vogel v. New York State Dept. of Taxation & Fin., 98 Misc 2d 222, 413 NYS2d 862; Chevlowe v. Koerner, 95 Misc 2d 388, 407 NYS2d 427, 430; Matter of Constantino, Tax Appeals Tribunal, September 27, 1990). Rather, whether a person is a "responsible officer" required to collect sales and use taxes is a factual determination (see, Matter of Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564; Stacy v. State, 82 Misc 2d 181, 368 NYS2d 448; Chevlowe v. Koerner, supra, 407 NYS2d 427, 429; Matter of Hall, Tax Appeals Tribunal, March 22, 1990; Matter of Martin, Tax Appeals Tribunal, July 20, 1989, affd, 558 NYS2d 239; Matter of Autex Corp., Tax Appeals Tribunal, November 23, 1988). This factual determination, according to the Division's regulations, generally depends upon whether the person is authorized to sign the corporation's tax returns, is in charge of maintaining corporate records, or is responsible for managing the corporation (20 NYCRR 526.11[b][2]). A study of the relevant case law suggests consideration of the following indicia of responsibility in a "responsible officer" determination: status as an officer, director, or stockholder (Matter of

Cohen v. State Tax Commn., supra, 513 NYS2d 564, 565); the derivation of substantial income from the corporation or stock ownership (Matter of Blodnick v. New York State Tax Commn., 124 AD2d 437, 507 NYS2d 536); day-to-day responsibilities, involvement with and knowledge of the financial affairs and management of the corporation, as well as the individual's duties and functions set forth in the certificate of incorporation and bylaws (Vogel v. New York State Dept. of Taxation & Fin., supra, 413 NYS2d 862, 865); ability to hire and fire employees (Chevlowe v. Koerner, supra, 407 NYS2d 427, 429); and authorization to sign the corporate tax returns and checks (Matter of Cohen v. State Tax Commn., supra; Chevlowe v. Koerner, supra, 407 NYS2d 427, 429).

The evidence here supports the conclusion that petitioner did not have sufficient authority and control over the corporation's affairs to be held a responsible officer and thereby liable under Article 28 for the collection and remission of corporate taxes. First, while petitioner was made President of Mar Jear and, it appears, was the corporation's sole officer, he was instructed as a condition of his employment to hold himself out, as well, as the owner of the bar in question. In his capacity as "owner" and/or President of Mar Jear, petitioner applied for all licenses needed by the corporation. However, he did so under the complete supervision and control of Messrs. Kurtz, Ianniello, and Cohen, who were later convicted on criminal racketeering charges stemming from, inter alia, tax evasion involving an entire ring of restaurants and bars. Petitioner's record ownership was meant to conceal the identities of these men.

Second, we find that Taylor was not truly involved with the financial affairs and management of the corporation. Taylor testified that each night, the club manager, Mario Mannino, would gather the cash register tapes and cash and give them to Bernard Kurtz for deposit the next day (see, Tr., #2, p. 39). Taylor had no access to, nor control over, corporate funds (see, Tr., #2, pp. 7, 24-25, 46). The accountant, Sol Goldman, was in charge of the books (see, Tr., #2, pp. 38-39). Taylor testified that the only reason he knew that Mar Jear owed sales tax was because the corporation received notices of determination from the State regarding same

(see, Tr., #2, p. 25). Further, Taylor had no authority to hire or fire employees. Finally, in view of the fact that all actions of petitioner were done under the supervision and control of Messrs. Kurtz, Cohen, and Ianniello -- the principals convicted in the criminal racketeering trial -- petitioner did not have the requisite responsibility to make management decisions on behalf of the corporation.

Third, while Herbert Taylor did have the authority to sign the corporate tax returns -- indeed, the Division submitted five sales tax returns at the hearing below which were signed during the audit period by Taylor as President of Mar Jear -- Taylor testified that he often signed the returns in blank, to be filled in later by the corporate accountant and/or others. We find that Taylor had no actual control over the preparing or filing of the tax returns. Rather, his involvement with the returns was purely ministerial, and was done at the direction of those persons in actual control, Messrs. Kurtz, Ianniello, and Cohen.

Finally, petitioner concedes that he had sole check signing authority; however, the hearing transcript reveals that petitioner had no control over which creditors were paid, and further, that he was often given blank checks to sign which were filled out by others later (see, Tr., #2, pp. 35, 38).

A review of the relevant case law demonstrates that a New York court, as well as this Tribunal, has rejected the narrow approach that the Division urges us to take here in finding officer liability, namely, that of simply matching the traditional indicia of responsibility to petitioner's surface acts (see, Chevlowe v. Koerner, supra; Matter of Constantino, supra). To the contrary, the term "factual determination" demands a consideration of the surrounding circumstances. Indeed, one's officer status can be offset by the circumstances in a particular case (see, Matter of Constantino, supra). Thus, the pertinent inquiry in a responsible officer case is not whether a person was an officer or performed the duties traditionally associated with such a position, but rather, whether the person in fact had authority to control the performance of the duties he performed (see, Matter of Hall, supra; Matter of Constantino, supra). In other words,

our analysis takes into account whether the person's acts were ministerial rather than evidence of actual authority.

Accordingly, we find that all of Herbert Taylor's actions were done under the supervision and control of those persons later convicted on criminal racketeering charges.[2]

The Division argues that the citation of Blodnick in support of petitioner's innocence is "misplaced" because Blodnick stands for the principle that every corporation must have at least one responsible officer (see, Matter of Blodnick, supra). The Division contends that this inculpates Taylor since he is the only person who could possibly be a responsible officer of Mar Jear. This is not a case where if petitioner is not liable, no other individual could be imputed with liability. The record indicates that there were other individuals involved with this business who it appears had the requisite authority and control to meet the statutory definition of responsible officer. Although petitioner was the only known officer of Mar Jear, the statutory definition of "responsible officer" (see, Tax Law § 1131[1]) includes "employee"; thus, there may be other employees of Mar Jear who could be held liable for the taxes due (see, Matter of Hall, supra).

Like the petitioner in Constantino but unlike those in Blodnick, Matter of LaPenna (Tax Appeals Tribunal, March 14, 1991), Matter of Baumvoll (Tax Appeals Tribunal, November 22, 1989), and Matter of D&W Auto Serv. Center (Tax Appeals Tribunal, April 20, 1989), Herbert Taylor did not decline to exercise his authority; rather, he was prevented from having any real authority to exercise.

Petitioner's lack of real authority precludes a finding of responsible officer status and, therefore, of liability (see, Matter of Constantino, supra). The Division cites the Third Department's decision in Matter of Martin (supra), which affirmed the Tribunal's own finding of liability against a person whose only involvement with his friend's corporation was to help defraud

---

[2]A wire tap transcript (see, Govt. Exhibit 28, pp. 21-22) reveals petitioner's total lack of authority as he is ordered to endorse a certain check. After he is told that "[i]f anybody ever asks . . . it's an insurance adjustment . . ." petitioner is rebuked when he responds, "[i]t is?"

the latter's creditors. We find ample bases on which to distinguish the "responsible officer" in Martin from petitioner here. First, while Mr. Taylor had no control over the finances of the Mar Jear corporation, in Martin, the petitioner in fact had some financial control of the operation as demonstrated by the fact that he was the sole shareholder of the corporation, held title to the property on which the business was located, was to receive rent from the corporation after the mortgage on the property was paid off, and personally guaranteed several loans for the corporation. Also, contrary to Mr. Martin, Mr. Taylor did not on his own volition perform the acts which seem to inculpate him. Rather, he acted under the direction of the men running the racketeering ring. Finally, unlike the case of Mr. Martin, there is no evidence that petitioner knowingly or willingly sought to aid or fuel the conspiracy.

We also reject the Division's comparison of Mr. Taylor to Mr. Hussain (see, Matter of Hussain, Tax Appeals Tribunal, December 6, 1990), who this Tribunal found to be a responsible officer, having concluded that, "[a]s president, [petitioner] must have had responsibilities . . . " The Division neglects to take into account that the Tribunal reached that conclusion after determining that Mr. Hussain "ha[d] not [met his burden of] establish[ing] that his responsibility . . . to sign checks and returns was only ministerial and not evidence of actual authority . . . " To the contrary, Mr. Taylor has, to the satisfaction of the Tribunal, met this burden.

Similarly, despite the Division's contentions, the rule in Vogel does not inculpate petitioner because limiting personal liability to "officers who are actively involved in corporate affairs" exculpates an officer like Mr. Taylor who was not actively involved in running the corporation (Vogel v. New York State Dept. of Taxation & Fin., supra, 413 NYS2d 862, 865).

Finally, we disagree with the Division's assertion that petitioner would be a responsible officer under Chevlowe because we find that petitioner cannot be said to be one who "has or shares 'final word' as to what bills or creditors should or should not be paid, the word 'final' meaning significant rather than exclusive control," (Chevlowe v. Koerner, supra, 407 NYS2d 427, 430).

The Administrative Law Judge found petitioner's testimony credible. Since the responsible officer determination pursuant to Tax Law § 1131(1) is based upon the specific facts in a given case, the analysis of the Administrative Law Judge regarding the credibility of the witness relating the facts to him should not, in the absence of compelling reasons, be disturbed (see, Matter of Constantino, supra). Although the facts leading to the determination of the Administrative Law Judge are less than generously recorded as facts in his determination, after a review of the entire record before us, we agree with his determination. The evidence supports petitioner's contention that he should not be deemed a responsible officer of the Mar Jear corporation.

We find no evidence to support the Division's theory that petitioner volunteered to front for the criminal conspiracy. We concede that Mr. Taylor was granted immunity in exchange for his testimony in the criminal trial, but we have seen no evidence to support a theory other than that petitioner is an individual who discovered he was being used as a front for others, though he knew not the true purpose of their enterprise, nor why they wished to conceal their identities.[3] Thus, we find meritless the Division's argument that Taylor "actively hid the participation of Ianniello and Cohen, thereby facilitating a fraud upon this Department . . . " (see, Division's letter brief, p. 3). Further, we find inappropriate the Division's insinuation that our decision to affirm the determination of the Administrative Law Judge would "condone the petitioner's behavior" (see, Division's letter brief, p. 3). Petitioner asserts that the reason he did not resign his position when he realized "he had become ensnared in a racketeering conspiracy" is that he valued his life, and saw that there was no escape (see, Petitioner's brief, p. 9).

A pawn or puppet merely cloaked with authority, but stripped of actual decision-making or other authority cannot be said to be one "under a duty to act" for the corporation as a

---

[3]We do, however, feel compelled to note that while petitioner argues that a Federal criminal jury was convinced beyond a reasonable doubt of his innocence, the statement is misleading because of the grant of immunity. The jury was not concerned with the issue of Mr. Taylor's liability. It was U.S. Attorney Rudolph Giuliani who was convinced of Mr. Taylor's innocence and who stated this as a fact in his brief (see, Exhibit 2, Govt. Brief on Appeal, pp. 21, 23), as well as via Assistant U.S. Attorney Howard Heiss, aloud to the court (see, Exhibit 2, Closing Argument to the Jury, pp. 2345-2348).

"responsible officer" must under Article 28 of the Tax Law (see, Chevlowe v. Koerner, supra; see also, Matter of Constantino, supra).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Herbert Taylor is granted in full; and

4. The Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued to Herbert Taylor on October 4, 1983 is cancelled.

DATED: Troy, New York
October 24, 1991

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner