

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
WILLIAM F. MARTIN	:	DECISION
OFFICER OF RAINBOW FOOD MARTS, INC.	:	
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 December 1, 1984	:	
through May 31, 1986.	:	

Petitioner, William F. Martin, officer of Rainbow Food Marts, Inc., 6014 Misty Ridge Lane, Clay, New York 13401, filed an exception to the determination of the Administrative Law Judge issued on August 25, 1988 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 December 1, 1984 through May 31, 1986 (File No. 804892). Petitioner appeared by Goldberg, Harding and Talev (Harold P. Goldberg, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

Petitioner did not file a brief. The Division of Taxation filed a letter in response to the petitioner's exception. Oral argument, at the request of the petitioner, was heard on January 20, 1989.

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

ISSUE

Whether petitioner was a person required to collect tax under Tax Law section 1133(a) and, therefore, liable for sales tax due from Rainbow Food Marts, Inc.

FINDINGS OF FACT

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

On December 30, 1986, as the result of an audit, the Division of Taxation ("Division") issued to petitioner, William F. Martin, a Notice and Demand for Payment of Sales and Use Taxes Due for the period December 1, 1984 through May 31, 1986, assessing tax due of \$22,358.70 plus penalty and interest. The notice explained that Mr. Martin, as an officer of Rainbow Food Marts, Inc. ("Rainbow"), was personally liable for taxes determined to be due from the corporation.

Rainbow operated a convenience store named Dairy Mart in North Syracuse, New York, during the audit period. Mr. Martin's association with Rainbow came about as a result of his personal friendship with an individual named Warren Newton.

Mr. Martin and Mr. Newton became acquainted in 1980 or 1981, when Mr. Newton took over the operation of a Syracuse gasoline service station previously run by a friend of Mr. Martin. In 1981, Mr. Martin moved from Syracuse to Watertown, New York. He and his family received monthly visits from Mr. Newton. During this time, Mr. Newton was having marital problems. He and his wife applied for a \$60,000.00 bank loan. The loan was approved while they were involved in divorce proceedings. Mr. Newton's wife refused to act as a cosigner after the loan was approved. As a favor, Mr. Martin cosigned for the loan.

In 1983, Mr. Martin returned to Syracuse where he worked as a shift manager for United Parcel Service ("UPS"). At that time, Mr. Martin knew Mr. Newton as a successful businessman who owned and operated several convenience stores in Syracuse, owned a home in a better section of the city and drove a late model car. He also considered Mr. Newton to be a friend.

In late 1983 or early 1984, Mr. Newton came to Mr. Martin with a business proposition. He told Mr. Martin that he was being forced into bankruptcy by circumstances caused by an employee who had embezzled funds from his business, and he asked for Mr. Martin's help in opening a new business. He proposed the following arrangement: A corporation, Rainbow, would be formed to operate a Dairy Mart convenience store. Mr. Martin would be the president and sole shareholder of Rainbow. The real property where the Dairy Mart was located was to be

placed in Mr. Martin's name, and after all mortgages were satisfied, Rainbow was to pay a rental to Mr. Martin. Mr. Newton was to be solely responsible for the operation of the Dairy Mart and was to retain any profits. Mr. Martin's name was to be used in connection with the acquisition of loans and vendor credit and to obtain any required licenses because Mr. Newton could not obtain credit or hold property in his own name.

Although Mr. Martin agreed to Mr. Newton's proposal, he insisted that his status as corporate officer could last no more than six months. UPS had a personnel policy prohibiting employees from having outside employment or business interests, and Mr. Martin was fearful of losing his job if his association with Rainbow became known.

Rainbow's incorporation papers were drafted by Mr. Newton's attorney, Angelo Rinaldi. In all legal matters regarding Rainbow, Mr. Martin allowed himself to be guided by Mr. Newton and Mr. Rinaldi.

At the outset, a \$36,000.00 loan was obtained from Key Bank to remodel the premises. Mr. Martin signed as a guarantor of the loan. The loan was secured by a second mortgage on the property. Since the property was valued at approximately \$120,000.00, Mr. Martin did not believe he was placing himself at risk by guaranteeing the loan. With his knowledge, a liquor license was obtained in Mr. Martin's name. A corporate checking account was established, and Mr. Martin signed approximately five checks to get the business started.

The Dairy Mart store was opened for business during Thanksgiving week, 1984. At first, Mr. Martin dropped in to see Mr. Newton and the store every few days. Over time his visits decreased.

The Dairy Mart was operated by Warren Newton. He hired a manager, Nicholas Bartolotti, to run the day-to-day operations. Mr. Newton kept all of the store's books and records, paid all vendors, collected and deposited cash receipts and had the power to hire and fire employees. Mr. Martin had no involvement with the day-to-day management of the Dairy Mart.

In July 1985 Rainbow filed its first State sales tax return. It was signed by Mr. Martin at the direction of Mr. Newton. It was the only sales tax return signed by Mr. Martin on Rainbow's behalf.

Shortly after Rainbow began doing business, Mr. Martin learned that Mr. Newton's business practices were the subject of a Federal investigation. He was contacted by agents of the Internal Revenue Service and asked questions regarding his relationship with Warren Newton. There was no immediate follow-up to this initial contact.

After four to six months had passed, Mr. Martin repeatedly asked Mr. Newton to find someone else to act as president and sole shareholder of Rainbow. Mr. Newton insisted that a change was not possible at that time, but he promised to find someone to replace Mr. Martin in another six months. The two men argued and their friendship deteriorated.

In the spring of 1986, Warren Newton approached his manager, Nicholas Bartolotti, and asked whether he would like to become a part owner of Rainbow. He told Mr. Bartolotti that Mr. Martin was forced to sell his shares because he was afraid of losing his job at UPS. Mr. Bartolotti agreed to pay Mr. Newton \$60,000.00 in return for which he was to receive a 50 percent interest in Rainbow. Mr. Bartolotti understood that some of this money was to be used by Mr. Newton for business ventures unrelated to Rainbow. Mr. Newton told him that some of the money would be used to pay outstanding sales tax liabilities.

Mr. Rinaldi drafted all the legal papers executed in connection with the sale of Mr. Martin's interest in Rainbow to Mr. Bartolotti. Neither Mr. Bartolotti nor Mr. Martin retained his own legal counsel. To consummate the transaction, Mr. Martin signed a bill of sale by which he purportedly sold ten shares of common stock in Rainbow, representing all of his interest in the corporation, to Nicholas Bartolotti. The consideration recited in the document is \$5,000.00. Mr. Martin signed a letter resigning as officer of the corporation. Mr. Bartolotti signed what purported to be the minutes of a joint shareholders and board of directors meeting of Rainbow. Mr. Bartolotti and Mr. Martin are shown as the only persons present. The minutes state that Mr. Martin's resignation was accepted at this meeting, and Mr. Bartolotti "assumed the

offices as sole director and as president and director of the corporation and the same was duly accepted." All of these documents were dated March 10, 1986, but were actually executed in May 1986. Mr. Bartolotti assumed the ownership and management of the Dairy Mart on May 20, 1986. Mr. Martin never received the \$5,000.00 recited in the bill of sale.

In July 1986, the Division began an audit of Rainbow with a visit to the Dairy Mart convenience store. The auditor interviewed Mr. Bartolotti who at first denied knowing who owned Rainbow. The auditor learned that Mr. Martin was Rainbow's principal officer, but whether that information came from Mr. Bartolotti or elsewhere cannot be determined from the record.

By the summer of 1986, Mr. Martin was receiving continual inquiries from Federal agents investigating crimes allegedly committed by Mr. Newton. Since phone calls were made to him at UPS, he was afraid that his job might be jeopardized.

The auditor contacted Mr. Martin at his UPS office and requested a meeting to discuss a sales tax audit of Rainbow.

On July 10, 1986, Mr. Martin attended a meeting with representatives of the Division. The purposes and methods of the sales tax audit were discussed, and arrangements were made for the auditor to review Rainbow's books and records at the offices of its accountant. At that meeting, Mr. Martin represented himself as the sole shareholder and principal officer of Rainbow. In response to direct questions, he denied that Mr. Newton had any involvement with Rainbow.

The auditor reviewed Rainbow's books and records at the offices of its accountant. The review continued over a period of weeks. Through conversations with Rainbow's accountant, the auditor learned that Mr. Newton had some involvement with the corporation; however, the nature of that involvement was not definitively explained. During the audit, Mr. Martin described Mr. Newton as a consultant to Rainbow and a friend. Mr. Martin continued to maintain that he was the sole owner of Rainbow during the audit period.

On September 29, 1986, Mr. Martin, as president of Rainbow, executed a consent fixing Rainbow's tax liability in the amount of \$22,358.70 plus penalty and interest for the period

December 1, 1984 through March 10, 1986. Mr. Martin was advised by Rainbow's accountant to sign the consent on these grounds: (1) that this was the lowest tax figure that the Division could be expected to assess; (2) that additional penalties could be assessed if Mr. Martin did not agree to the tax; (3) that if Mr. Martin denied being the owner of Rainbow, at this point, the accountant would bear some responsibility for misleading the Division.

While the audit was being conducted, Mr. Newton and his attorney advised Mr. Martin to declare himself solely responsible for Rainbow. He was told that the Dairy Mart would be forced to close if Mr. Newton's connection with Rainbow became known and that all of the parties would suffer financially as a result. As relations between the two men deteriorated, Mr. Newton threatened to inform UPS of Mr. Martin's involvement with Rainbow.

In the latter half of 1986, Mr. Martin learned that Mr. Newton was being investigated by the Federal government for bankruptcy fraud. In May 1987, Mr. Newton pleaded guilty to conspiracy, bankruptcy fraud and filing a false tax statement. None of these crimes was directly related to the operation of Rainbow. However, Rainbow fraudulently obtained an investment tax credit through a scheme devised by Mr. Newton. Mr. Martin signed the application for the credit. He later repaid the amount of the credit to the Federal government, although he had not personally received any monies in connection with the credit.

The real property owned by Mr. Martin was sold to satisfy the mortgages, including the \$36,000.00 loan from Key Bank. If any monies remained after the mortgages were paid, Mr. Martin did not receive it. He found himself obligated to satisfy the remaining balance of the \$60,000.00 bank loan which he cosigned in 1981. He repaid the amount of the investment tax credit illegally received by Rainbow. By the time of hearing, Mr. Martin had paid out approximately \$67,000.00 to satisfy obligations incurred as a result of his association with Mr. Newton.

OPINION

In the determination below the Administrative Law Judge denied the petition of William F. Martin, officer of Rainbow Food Marts, Inc., and in so doing decided that petitioner could not absolve himself of liability by asserting that he did not exercise corporate responsibilities. Further, the Administrative Law Judge noted that petitioner was Mr. Newton's willing victim because he knowingly cooperated with Mr. Newton in creating a corporation to mislead Mr. Newton's creditors, sought to derive a financial benefit from ownership of real property, and was the principal officer and sole shareholder of Rainbow Food Marts, Inc. As a result, the Administrative Law Judge determined that petitioner was a person required to collect tax under Tax Law section 1133(a) and, therefore, liable for sales tax due from said corporation.

Petitioner takes general exception to the determination of the Administrative Law Judge that petitioner was a responsible officer on the ground that the determination is not in accord with the weight of the evidence or the facts adduced at the hearing. In particular, petitioner asserts that he derived no substantial benefit or income from the transactions in question, had no authority to hire or fire employees and was not responsible for the management or maintenance of the corporate books. Additionally petitioner claims he had no decision making authority over the corporation, which bills would be paid (did not write any checks in payment of such bills) and was acting under and subject to the fraud and duress of Mr. Newton. Finally, petitioner argues he did not seek to derive benefit from the ownership of the real property, and, therefore, was not a responsible officer as said term is defined in the tax law.

In response, the Division while not filing a brief, stated its position is that the assessment should be upheld for the reasons outlined by the Administrative Law Judge.

We affirm the determination of the Administrative Law Judge.

Tax Law section 1133(a) imposes personal liability for taxes required to be collected under Article 28 of the Tax Law upon a person required to collect such tax. A person required to collect such tax is defined as "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 requirement of [article 28]" (Tax Law § 1131[1]).

The holding of corporate office does not per se impose tax liability upon the office holder (Chevlowe v. Koerner, 95 Misc 2d 388; Blodnick v. State Tax Commn., 124 AD2d 437). The determination that an individual is a responsible officer depends upon the particular facts of each case (Stacy v. State Tax Commn., 82 Misc 2d 181, 183; Matter of Autex Corp., Tax Appeals Tribunal, November 23, 1988). The relevant factors to consider when 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 or maintenance of the corporate books, authorization to hire and fire employees and derivation of substantial income from the corporation or stock ownership (see, 20 NYCRR 526.11[b][2]; Matter of Cohen v. State Tax Commn., 128 AD2d 1022; Matter of Blodnick v. State Tax Commn., *supra*; Matter of Rosenblatt v. State Tax Commn., 114 AD2d 127, revd in part on dissenting opn below 68 NY2d 775).

Applying these criteria to petitioner William F. Martin's circumstances, we find that he was a responsible officer of Rainbow Food Mart, Inc. As the principal officer and sole shareholder of Rainbow Food Mart, Inc., he not only signed as a guarantor on a loan for the business but the real property of the business was placed in his name. Petitioner's economic interest in the real property was to be enhanced as the mortgages on the real property were reduced. Additionally, petitioner signed a sales tax return, had check signing authority and in fact executed 5 to 6 checks in the starter checkbook as the business began operations. Mr. Martin also participated in securing a liquor license for the business and continually held himself out to be the owner of the business. The fact that he, as an officer and sole shareholder, failed to exercise his share of the responsibility does not operate to shed him of liability since "corporate officials responsible as fiduciaries for tax revenues cannot absolve themselves merely by disregarding their duty and leaving it to someone else to discharge" (Ragonesi v. State Tax Commn., 88 AD2d 707, 708; Capoccia v. State Tax Commn., 105 AD2d 528, 529). Thus, the Administrative Law Judge's determination that petitioner was a responsible officer personally liable for all of petitioner corporation's unpaid sales taxes during the audit period was correct.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of William F. Martin, officer of Rainbow Food Marts, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of William F. Martin, officer of Rainbow Food Marts, Inc., is denied; and
4. The Notice and Demand for Payment of Sales and Use Taxes due issued on December 30, 1986 is sustained.

DATED: Troy, New York
July 20, 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