STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ALLAN J. KROPF	:	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 June 1, 1982 through February 29, 1984.	:	

Petitioner Allan J. Kropf, 1790 Judge Road, Basom, New York 14013 filed an exception to the determination of the Administrative Law Judge issued on October 12, 1989 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 June 1, 1982 through February 29, 1984 (File No. 803763). Petitioner appeared by Robert D. Kolken, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

Petitioner filed a brief on exception. The Division of Taxation responded by a letter in lieu of a brief. Oral argument was heard at the request of petitioner on September 26, 1990.

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

ISSUES

I. Whether the assessment herein was time barred by the statute of limitations set forth in Tax Law § 1147.

II. If not, whether the Division of Taxation properly determined that petitioner was a person required to collect sales taxes on behalf of Medina Ford-Mercury, Inc. within the meaning of Tax Law §§ 1131(1) and 1133(a).

III. Whether penalties imposed pursuant to Tax Law § 1145 should be abated.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "1" which has been modified. We have also made additional findings of fact. The Administrative Law Judge's findings of fact, the modified finding of fact and the additional findings of fact are set forth below.

We modify the Administrative Law Judge's finding of fact "1" to read as follows:

> On April 17, 1986, the Division of Taxation issued to petitioner, Alan J. Kropf, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due which assessed $50,384.04 in tax due, plus penalty and interest (for a total due of $88,781.67), for the period June 1, 1982 through February 29, 1984. The notice assessed tax due from petitioner "individually and as officer of Medina Ford-Mercury, Incorporated".[1]

The assessment set forth in the April 17, 1986 notice of determination was subsequently revised to $19,622.71 in tax due, plus penalty and interest, for the period June 1, 1982 through November 30, 1982. This assessment was premised upon sales tax reported due in quarterly sales tax returns filed by Medina Ford-Mercury, Inc., for the periods ended August 31, 1982 and November 30, 1982. Said returns were late filed, without payment, by Medina Ford-Mercury, Inc.

In or about October 1981, petitioner and one Lorne McMurray formed Medina Ford-Mercury, Inc. The corporation issued 100 shares of stock to its shareholders as follows: 51 shares to Mr. McMurray and 49 shares to petitioner. Mr. McMurray became the corporation's president and treasurer while petitioner became the corporation's vice-president and secretary.

Petitioner contributed $15,000.00 to the corporation upon its formation. Mr. McMurray agreed to contribute the same amount, but did not.

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[1] We modified the Administrative Law Judge's finding of fact "1" to add the words "(for a total due of $88,781.67)."

Medina Ford-Mercury, Inc. was a new car dealership which began doing business in October 1981. The corporation employed petitioner and Mr. McMurray, and also a salesman, a bookkeeper, and (at various times) one or two mechanics.

Petitioner ran the service department of the dealership. In that capacity he repaired cars, supervised the other mechanic(s), ordered and sold spare parts, and handled customer transactions. Petitioner charged sales tax on all repairs performed by the service department and turned all receipts received by him over to the corporation's bookkeeper. All payments for parts petitioner ordered were paid by the corporation's bookkeeper. Petitioner was involved in the hiring of mechanics and had authority to fire a mechanic, if necessary. Petitioner had no involvement in the hiring and firing of the other employees.

Mr. McMurray handled the balance of the corporation's day-to-day operations. He sold cars and also supervised the corporation's other salesman. He was responsible for the hiring and firing of the salesmen and the bookkeeper. He was involved in the hiring of the mechanics. He was also in charge of the corporation's financial matters and the maintenance of its books and records, as he supervised the corporation's bookkeeper and determined which of the corporation's creditors were to be paid. Checks drawn on the corporation's bank account were drawn up by the bookkeeper under his direction. Mr. McMurray was also generally responsible for the preparation and filing of tax returns. Such returns, including sales tax returns, were prepared by the bookkeeper at Mr. McMurray's direction. Mr. McMurray signed the vast majority of all such returns. Finally, Mr. McMurray was responsible for the deposit of the corporation's receipts into its bank account.

Petitioner was not involved in determining which of the corporation's bills were to be paid.

Both petitioner and Mr. McMurray were paid a weekly salary of $350.00 during the period at issue.

The corporation operated out of premises owned by Mr. McMurray located at 1405 S. Main Street, Medina, New York. The corporation paid Mr. McMurray rent for these premises.

Petitioner had no part in determining the amount of rent paid to Mr. McMurray for the premises.

Mr. McMurray and petitioner were both authorized to sign checks on the corporation's behalf. Mr. McMurray signed the vast majority of the hundreds of checks drawn on the corporation's account annually.

Petitioner signed a few dozen corporate checks per year. He signed checks in Mr. McMurray's absence when asked to do so by the bookkeeper. Petitioner signed at least one check for payment of sales taxes, a $2,569.14 check dated December 18, 1981. Petitioner also signed at least one check payable to the Internal Revenue Service.

Petitioner signed the corporation's sales tax return for the period ended August 31, 1982. Petitioner was not involved in the preparation of this return, which was dated April 4, 1983 and stamped received by the Rochester District Office of the Division of Taxation on April 22, 1983.

Petitioner may have signed other returns of the corporation. At hearing petitioner stated that he did not know if he had signed any other returns. At no time did petitioner mail any returns.

In October 1981, petitioner and Mr. McMurray, as officers of the corporation, authorized the corporation to borrow $50,000.00 from the Small Business Administration. The corporation subsequently did borrow $50,000.00 from the S.B.A. and, under the terms of the loan agreement, petitioner incurred personal liability for at least some portion of the corporation's indebtedness. Following the corporation's demise, petitioner personally repaid a portion of the loan proceeds back to the S.B.A.

In May 1983, petitioner and Mr. McMurray attended a meeting at the Division's Rochester District Office. At that meeting petitioner first became aware that the corporation was in arrears with respect to its sales tax obligations (including the period at issue herein). Mr. McMurray had been aware of the corporation's sales tax problems prior to this meeting as he had previously been in contact with Division personnel regarding these problems. He did

not, however, advise petitioner of these problems. At the meeting, petitioner and Mr. McMurray executed, on the corporation's behalf, a Deferred Payment Agreement whereby the corporation conceded liability for sales tax assessments for certain periods (including the periods at issue herein) and agreed to a payment schedule for that liability.

By his execution of the Deferred Payment Schedule, petitioner did not intend to concede that he was a responsible officer of the corporation for sales tax purposes.

After learning of the corporation's sales tax problems, petitioner made a few casual inquiries of the bookkeeper as to whether "things were being taken care of here", i.e., if the corporation was making its payments as required under the deferred payment agreement. The record is unclear as to precisely how the bookkeeper responded to petitioner's inquiries. The record is also unclear as to how specific petitioner's inquiries were. It is clear, however, that the bookkeeper did not specifically advise petitioner that the corporation was not complying with the deferred payment agreement. The bookkeeper believed that Mr. McMurray did not want petitioner (or anyone) to know the status of the corporation's finances. In fact, the corporation did not make payments as agreed under the deferred payment agreement.

Mr. McMurray was secretive regarding the corporation's finances. He regularly locked up the corporation's records and instructed the bookkeeper not to allow anyone access to those records. There is no evidence in the record that petitioner ever requested access or was ever denied access to the corporation's books and records.

At no time did Mr. McMurray advise petitioner that the corporation was not fulfilling its obligations under the deferred payment agreement. Additionally, the record does not reveal that Mr. McMurray deceived petitioner regarding the corporation's financial status or its status under the deferred payment agreement.

Prior to his involvement with Medina Ford-Mercury, Inc., petitioner ran his own automotive repair business. Petitioner's wife, and later, his son, handled the bookkeeping chores for that business, including the preparation of sales tax returns. Petitioner signed all sales tax returns for that business. Later, during the period of his involvement with Medina

Ford-Mercury, petitioner continued to run his automotive repair business, but he devoted no time to that business and earned no income from that business because of his full-time employment with Medina Ford-Mercury, Inc.

Medina Ford-Mercury, Inc. ceased doing business in February 1984.

The Division was unable to produce the corporation's sales tax return for the period ended November 30, 1982. Petitioner was unable to produce a copy of said return. The Division's records indicated that the November 30, 1982 return was filed on April 22, 1983.

The Division reviewed its files to locate an envelope in which the sales tax returns of Medina Ford-Mercury for the periods at issue herein may have been mailed to the Division. The Division was unable to locate any such envelope.

The Division presented no evidence of its procedures regarding receipt of sales tax returns at its Rochester District Office.

The Division further reduced the assessment herein by $6,097.76 based upon a payment in that amount made by Mr. McMurray on or about October 20, 1987.

In addition to the facts found by the Administrative Law Judge we find the following facts.

> At the hearing, the Division introduced a copy of Postal Service Form 3877 which indicated that article number P27892 was mailed by the Division to petitioner by certified mail. The form bears a postmark of April 17, 1986. The Division also submitted a copy of its form entitled "Mailing Record-Notice of Determination" which is dated April 17, 1986 and lists an assessment to Allan J. Kropf in the amount of $88,781,67. This form was accompanied by a signed statement that said "[o]n April 17, 1986 I delivered all notices identified on the reverse of this sheet to the Mail and Supply Section of the Department of Taxation and Finance, Albany, N.Y. and there witnessed the sealing and stamping of the envelopes in which they were enclosed. Each such notice was enclosed in an envelope addressed to the taxpayer named therein, at the address show on the notice." This statement was signed by one individual and witnessed by another. A second statement provided that "[o]n April 17, 1986, I deposited in a branch of the United States Post Office of Albany, New York all notices described above, all enclosed in sealed postpaid envelopes." This statement was also signed by an individual and witnessed by another individual (Exhibit D).

After the hearing, the Division submitted Postal Service form 3811-A, "Request for Return Receipt." This form indicates that article number P27892 was mailed to Allan J. Kropf on April 17, 1986 and was delivered to him on April 30, 1986 (Exhibit D).

OPINION

The Administrative Law Judge concluded that petitioner did not prove that the returns due for the periods ending August 31, 1982 and November 30, 1982 were filed before April 22, 1983 and that the Division of Taxation (hereinafter the "Division") did establish that the returns were received on April 22, 1983. The Administrative Law Judge further determined that the Notice of Determination was issued on April 17, 1986 and, therefore, was issued within three years of the filing of the returns. With respect to the merits of the case, the Administrative Law Judge held that petitioner was a person required to collect sales tax on behalf of Medina Ford-Mercury, Inc. and was, therefore, personally liable for such tax.

On exception, petitioner argues that the Administrative Law Judge erred in finding that the returns were filed on April 22, 1983. Petitioner also asserts that the Division did not submit adequate proof to establish that the Notice of Determination was mailed on April 17, 1986 and, as a result, the Division has not established that it timely assessed the taxes. Further, petitioner asserts that he is not responsible for the taxes of the corporation because he, as minority shareholder, vice-president/secretary, and service manager, was clearly subordinate to the person who was the majority shareholder, president/treasurer and who generally handled the collection and reporting of sales tax. With respect to the assessment for the period ending November 30, 1982, petitioner alleges that it has no rational basis because the Division has not produced the sales tax return upon which the assessment was allegedly based. Finally, petitioner argues that penalties should be abated because he reasonably assumed that he was not a responsible officer.

The Division responds to petitioner's arguments by first asserting that petitioner failed to prove when he mailed the returns. In view of this failure, the Division argues that it was "perfectly correct in relying on its stamped receipt date" (Division's letter in lieu of a brief, p. 3), without any proof as to office practice, to establish that the returns were received on April 22, 1983. Next, the Division argues that its documents, without proof of office practice, were adequate to establish that the Notice of Determination was mailed on April 17, 1986. With respect to the merits of the case, the Division asserts that there are many factors that indicate that petitioner was a responsible officer and, the Division claims, petitioner recklessly disregarded his responsibility. Further, the Division argues that petitioner bore the burden to prove the assessment erroneous and that he failed to do so by claiming for the first time on exception that there is no rational basis for the assessment. Finally, the Division asserts that there is no basis in the record to abate the penalties imposed.

We affirm the determination of the Administrative Law Judge.

The first issue before us is whether the Administrative Law Judge properly concluded that the Notice of Determination was issued within three years from the filing of the returns for the periods ending August 31, 1982 and November 30, 1982, as required by section 1147(b) of the Tax Law. Since the evidence on this issue submitted by both sides has many omissions, we begin our analysis with a review of the nature of a statute of limitations claim and the burden of proving such a claim.

It is well established that the statute of limitations defense is waived unless affirmatively raised by the taxpayer (see, Matter of Adamides v. Chu, 134 AD2d 776, 521 NYS2d 826, 828, lv denied 71 NY2d 806, 530 NYS2d 109; Matter of Convissar v. State Tax Commn., 69 AD2d 929, 415 NYS2d 305; Matter of Servomation Corp. v. State Tax Commn., 60 AD2d 374, 400 NYS2d 887). To establish this defense, the taxpayer must go forward with a prima facie case showing the date on which the limitations period commences, the expiration of the statutory period and receipt or mailing of the notice

after the running of the period (see, Amesbury Apts. v. Commr., 95 TC 227; Robinson v. Commr., 57 TC 735; Matter of Jencon, Tax Appeals Tribunal, December 20, 1990). Where the taxpayer has satisfied this initial burden, the burden of going forward with the evidence shifts to the Division to demonstrate that the bar of the statute is not applicable (see, Amesbury Apts. v. Commr., supra; Adler v. Commr., 85 TC 535). The Division must then proceed with countervailing evidence that the statutory notice was timely mailed (see, Coleman v. Commr., 94 TC 82).

Under this analysis we must first decide whether petitioner established a prima facie case showing when the period of limitations commenced, i.e., when the returns were filed. We agree with the Administrative Law Judge that the testimony of the bookkeeper was insufficient to establish that the returns were mailed on the date signed. As noted by the Administrative Law Judge, this testimony consisted only of the bookkeeper's recollection that under the corporation's office practice a document would not be signed unless it was to be mailed on that date. Such indirect testimony that does not even address whether the document was properly stamped and addressed and which is not corroborated by any direct proof of mailing, i.e., a registered or certified mail receipt, is inadequate to make a prima facie case that the returns were mailed and that the period of limitations commenced to run (cf., Matter of Mutual Life Ins. Co. of New York v. New York State Tax Commn., 142 AD2d 41, 534 NYS2d 565 [where the taxpayer's extensive, detailed proof of mailing did establish a prima facie case, requiring the Division to respond]).

The only other evidence of when the returns were filed is the date stamp of April 22, 1983 on the return for the period ending August 31, 1982 (Exhibit E) and the date of April 22, 1983 on the computer printout (Exhibit F) for the period ending November 30, 1982. In other circumstances, we might find this evidence alone insufficient to establish the date of receipt. However, here it is offered by the Division, and is the only evidence in the record that indicates that the period of limitations did begin to run and that the

Notice of Determination was required to be issued by a certain date. Accordingly, under these unique circumstances, we conclude that this evidence is sufficient to establish that the period of limitations began to run on April 22, 1983.

Since the record indicates that the Notice was delivered on April 30, 1986,[2] after the expiration of the three year period, the burden of going forward was shifted to the Division to prove that it mailed the Notice within the three year period (cf., Matter of Jencon, supra [where the Division was not required to prove timely mailing because the taxpayer did not establish receipt outside the period of limitations]). We turn our attention then to the question of whether the Division proved that it mailed the Notice on or before April 22, 1986.

As proof of mailing, the Division submitted what its representative described as a "three page mailing record" (Tr., p. 6). This mailing record consisted of a Postal Service form 3877, a mailing log, which indicates that article P27892 addressed to Allan J. Kropf was delivered to the Postal Service on April 17, 1986 for certified mailing, a Division form entitled "Mailing Record-Notice of Determination," dated April 17, 1986 and listing the assessment against petitioner, and signed statements indicating that the listed assessment was mailed to the taxpayer. Subsequently, the Division submitted the Postal Service's return receipt which indicated that certified no. P27892, which was mailed on April 17, 1986, was delivered to petitioner on April 30, 1986.

Petitioner argues that this evidence is insufficient, relying on Matter of MacLean v. Procaccino (53 AD2d 965, 386 NYS2d 111) for the proposition that affidavits or testimony with respect to the Division's normal course of business or office practice is an essential element to prove the issuance of a notice of determination. Petitioner's reliance on MacLean is misplaced since MacLean held that evidence of office practice was necessary to corroborate the mailing log only because the Division could not produce either the return receipt or the returned notice itself. The court stated "[w]hatever weight

[2]Petitioner also acknowledges that the Notice of Determination was received on April 30, 1986 (petitioner's brief on exception, p. 28).

may be ascribed to the mailing log herein is overcome by the failure of respondents to produce either the return receipt or the letter, as returned by the post office, or any further proof that the subject notice was mailed as required" (Matter of MacLean v. Procaccino, supra, 386 NYS2d 111, 112). Since the Division produced a return receipt in the instant case which indicates delivery of article P27892 on April 30, 1986, and the receipt corroborates the April 17, 1986 mailing date indicated on the mailing log (Form 3877), we conclude that the evidentiary problems which would otherwise be raised by the Division's failure to introduce evidence of office practice are not present here and that the evidence is sufficient to prove mailing on April 17, 1986.

Next, we address whether the portion of the assessment for the period ending November 30, 1982 must be cancelled because it lacks a rational basis. Petitioner argues that the basis for the assessment for the period November 30, 1982 is purportedly a sales tax return filed by the corporation, but that the Division was unable to produce this return. The only evidence produced by the Division with respect to this return was a computer printout (Exhibit F). The Division introduced no testimony or other evidence to explain the search for the return and none with respect to the meaning of the computer printout. Petitioner argues that without such testimony the printout is not admissible, and even if admissible, the printout alone is insufficient to provide a rational basis for the assessment.

The record indicates that petitioner has challenged the basis of the amount assessed for the first time on exception. The record reveals no effort by petitioner, either prior to or at the hearing, to obtain from the Division an explanation of the amount assessed. We see no evidence that petitioner requested the Division to provide a witness to explain the assessment, that petitioner subpoenaed such a witness or that petitioner attempted to obtain any documents, other than the return itself, from the Division to explain the source of the amounts assessed. In fact, petitioner did not raise this issue in his petition nor even as an argument at the hearing. Where a petitioner has so completely failed to raise a challenge to the source of the amount assessed, we cannot conclude that

the Division has an affirmative burden to establish the basis for the assessment. Instead, we conclude that this case falls within the rule that the Division "is not responsible for demonstrating the propriety of the assessment, including the basis for its audit" and that petitioner is responsible for establishing by clear and convincing evidence that the method used to arrive at the assessment and the assessment itself are erroneous (Matter of Blodnick v. New York State Tax Commn., 124 AD2d 437, 507 NYS2d 536, 538). Since petitioner has introduced no evidence indicating that the amount of the assessment was erroneous, we conclude that he has not proved this fact.

The next question is whether petitioner is personally liable for the tax due from the corporation pursuant to section 1133(a) of the Tax Law because he was a person required to collect such tax. Section 1131(1) provides 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 (Matter of Blodnick v. New York State Tax Commn., supra, 507 NYS2d 536, 537). Rather, officer liability turns on the facts of each case (Matter of Autex Corp., 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" (Matter of Blodnick v. New York State Tax Commn., supra, 507 NYS2d 536, 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 (Matter of 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. New York State Dept. of Taxation & Fin., 98 Misc 2d 222, 413 NYS2d 862, 865; see, Matter of Autex Corp., supra).

We agree with the Administrative Law Judge's conclusion that the facts here indicate that petitioner was a person required to collect the sales tax on behalf of Medina Ford-Mercury, Inc. during the period at issue. Petitioner was a 49% shareholder of the corporation and was its vice-president and secretary. He invested $15,000.00 in the corporation. He incurred personal liability on the corporation's $50,000.00 loan from the S.B.A. During the period at issue, all of petitioner's income was derived from the corporation. He managed the service department of the corporation on a daily basis. He was authorized to sign checks on the corporation's behalf and he exercised that authority by signing a few dozen checks per year in Mr. McMurray's absence. Petitioner also had experience in running a business and was aware of the corporation's responsibility to file sales tax returns. Subsequent to the period at issue herein, petitioner became involved in the corporation's sales tax difficulties with the Division and, along with Mr. McMurray, executed a deferred payment agreement on its behalf. Finally, he signed the corporation's sales tax return for the period ended August 31, 1982.

Although petitioner and Mr. McMurray may have divided the day-to-day responsibilities of running the corporation (petitioner not having primary responsibility for the day-to-day finances) such a division of responsibility does not establish that petitioner is not a person required to collect taxes (see, Matter of Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564). Here, as in Cohen, petitioner not only had authority to act on behalf of the corporation, he in fact acted on behalf of the corporation and was involved in the general finances of the corporation. Specifically, petitioner participated in authorizing the corporation to borrow $50,000.00 and petitioner incurred personal liability for part of this loan. Petitioner also invested $15,000.00 of his own funds in the corporation and signed the deferred payment agreement with the Division that encompassed the periods at issue. We conclude that these facts make the instant case virtually indistinguishable from Matter of Cohen v. State Tax Commn. (supra) and require the conclusion that petitioner was a person required to collect the

taxes at issue. With respect to petitioner's argument that he was subordinate to Mr. McMurray in the corporation's management, we note simply that petitioner did not prove that he was unable to act because of Mr. McMurray's power in the corporation[3] (cf., Matter of Constantino, Tax Appeals Tribunal, September 27, 1990), instead it appears that petitioner simply failed to pay adequate attention to the financial affairs of the corporation. As the court in Blodnick noted, "corporate officials responsible as fiduciaries for tax revenues cannot absolve themselves merely by disregarding their duty and leaving it to someone else to discharge (Matter of Blodnick v. New York State Tax Commn., supra, 507 NYS2d 536, 538, quoting Matter of Ragonesi v. New York State Tax Commn., 88 AD2d 707, 451 NYS2d 301).

Finally, we address the question of the imposition of penalty. Petitioner argues that penalty should be abated because he reasonably assumed that he was not a responsible officer. Further, petitioner argues that he should not be liable for interest until after April 30, 1986, the date of receipt of the Notice of Determination, "because neither he nor the Division considered him a responsible officer until such time" (Petitioner's brief on exception, p. 28).

The only basis for abating the penalty, and interest in excess of the minimum, imposed pursuant to section 1145(a) of the Tax Law and interest in excess of the minimum, is if the failure to pay tax is shown to be due to reasonable cause and not due to willful neglect (Tax Law § 1145[a][1][iii]). Since petitioner's thoughts about his status as a responsible officer are irrelevant to the question of why the tax was not paid when due, we find petitioner's argument without merit. Further, since there are no statutory grounds to abate the minimum interest which accrues from the time the tax was due, we have no basis to consider petitioner's request to abate interest (Tax Law § 1145[a][1][i] and [iii]).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

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[3]Petitioner's witness, the corporation's former bookkeeper, testified both that Mr. McMurray attempted to keep the financial affairs of the corporation secret (Tr., pp. 54, 64-65) and that petitioner expressed little interest in the affairs of the corporation (Tr., p. 64). Since this bookkeeper did not begin working for the corporation until February, 1983 (Tr., p. 50), this testimony has little weight in determining petitioner's role in the corporation during the period at issue, June 1, 1982 through November 30, 1982.

1. The exception of Allan J. Kropf is denied;

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

3. The petition of Allan J. Kropf is denied; and

4. The Notice of Determination dated April 17, 1986, as adjusted by the Division of Taxation (see, findings of fact "2" and "26" of the Administrative Law Judge's determination) is sustained.

DATED: Troy, New York
March 21, 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