STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
SAMUEL V. EDENS, OFFICER OF TELEFILE COMPUTER PRODUCTS, INC.	:	DECISION DTA No. 809607
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Periods March 1, 1983 through May 31, 1983 and September 1, 1983 through November 30, 1983.	:	

Petitioner Samuel V. Edens, Officer of Telefile Computer Products, Inc., 13331 Mt. Hood Drive, Santa Ana, California 92714, filed an exception to the determination of the Administrative Law Judge issued on April 7, 1994. Petitioner appeared by Siegel, Sommers & Schwartz (Eric Haber, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (John E. Matthews, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Petitioner's request for oral argument was denied.

On December 8, 1994, the Division of Taxation filed a motion for an order staying the issuance of a decision in this matter awaiting the result of the Court of Appeals' decision in Matter of Orvis Co. v. Tax Appeals Tribunal (204 AD2d 916, 612 NYS2d 503, modified and remanded 86 NY2d 165, 630 NYS2d 680) and Matter of Vermont Info. Processing v. Tax Appeals Tribunal (206 AD2d 764, 615 NYS2d 99, revd sub nom. Matter of Orvis Co. v. Tax Appeals Tribunal, 86 NY2d 165, 630 NYS2d 680, cert denied 133 L Ed 2d 426, 116 S Ct 518).

Prior to the issuance of an order granting the Division's motion, Matter of Orvis Co. v. Tax Appeals Tribunal (86 NY2d 165, 630 NYS2d 680) was decided by the Court of Appeals on June 14, 1995. By letter dated July 10, 1995, Roberta Moseley Nero, Secretary to the Tax Appeals Tribunal, informed both parties that the Court of Appeals' decision was issued and the

case file was to be forwarded to the Tribunal for a decision in this matter. Such decision was to be issued on or before October 24, 1995. Due to an error in office procedures, the case file was not forwarded to the Tax Appeals Tribunal until February 23, 1996. Ms. Moseley Nero then informed both parties that a decision would be rendered on or before June 6, 1996.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether Telefile Computer Products, Inc. had sufficient nexus with New York State to support an obligation to collect and remit taxes on sales of personal property to New York State customers.

II. Whether a bankruptcy court's dismissal of the Division of Taxation's claim for taxes estops the Division of Taxation from collection of the tax from responsible officers of the bankrupt corporation.

III. Whether petitioner was a responsible officer of Telefile Computer Products, Inc.

FINDINGS OF FACT

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

Telefile Computer Corporation ("TCC") was a publicly-held corporation incorporated in the State of Delaware on November 26, 1968. During the years in question, TCC's principal executive offices and production facilities were located at 17131 Daimler Street, Irvine, California. TCC's primary business centered around the operation of its wholly-owned subsidiary, Telefile Computer Products, Inc. ("TCPI").[1] TCPI, in turn, was a Delaware corporation serving as the principal operating company within the TCC family of companies. TCPI owned 100% of the capital stock of Telefile Computer Products GMBH, a West German

[1]In addition to TCPI, TCC also owned all of the outstanding stock of Peripherals Journal, Inc., a nonoperational Delaware corporation.

company, and 100% of the capital stock of Telefile Computer Products, Ltd. and Telefile Computer Services, Ltd., English companies.[2]

Telefile's original business purpose was to serve the data communication and computer enhancement markets. A significant portion of its business was manufacturing and marketing add-on equipment for Xerox computers. When Xerox announced its withdrawal from the computer business in 1975, Telefile embarked on a program to enter the medium- to large-scale main frame computer business and supply total computer systems to fill the void left by Xerox. According to petitioner's Exhibit "1", "The Telefile Story", Telefile provided "total capability in hardware, system software, application programs, customer training, and maintenance." This same document indicated Telefile's total consolidated revenues for, inter alia, the fiscal years ended September 30, 1980 through September 30, 1983 to be $9,700,000.00, $8,300,000.00, $8,200,000.00, and $9,500,000.00, respectively.[3]

TCPI was audited for sales and use tax purposes by the Division of Taxation ("Division") for the period December 1, 1979 through November 30, 1983. This audit was completed in November 1984 and, as a result, two notices of determination and demands for payment of sales and use taxes due were issued to Telefile on December 20, 1984. The first of such notices covered the period December 1, 1979 through May 31, 1983 and assessed tax due in the amount of $143,230.01, plus interest. The second notice covered the period June 1, 1983 through November 30, 1983 and assessed tax due in the amount of $14,668.26, plus interest. During the period under audit, Telefile was not registered with the Division as a vendor (for sales and use tax purposes).

We make the following additional finding of fact.

> The assessments were based on the auditor's finding that taxable sales to New York purchasers during the audit period amounted to $2,093,558.00.

In turn, TCPI challenged the Division's assessments by filing a petition with the former

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[2]Unless otherwise specified, the group of corporations described above will be called, generically, Telefile.

[3]The parties to this proceeding, by their representatives, executed a stipulation agreeing to certain facts relevant to this case. Such stipulated facts are included within the findings of fact set forth herein.

State Tax Commission on March 15, 1985. A prehearing conference was held with the conference unit of the former State Tax Commission's Tax Appeals Bureau. At this conference, the Division agreed to reduce the total amount assessed against TCPI from $157,898.27 to $107,084.48, apparently based on TCPI's submission of certain documents establishing that a portion of its sales to New York customers represented exempt sales. In turn, TCPI's executive vice-president, one Chris B. Reehl, executed a Withdrawal of Petition and Discontinuance of Case ("the Withdrawal") whereunder TCPI's petition was withdrawn. This Withdrawal, dated November 3, 1986, specified that the reduced amount of tax assessed ($107,084.48) should be further reduced to reflect TCPI's May 23, 1985 payment of $67,431.53, thus leaving a balance due from TCPI in the amount of $39,652.95.

On September 12, 1989, the Division issued two notices of determination and demands for payment of sales and use taxes due against petitioner, Samuel V. Edens, as a person responsible to collect and remit sales and use taxes on behalf of TCPI. The first of these notices assessed tax due for the sales tax quarterly period ended May 31, 1983 in the amount of $31,917.87, plus interest, while the second such notice assessed tax due for the sales tax quarterly period ended November 30, 1983 in the amount of $7,735.08, plus interest. These notices together assessed tax in the amount of $39,652.95, the same total amount as remained due from TCPI pursuant to the Withdrawal described hereinabove.

Petitioner protested the above-described responsible person assessments and, on December 13, 1990, a conciliation conference was held before the Division's Bureau of Conciliation and Mediation Services ("BCMS"). On March 1, 1991, a Conciliation Order (BCMS Order No. 10150)[4] was issued to petitioner reducing the assessments to $8,204.75 for the period ended May 31, 1983 and to $7,718.85 for the period ended November 30, 1983. These reduced amounts correspond to the amounts appearing in the Division's audit report with respect to TCPI for the sales tax quarterly periods ended May 31, 1983 and November 30, 1983, respectively. Petitioner continues to challenge the reduced amounts resulting from the

[4]Although the parties stipulated to the fact that the BCMS Order No. was "10150," in fact it was BCMS Order No. 101504.

conciliation conference.

On September 27, 1987, TCPI filed a petition with the U.S. Bankruptcy Court, Central District of California, seeking reorganization under Chapter 11 of the Bankruptcy Code.

On April 12, 1988, the Division filed a proof of claim in the TCPI bankruptcy proceeding seeking the balance due on the above-described sales tax assessments against TCPI (per the Withdrawal) plus other taxes due. More specifically, the Division's initial proof of claim totalled $93,987.14, of which $39,652.95 represented sales tax, with the balance consisting of corporation franchise tax and withholding tax.

In November 1988, all of TCPI's assets were sold and its operations were discontinued. On June 19, 1989, the Division filed an amended proof of claim seeking $94,641.19 in the bankruptcy proceeding against TCPI. The Division's claim was subsequently amended a second time on September 29, 1989, with such amended total set at $93,946.14. At all times, the sales tax portion of the Division's proof of claim totalled $39,652.95 (the amount of the sales tax assessment against TCPI after the Withdrawal).

On September 16, 1989, TCPI's Chapter 11 bankruptcy proceeding was converted to a Chapter 7 liquidation proceeding. Thereafter, on April 13, 1991, the Chapter 7 trustee filed an objection to the Division's proof of claim. This objection alleged that no debt remained due and owing from TCPI, and, alternatively, that any such debt asserted was owed by parties other than TCPI with TCPI at best only secondarily liable after such parties.

By a letter to the Division dated April 14, 1991, notice was given of a scheduled hearing on the trustee's objection to the Division's proof of claim. This letter noted, per Local Bankruptcy Rule 111(1)(g) regarding the manner and time for responding to the objection filed by the trustee, that:

> "Should you fail to appear at the hearing on said objection to proof of claim, the Court is authorized to enter a default judgment against you and to grant the relief requested by the Trustee in the objection to proof of claim." (Emphasis added.)

On May 14, 1991, a hearing was held on the trustee's objection to the Division's proof of claim. The Division did not respond to the notice of hearing or make an appearance at hearing,

nor did it file any written response or opposition. On May 22, 1991, the bankruptcy court judge signed an order sustaining the trustee's objection and disallowing the Division's proof of claim.

The majority of TCPI's New York sales were made to two companies, Telestat and CRC Information Systems, Inc. ("CRC"). The $67,431.53 reduction for payment specified in the Withdrawal (see, above) represents sales tax payments made by Telestat to TCPI (upon TCPI's request to Telestat) which were, in turn, remitted to the Division by TCPI. Although TCPI also attempted to obtain payments from CRC, it was unsuccessful in such efforts.

During the periods at issue, TCPI's standard sales contract, including the sales contract it used for New York customers, included a tax clause, at section A, paragraph 5, which provided as follows:

> "Buyer agrees to pay all taxes, however designated, levied or based on the purchase price, and all taxes or amounts in lieu thereof paid or payable by Telefile in respect of the foregoing, exclusive, however, of taxes based on Telefile's net income. Any and all personal property taxes assessable on the Equipment after delivery shall be paid by Buyer."

During most of the audit period, and during both of the specific sales tax quarterly periods under assessment herein, petitioner was president and chairman of the board of TCC.[5] Securities and Exchange Commission ("SEC") filings included in evidence list petitioner as TCC's chief executive officer, chief financial officer and chief accounting officer, and also indicate petitioner as the holder of secured debt in excess of $3,000,000.00 owed by TCC. Petitioner signed checks and made financial decisions on behalf of Telefile. With regard to check signing, during some of the period, petitioner was the only authorized signator, at other times petitioner as well as other persons were, individually, authorized signators, and at other times petitioner was an authorized signator in combination with certain other authorized signators. Petitioner had the authority to hire and fire employees. Petitioner also authorized Price Waterhouse to represent TCPI in the appeal of its sales and use tax assessments noted

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[5]Petitioner first became involved with TCC in 1971 as a consultant to its president. Thereafter, he became its president in 1972, remaining in such position until leaving in 1978. Petitioner returned as president in 1979, again left TCC in 1980, and thereafter returned as president in early 1981. Petitioner remained as TCC's president from early 1981 until his resignation in September 1987. The record does not specify who was president and/or chairman of the other Telefile entities.

above. Petitioner described Telefile as a company with approximately 90 to 100 employees and $9,000,000.00 of revenue per annum, and described his job as bearing the responsibility to "manage that far-flung organization", meaning TCC and its subsidiary corporations as described.

Petitioner explained that his activities for Telefile included negotiating with banks to get money for Telefile's operations, signing off on audit reports, and reviewing the actions of Telefile's vice-president of finance. He explained that he could sign tax returns or reports, noting however that such task was usually performed by a subordinate employee. Petitioner explained that he lost a substantial amount of his own money as a result of Telefile's bankruptcy. In this regard, the secured Telefile debt of more than $3,000,000.00 held by petitioner, as noted above, resulted from a debt restructuring undertaken by Telefile in the late 1970's or early 1980's under which the Telefile debt was assigned to petitioner in exchange for his personal guarantee of other (unspecified) obligations (presumably new or restructured Telefile debt). With regard to signing or co-signing all of Telefile's sales contracts (and specifically all contracts in excess of $50,000.00), petitioner explained that since Telefile had only several hundred customers, such signing was "not an outstanding chore". Petitioner likened such activity to a pro forma act.

During the periods at issue, petitioner Samuel V. Edens took no active part in soliciting customers in New York or negotiating contracts with New York customers. Such duties were primarily the responsibility of Chris B. Reehl, Telefile's executive vice-president, and other subordinates. Petitioner did, however, sign all of Telefile's contracts, as approved.

Petitioner resigned from his position as Telefile's president and chief executive officer by letter dated September 12, 1987.

During the audit period, Telefile solicited customers in New York State (and apparently elsewhere) by the use of direct mailers and, to a lesser degree, by telephone calls. In these activities, Telefile utilized a list of "users" supplied to Telefile by Xerox when Xerox withdrew from the computer business (see, above). The users on the list were organized into a user's

group known as Exchange, later reorganized under the name Telexchange, and Telefile mailed each user a bi-monthly publication entitled Teleflyer. Petitioner explained that Telefile became the main source for items needed by former Xerox customers. He noted that the customers on the user list were aware of Telefile's ability to fill the void left by Xerox's departure from the computer business, and that the Telefile mailings described what was happening in the business and what was available in terms of equipment. He further explained that the user/customers would often respond to the mailings by contacting Telefile to purchase existing equipment or to see if Telefile could make a particular piece of equipment for the customer.

Telefile was not registered to do business in New York nor was Telefile registered as a vendor for sales tax purposes. Telefile did not maintain offices in New York or have any employees based in New York. Approval of sales orders by New York customers and signing of contracts therefor by Telefile occurred in California. Shipments of merchandise to New York purchasers were made FOB, Irvine, California. Customer training was provided in Telefile's education center located in California, and none of Telefile's salesmen maintained offices in New York. Telefile provided installation and maintenance of its equipment through the use of field service personnel, who were based outside of New York State. Such personnel would travel into New York State to install and maintain equipment purchased by New York customers. Petitioner noted that maintenance services could be performed on an as-needed basis or under contractual arrangement. All of Telefile's New York customers were informed by Telefile that it was not acting as a collector of New York sales tax and that such tax could be imposed upon the customers by New York State.

OPINION

First, the Administrative Law Judge held that the disallowance of the Division's claim by the bankruptcy court does not estop the Division from collecting unpaid taxes from responsible officers of the corporation because the Division's nonappearance resulted in a default judgment. Noting that responsible officer liability is independent from that of the corporation, the Administrative Law Judge held that the Division has the discretion to pursue a responsible

officer rather than the corporation itself. Second, the Administrative Law Judge found that Telefile's activities in New York were sufficient to establish nexus and to make Telefile a vendor and, therefore, impose a duty upon Telefile to collect and remit New York State sales tax. Third, the Administrative Law Judge held that petitioner, based upon petitioner's activities, duties and authority, was a responsible officer of Telefile and consequently under a duty to collect and remit sales tax. Finally, the Administrative Law Judge held that contractual language in a sales contract providing that the purchaser would be liable for payment of sales tax does not act to relieve either the seller or its responsible officers of their statutorily imposed duty to collect and remit sales tax.

On exception, petitioner asserts that the Division is bound by the bankruptcy court's ruling and such order of the bankruptcy court is to be given res judicata effect precluding the Division from asserting liability against petitioner. Petitioner also contests the Administrative Law Judge's holding that petitioner was a vendor required to collect and remit sales tax because Telefile did not have a sufficient nexus with New York. In the alternative, petitioner alleges that because Telefile's sales agreements provided that the purchasers would be responsible for payment of sales tax, Telefile's obligation for such was discharged. Petitioner also asserts that even if Telefile was a vendor required to collect and remit sales tax, petitioner was not a responsible officer of Telefile.

In response, the Division argues that a responsible officer's liability is separate and distinct from that of the corporation. The Division asserts that since no factual issues relating to the validity of the claim were actually litigated in the bankruptcy proceeding, the Division is not estopped from pursuing responsible officers of the corporation.

We affirm the determination of the Administrative Law Judge for the reasons set forth below.

Before addressing the merits in this matter, we will deal with the Division's motion for an order staying the issuance of a decision in this matter until the Court of Appeals issued its decision in Matter of Orvis Co. v. Tax Appeals Tribunal (supra) and Matter of Vermont

Information Processing v. Tax Appeals Tribunal (supra). The Court decision was issued before this Tribunal issued an order on the motion, thus, rendering the matter moot. However, to provide a complete record we will deal with the Division's motion. In its motion papers, the Division pointed out that in Matter of Net Realty (Tax Appeals Tribunal, March 12, 1992) we granted a motion for a stay pending further court litigation where the situation of the parties was similar to that of the parties in this case. In Net Realty, we stated that:

> "We conclude that the Division has shown exceptional circumstances that warrant granting a stay of these proceedings, namely, that the Division cannot appeal the decisions of this Tribunal (Tax Law § 2016), that the Division's appeal . . . is pending before the Court of Appeals and that the Division is diligently pursuing this appeal (cf., Robert Stigwood Org. v. Devon Co., 44 NY2d 922, 408 NYS2d 5; Peerce v. Peerce, 97 AD2d 718, 468 NYS2d 872 [where stays were denied because prejudice was not shown by the party requesting the stay]; Matter of Weinbaum, 51 Misc 2d 538, 273 NYS2d 461 [where the party seeking the stay was not prohibited from appealing an adverse decision])" (Matter of Net Realty, supra).

In our view, the Division showed these factors to be present in the instant case. Accordingly, the Division's motion would have been granted.

Turning to the merits, we first address whether Telefile was under a duty to collect and remit sales tax to New York.

A tax imposed on interstate commerce is not violative of the commerce clause if "the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State" (Complete Auto Transit v. Brady, 430 US 274, 279). On exception, petitioner does not argue that Telefile was not a vendor as defined in the Tax Law and corresponding regulations, but asserts that Telefile did not have a substantial nexus with New York to support an obligation to collect and remit sales tax from its New York purchasers. Thus, the focus of our inquiry is on the substantial nexus requirement.

An out-of-state vendor whose only contacts with the state seeking to impose tax are by common carrier or postal service does not satisfy the substantial nexus requirement (National Bellas Hess v. Department of Rev. of Illinois, 386 US 753, 758; Quill Corp. v. North Dakota,

504 US 298, 315). Some physical presence is required (National Bellas Hess v. Department of Rev. of Illinois, supra; Quill Corp. v. North Dakota, supra). "While a physical presence of the vendor is required, it need not be substantial. Rather, it must be demonstrably more than a 'slightest presence'" (Matter of Orvis Co. v. Tax Appeals Tribunal, supra, 630 NYS2d 680, 686-687). In other words, the substantial nexus requirement does not require a substantial physical presence. Further, the activities of the vendor in the taxing state do not have to be directly related to the activity sought to be taxed (National Geographic Socy. v. California Board of Equalization, 430 US 551, 560).

Petitioner asserts that because there were no employees, offices or sales people and because orders were approved and title to equipment passed in California, there was not a sufficient nexus between Telefile and New York. Petitioner contends that the installation of equipment by its employees for its customers in New York does not satisfy the substantial nexus requirement. Petitioner also asserts that Telefile did not have a substantial nexus with New York because during the two quarters that remain at issue, only 4.5% of Telefile's sales were made to New York customers. We disagree.

With respect to the petitioner in Vermont Information Processing, the Court of Appeals held in Matter of Orvis Co. v. Tax Appeals Tribunal (supra) that 41 visits by employees of an out-of-state vendor to provide trouble-shooting services to computer hardware and software purchased from the vendor during a three year audit period in which there were 154 taxable transactions in New York satisfied the substantial nexus requirement. Similarly, Telefile provided installation and maintenance services to its New York customers through its field service employees who came into New York to provide such services. Although the exact number of visits to New York purchasers by Telefile's service people is unknown, the assessments were based on a finding that Telefile's taxable sales to New York customers amounted to $2,093,558.00 during the audit period. Petitioner has not provided any evidence to quantify the number of visits during the audit period and, thus, has not proved that these visits amounted to only the "slightest presence." Nor has petitioner provided any support as to why

the focus of our analysis should be limited to the two quarters remaining in issue for purposes of determining whether the "substantial nexus" requirement has been met. As stated in the facts, the Division agreed to reductions in the amounts of the assessments based on evidence submitted at the conference that certain of the New York sales were exempt and because TCPI made a payment of $67,431.53 (after receiving this amount from its customer Telestat). Thus, the fact that only two quarters of the assessments remain in issue does not indicate that Telefile was not making sales in New York during the other quarters not remaining in issue. Accordingly, we conclude that it is proper to determine whether there was a substantial nexus between Telefile and New York based on Telefile's activity in New York during the entire audit period. We hold that the substantial nexus requirement has been met based on the physical presence of Telefile's service people in New York.

Having held there was a substantial nexus between Telefile and New York, we next address whether petitioner was a responsible officer of Telefile.

Tax Law § 1133(a) imposes personal liability on any person required to collect sales tax. Pursuant to Tax Law § 1131(1) an officer, director or employee of a corporation "who as such officer, director or employee is under a duty to act for such corporation" is a person required to collect sales tax. Relevant factors to be considered in determining whether a person is under a duty to act for the corporation are whether the person is authorized to sign the corporation's tax returns, or is responsible for maintaining the corporate books, or is responsible for the corporation's management (20 NYCRR 526.11[b][2]). Other factors include the authority to hire and fire employees, the derivation of substantial income from the corporation and the authority to write checks on behalf of the corporation (Matter of Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564; Matter of Blodnick v. New York State Tax Commn., 124 AD2d 437, 507 NYS2d 536; Matter of Autex Corp., Tax Appeals Tribunal, November 23, 1988).

In this regard, the Administrative Law Judge stated:

> "Petitioner clearly was a person responsible to collect and remit taxes on behalf of Telefile within the contemplation of Tax Law §§ 1131(1) and 1133(a). Petitioner's argument that he was not personally involved in soliciting, negotiating or executing the sales in question is fully overcome by petitioner's activities, duties and authority within Telefile as its president and chief executive officer, as a majority stockholder, as a large debt-holder, and as a person who was generally charged with the overall operation of the entire corporate organization. Petitioner's title, authority and activities fall squarely within the indicia developed by the case law, as set forth above, and the Division's assessment against petitioner as a person responsible for collection of tax is sustained" (Determination, conclusion of law "F").

On exception, petitioner makes the same arguments made before the Administrative Law Judge. The Administrative Law Judge completely and adequately addressed this issue so we affirm for the reasons stated in his determination.

Petitioner also asserts that he cannot be held personally liable as a responsible officer of Telefile because sales and use taxes are not trust fund taxes such as payroll taxes. Clearly, this is not the case. Tax Law § 1132(a) specifically provides that sales and use tax "shall be paid to the person required to collect it as trustee for and on account of the state" (Tax Law § 1132[a]). Thus, contrary to petitioner's argument, sales tax is properly regarded as a trust fund tax (DeChiaro v. New York State Tax Commn., 760 F2d 432).

Next, we address whether language in a sales contract providing that the purchasers would be responsible for payment of sales tax relieves from liability those persons responsible for collection and remittance thereof. Here, we agree with the Administrative Law Judge that such language in a contract "does not relieve either Telefile or, as a responsible officer, petitioner from liability for collecting and paying such tax. Such language in a contract, while perhaps giving recourse to a seller as against its purchaser, does not change the seller-vendor's obligation to collect and remit tax on its sales" (Determination, conclusion of law "G").

Last, we address whether the bankruptcy court's order dismissing the Division's claim precludes the Division from asserting taxes due against petitioner as a responsible officer of Telefile.

Petitioner asserts that the Division is collaterally estopped from seeking payment from him as a responsible officer of Telefile. Petitioner argues that the bankruptcy court determined

that the Division's claim was zero and that such determination precludes the Division from seeking payment from him. Petitioner contends that once the Division filed proof of its claim with the bankruptcy court, it was bound by that court's determination because although based on a default, it is still a judgment on the merits. Petitioner also contests the Administrative Law Judge's characterization of the bankruptcy court's order expunging the Division's claim as a default judgment.

First, we agree with the Administrative Law Judge that "[n]otwithstanding that the court's order does not use the word 'default,' it is evident that the Division's nonappearance simply resulted in a default judgment" (Determination, conclusion of law "A"). In this regard, the notice of hearing sent to the Division stated that nonappearance could result in the entry of a default judgment and petitioner does not challenge the factual finding that the Division failed to appear in the bankruptcy proceeding. Further, there is nothing to indicate that the factual basis of the Division's claim was ever litigated.

Although we agree with petitioner that the bankruptcy order would preclude the Division from seeking payment of the discharged debt from Telefile under the doctrine of res judicata or claim preclusion (see, Siegel, NY Prac § 451, at 683-684 [2d ed]), the Division is not seeking to relitigate the same claim. Since the personal liability of a corporate officer is separate and distinct from that of the corporation (Matter of Waite, Tax Appeals Tribunal, January 12, 1995, affd Matter of Waite v. Tax Appeals Tribunal, ___ AD2d ___ [Mar. 21, 1996]; Matter of Mustafa, Tax Appeals Tribunal, December 27, 1991), a different claim is involved than that asserted in the prior bankruptcy proceeding. However, the issue of whether Telefile in fact owed sales tax to New York is common to both claims. Accordingly, the issue of whether the Division is precluded from pursuing petitioner as a responsible officer is to be determined under the doctrine of collateral estoppel or issue preclusion.

In Matter of Planit (Tax Appeals Tribunal, February 7, 1991) we stated:

> "The doctrine of collateral estoppel precludes a party from relitigating in a subsequent action an issue clearly raised in a prior action and decided against that party or those in privity with that party (Matter of Choi v. State of New York, 74 NY2d 933, 550 NYS2d 267,

> 269; Ryan v. New York Tel. Co., 62 NY2d 494, 478 NYS2d 823, 826). In order to invoke this doctrine there must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action and there must have been a full and fair opportunity to contest the prior decision (Staatsburg Water Co. v. Staatsburg Fire Dist., 72 NY2d 147, 531 NYS2d 876, 878; Schwartz v. Public Adm'r of County of Bronx, 24 NY2d 65, 298 NYS2d 955, 960). The party seeking the benefit of collateral estoppel must meet the burden of showing the identity of the issues in the present litigation and the prior determination (Kaufman v. Eli Lilly & Co., 65 NY2d 449, 492 NYS2d 584, 588).
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> "In this case, the record reveals that in the course of the prior bankruptcy proceedings, the court issued orders expunging certain claims filed by the State Tax Commission. Based on the transcript of those proceedings and petitioner's testimony at the hearing below, the most that can be established was that in that previous action, the bankruptcy court ordered those claims be expunged upon the State's failure to respond to its order to show cause for the same. There is nothing in the record to indicate that any factual issues related to the validity of the claims had actually been litigated or determined in the prior proceeding. This State's highest court had consistently held that 'an issue is not actually litigated if, for example, there has been a default, a confession of liability, a failure to place a matter in issue by proper pleading or even because of a stipulation' (Kaufman v. Eli Lilly & Co., supra, 492 NYS2d 584, 589, citing Restatement [Second] of Judgments § 27 comments d, e, at 255-257; see, Matter of Halyalkar v. Board of Regents of State of New York, 72 NY2d 261, 532 NYS2d 85, 88). Where, as here, the issue has not been litigated at all, there can be no identity of issues between the present action and the prior determination (Matter of Halyalkar v. Board of Regents of State of New York, supra; Kaufman v. Eli Lilly & Co., supra). Absent a showing that specific factual issues had been litigated and necessarily decided in the previous bankruptcy proceedings and that those same issues are decisive in determining the outcome of the instant action, we hold that the doctrine of collateral estoppel may not be invoked to bar the State from relitigating any issues of facts in the present proceeding" (Matter of Planit, supra).

Similar to the facts in Matter of Planit (supra), there is nothing in the record to indicate any factual issues relating to the Division's claim against Telefile were actually litigated. Accordingly, we conclude petitioner has not met his burden of proving that the doctrine of collateral estoppel can be properly invoked under the circumstances.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Samuel V. Edens, Officer of Telefile Computer Products, Inc., is denied;

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

3. The petition of Samuel V. Edens, Officer of Telefile Computer Products, Inc., is denied; and

4. The notices of determination dated September 12, 1989 as adjusted by Conciliation Order No. 101504 are sustained.

DATED: Troy, New York
April 25, 1996

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

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

/s/Donald C. DeWitt
Donald C. DeWitt
Commissioner