

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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In the Matter of the Petition :

of :

**WILLIAM D. BARTON** :  
**OFFICER OF DATEL SYSTEMS CORPORATION** :

DECISION

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, 1980 through February 28, 1983.

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Petitioner, William D. Barton, Officer of Datel Systems Corporation, 201 East 83rd Street, New York, New York 10028, filed an exception to the determination of the Administrative Law Judge with respect to his petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1980 through February 28, 1983 (File No. 801445). Petitioner appeared by Milgrim, Thomajan & Lee, P.C. (James A. Guadiana, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Michael J. Glannon, Esq., of counsel).

Only the petitioner filed a brief on exception. Oral argument was heard on September 27, 1989 at petitioner's request.

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

***ISSUES***

I. Whether William D. Barton was a person required to collect sales and use taxes on behalf of Datel Systems Corporation within the meaning and intent of Tax Law §§ 1131(1) and 1133(a) for the period at issue herein.

II. If so, whether the Division of Taxation properly determined the sales and use taxes due from Datel Systems Corporation for the period at issue herein.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge and such facts are stated below.

Pursuant to a field audit of Datel Systems Corporation ("Datel") which commenced in March 1983, the Division of Taxation, on June 8, 1984, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to William D. Barton ("petitioner"), as officer of Datel, in the amount of \$41,312.91, plus interest, for a total amount due of \$51,214.55 for the period September 1, 1980 through February 28, 1983. The notice of determination advised petitioner that he was personally liable as an officer of Datel under Tax Law §§ 1131(1) and 1133.

On November 19, 1983, Datel, by its president, executed a consent extending the period of limitation for the assessment of sales and use taxes whereby he agreed, on behalf of Datel, that such taxes due for the period September 1, 1980 through February 28, 1981 could be assessed at any time on or before June 20, 1984.<sup>1</sup>

Datel was engaged in retail sales of computer hardware and software to individuals, corporations and small businesses. During the audit period, the corporation maintained two stores and its administrative offices at 1211 Avenue of the Americas in New York City.

During the course of the audit, the auditor met primarily with and was supplied with the corporation's books and records by the corporation's controller, Raj Patel. At the time of the commencement of the audit, records for the entire audit period were requested and, with the exception of some documentation to support Datel's claimed nontaxable sales, all records requested were provided to the auditor. The audit actually consisted of an examination in three areas, i.e., fixed assets (fixtures, equipment and leasehold improvements), recurring expense purchases and sales. With respect to fixed assets, a detailed audit of Datel's books and records

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<sup>1</sup>It is not clear, from the signature on the consent, who signed this document on behalf of Datel. Petitioner had, however, left the corporation on November 8, 1983 and, at that time, vacated his position as president.

was performed resulting in the auditor's determination that fixed asset purchases of \$81,639.28, upon which sales tax had not been paid, were subject to tax. By applying the statutory rate in effect for the particular periods at issue, additional tax due in the amount of \$6,734.13 was assessed thereon.

While books and records relative to expense purchases and sales were available for the entire audit period, the auditor discussed with Mr. Patel the possibility of performing a test-period audit of these expense purchases and sales. At the recommendation of Mr. Patel, petitioner, as president of Datel, executed an Audit Method Election form on May 6, 1983 whereby he elected the utilization of a representative test period audit method to determine the corporation's sales or use tax liability despite the fact that Datel's records available for audit were adequate and sufficient to perform a detailed audit of expense purchases and sales.

Pursuant to the instructions of his supervisor, the auditor selected the month of November 1982 as the test period for the audit of Datel's expense purchases and sales. The primary reason for selection of this month was that the auditor and his supervisor felt that there existed a substantial number of invoices for examination. The auditor stated that neither Mr. Patel nor anyone else on behalf of the corporation objected to the use of the test period selected. It was determined that some office supplies had been purchased without the payment of sales tax during the test period. An error rate of 42.27 percent was calculated which, when applied to expense purchases of \$18,850.40, resulted in a determination by the auditor that Datel had made purchases in the amount of \$7,968.00 upon which tax was unpaid. Additional tax due calculated thereon was \$650.16.

With respect to the audit of the corporation's sales, approximately 300 invoices for November 1982 were examined. Of these 300 invoices, 36 invoices related to claimed nontaxable sales. Initially, 22 of the 36 invoices were disallowed by the auditor as unsubstantiated. An error rate of 30.924 percent was computed ( $\$37,897.07$  disallowed, divided by  $\$122,547.28$  in total nontaxable sales for November 1982, equals .30924) and was applied to total nontaxable sales for the audit period ( $\$3,210,555.00$ ), resulting in disallowed nontaxable sales of  $\$992,832.00$  for the period. Tax due thereon, at the appropriate statutory rate, was determined to be  $\$81,252.10$ .

When added to tax due on fixed asset purchases (\$6,734.13) and expense purchases (\$650.16), total additional tax due was \$88,636.39. On September 16, 1983, a Statement of Proposed Audit Adjustment, asserting additional tax due of \$88,636.39 was issued to Datel. By a letter dated October 11, 1983, C. E. Morgan, vice-president of operations and service, disagreed with the findings set forth on the Statement of Proposed Audit Adjustment.

On November 9, 1983, an informal conference was held at the auditor's office. Pursuant to this conference and the auditor's acceptance of documentation for certain (7 sales invoices) of the previously disallowed nontaxable sales, a revised error rate of 12.913 percent was computed. By applying this revised error rate to total nontaxable sales for the audit period (\$3,210,555.00), total disallowed nontaxable sales were determined to be \$414,579.00, with tax due thereon in the amount of \$33,928.62. When added to tax due on fixed asset purchases (\$6,734.13) and expense purchases (\$650.16), total additional tax due, pursuant to the revised computations, was found to be \$41,312.91 (the amount of the assessment issued to petitioner on June 8, 1984).

The primary basis for the issuance of the assessment to petitioner was an examination of Datel's Federal income tax returns for 1980 through 1982 on which petitioner was listed as an officer who devoted 100 percent of his time to the business, owned 40 percent of the common stock and received compensation of \$40,694.00, \$44,789.00 and \$61,250.00, respectively, for each of these years. In addition, petitioner's signature appeared on nearly all of the corporation's sales tax returns filed during the audit period and on corporate checks issued for payment of Datel's tax liabilities.

Petitioner was the founder of Datel and was its chief financial officer during his employment with the corporation from November 8, 1978 through November 8, 1983. During this period, he served as corporate president and also as a director. His primary duties were to promote the company, obtain corporate financing, procure sales and manage both the operation and the corporate personnel. Petitioner had the authority to and did hire and fire personnel at all levels, and he had authority to sign corporate tax returns. With the exception of temporary authority granted by petitioner to Marjorie Yellon, assistant treasurer, in his absence, petitioner had sole authority to sign corporate checks.

During the early stages of the audit (April and May 1983), approximately 50 percent of petitioner's workday was spent preparing Datel's shares for public offering, the purpose of which was to obtain adequate financing for the corporation which, at that time, was undercapitalized. Datel had been the first computer retailer to carry IBM products but, due to its financial condition, was unable to pay its vendors and, subsequently, lost IBM as a supplier. This was the primary cause for petitioner's leaving the corporation in November 1983. After November 1983, petitioner was no longer an officer or director of Datel, but continued as a shareholder. Prior to the public offering, petitioner owned 40 percent of the corporate stock; afterward, he owned 22 percent.

During petitioner's tenure with Datel, its sales tax returns were prepared and/or reviewed by its accounting firm, Arthur Young & Co., in concert with the corporation's controller, Raj Patel. The corporation's sales department was responsible for collecting sales tax on taxable sales, obtaining exemption documents for nontaxable sales and turning over the tax or exemption documents to the accounting department (Mr. Patel and his supervisor, Peter Sattin, Vice President-Finance). Petitioner received the sales tax returns for the purpose of affixing his signature thereto. Due to the fact that Datel had undergone a previous sales tax audit for the period September 1, 1978 through August 31, 1980, petitioner was aware of and impressed upon his employees the corporation's responsibility for collecting tax and securing exemption documents. Datel maintained a separate bank account at the Barclay Bank for the deposit of State and Federal taxes. Approximately eight percent of daily receipts were deposited into this account.

### ***OPINION***

In the determination below, the Administrative Law Judge held that petitioner failed to prove that he, as president and primary shareholder of Datel Systems Corporation, was not responsible for collecting Datel's sales tax. The Administrative Law Judge also determined that the petitioner failed to prove by clear and convincing evidence that the test period used in determining Datel's sales tax owed was not representative of the audit period of September 1, 1980 through February 28, 1983.

On exception, petitioner argues that since he delegated Datel's day to day accounting responsibilities and the responsibility for collecting and paying sales taxes to other officers in the corporation he should not be held responsible for those taxes. He also argues that the one month test period used for the audit, November 1982, ignored the seasonal nature of Datel's computer sales and therefore produced an erroneous assessment of sales tax due.

We sustain the determination of the Administrative Law Judge.

New York State Tax Law § 1133(a) provides, in pertinent part, that every person who is required to collect the tax imposed by Article 28 of the Tax Law is personally liable for that tax. Section 1131(1) says that a person required to collect a tax includes "any officer, director, or employee of a corporation, . . . who as such officer, director, or employee is under a duty to act for such corporation, . . . in complying with any requirements of this article" (emphasis added). Therefore, the holding of a corporate office does not, per se, impose liability for taxes owed by the corporation (Blodnick v. State Tax Commn., 124 AD2d 437; 507 NYS2d 536, 537). Rather, officer liability turns on the facts of each case (Matter of Autex Corporation and Christopher T. Gilligan, Tax Appeals Tribunal, November 23, 1988).

"Pertinent inquiries in determining whether a person has such a duty to act for the corporation include, inter alia, authorization to sign the corporate tax return, responsibility for management and maintenance of the corporate books, authorization to hire or fire employees, [and] derivation of substantial income from the corporation or stock ownership" (Blodnick v. State Tax Commn., supra, 507 NYS2d 536, at 538).

Other indicia include whether the person was generally permitted to manage the corporation (20 NYCRR 526.11[b][2]), the individual's simultaneous status as an officer, director, or shareholder (Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564, 565), the authorization to write checks on behalf of the corporation (Chevlowe v. Koerner, 95 Misc 2d 388, 407 NYS2d 427, 429), and the individual's knowledge of and control over the financial affairs of the corporation (Vogel v. State Tax Commn., 98 Misc 2d 222, 413 NYS2d 862, 865; see, Matter of Autex Corporation and Christopher T. Gilligan, supra).

Applying these criteria to petitioner's case, we find that he was a responsible officer within the meaning of Tax Law § 1131(a). Petitioner testified that he was president and a director of Datel during the audit period. He had sole check-writing responsibilities; he hired and fired employees, owned 40% of the common stock at the time of the audit, signed the corporation's tax returns, managed corporate personnel and operations and was the corporation's chief financial officer.

Petitioner argues that since he delegated much of the day to day mechanics of the business operation to others, he is not a person required to collect the tax. He argues that Wiggins v. United States (188 F Supp 374) supports this principle. Petitioner's reliance on Wiggins v. United States is misplaced. In that case plaintiff Wiggins, as president, treasurer, primary supervisor, and check-writer, failed to pay his corporation's Federal Insurance Contribution Act (F.I.C.A.) taxes as required by Internal Revenue Code § 2707. Section 2707(d) of that statute penalizes a person who is "under duty to collect and pay" the F.I.C.A. tax for willfully failing to do so. It is true, as petitioner maintains, the court said, "Mr. Wiggins, having delegated to the bookkeeper the duties of keeping up with obligations and payment [of F.I.C.A. taxes], it is quite doubtful that he is a 'person' under the provisions of this statute". It is apparent from reading the full text of the decision, however, that the evidence of delegation was used solely with regard to the issue of willfulness. The court concluded that Mr. Wiggins did not willfully fail to pay the F.I.C.A. taxes and the case has been so cited (see, McCarty v. United States, 437 F2d 961, 968).

Applying the statute before us, the court in Cohen v. State Tax Commn. (supra, 513 NYS2d 564, 566), said, "[a]lthough it appears that petitioner was not responsible for [the corporation's] daily management, it is clear he played a role in [the corporation's] overall management" and was thereby held liable for the unpaid sales taxes. The evidence here showed petitioner was the primary financial officer of Datel during the audit period even though he spent a large percentage of his time preparing the corporation for public offering. He owned the largest share of stock and oversaw the entire business operation. For these reasons, petitioner is responsible for Datel's sales and use taxes within the meaning of Tax Law § 1131. Since

petitioner's willfulness is not in issue, the fact that he delegated the day to day duties to his subordinates does not relieve him of his financial obligation to pay Datel's taxes.

In his second issue, petitioner argues that the test period used during the audit period was not a representative sample of Datel's business. Petitioner argues that his gross sales for November 1982 were inordinately high because of the end of the year business sales and the holiday season. He said his disallowed nontaxable sales for November 1982 were also inordinately high because one salesman, employed for only a brief period, often did not obtain sales tax exemption certificates. Petitioner also argues that because he objected to use of the November 1982 test period it should not have been used since Datel had adequate records to receive a complete audit.

New York Tax Law § 1138(a) provides that if a tax return is incorrect or insufficient, an audit shall be performed by the Tax Commission from such information as may be available. When tax records are inadequate, estimation techniques may be used in lieu of a complete audit (Matter of Chartair v. State Tax Commn., 65 AD2d 44, 411 NYS2d 41). If a taxpayer's records are adequate, "[r]eliance on estimation procedures to determine tax due [is] indefensible, unless, of course, . . . petitioner[], . . . knowingly waived [his] right to a complete audit" (Matter of Kennedy and Co., Inc. v. Chu, 125 AD2d 773, 509 NYS2d 199, 201). Once a test period audit has been properly used, the burden of proof lies with the taxpayer to show by clear and convincing evidence that the method of audit or the amount of tax assessed was erroneous (Matter of Clarence R. Oliver Post Memorial, Inc. v. State Tax Commn., 101 AD2d 922; 475 NYS2d 623, 624). "The method of estimating tax must be reasonably calculated to reflect the tax due but exactness is not required for such a method" (Matter of Markowitz v. State Tax Commn., 54 AD2d 1023, 388 NYS2d 176, 177).

The record before us indicates that petitioner knowingly waived the corporation's right to a complete audit. As evidenced by the Audit Method Election form (Exhibit F), petitioner was informed that Datel had sufficient records for a complete audit. In spite of this, he signed the Audit Method Election form, consenting to the use of a representative test period in lieu of the full audit (cf., Matter of James Kennedy & Co., Inc. v. Chu, supra -- mere acquiescence to use of



a test period where complete records are available is insufficient to prove petitioner's waiver of his right to a full audit). Petitioner's assertion that he objected to the November 1982 test period to the auditor is unsubstantiated in the record. In any event, if petitioner had a valid objection to the use of the November test, his opportunity to prove this objection was at the hearing; this petitioner failed to do.

At the hearing petitioner testified that November 1982 was not representative of the audit period because an unusually high volume of sales occurred in this month. However, the assessment was not based on an audit of gross sales. Instead, the assessment was based on a review of nontaxable sales claimed by Datel in November 1982: the dollar amount of those sales erroneously claimed to be nontaxable was divided by the total amount of nontaxable sales claimed for the month. The resulting percentage was applied to the total of nontaxable sales claimed for the audit period. Since this aspect of the audit focused completely on the rate, in terms of dollars, at which Datel erroneously claimed that sales were not taxable, it is not necessarily affected by the volume of gross sales. Thus, petitioner's claim that November was an unusually active month for gross sales does not prove an audit error.

Petitioner's assertion that the amount of its improperly documented nontaxable sales was unusually high in November, due to the errors of one employee, would be relevant to show the test month unrepresentative. However, petitioner has introduced no proof documenting that more mistakes were made in November than in any other month. Petitioner's argument that he did not have ready access to Datel's corporate records does not relieve him of his burden of proof. (Petitioner could have attempted to obtain the records by requesting that the Administrative Law Judge subpoena the necessary records or he could have issued a subpoena through his representative [20 NYCRR 3000.6(c)].)

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the William Barton is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of William D. Barton, officer of Datel Systems Corporation, is denied; and

4. The Notice of Determination and Demand, issued June 8, 1984, is sustained.

DATED: Troy, New York  
December 28, 1989

/s/John P. Dugan

John P. Dugan  
President

/s/Francis R. Koenig

Francis R. Koenig  
Commissioner

/s/Maria T. Jones

Maria T. Jones  
Commissioner