STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
SALVATORE A. MOSCHETTO OFFICER OF CITY CHRYSLER & PLYMOUTH, INC.	:	D E C I S I O N DTA No. 809873
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, 1987 through November 30, 1989.	:	

Petitioner Salvatore A. Moschetto, Officer of City Chrysler & Plymouth, Inc., 11 McAlpine Drive, Poughkeepsie, New York 12601, filed an exception to the determination of the Administrative Law Judge issued on June 16, 1993. Petitioner appeared by Raymond M. Pezzo, Esq. The Division of Taxation appeared by William F. Collins, Esq (John E. Matthews, Esq., of counsel).

Petitioner filed a brief in support of his exception and the Division of Taxation filed a brief in response. No reply brief was filed, but the due date of any such reply was September 30, 1993, which date began the six-month period for the issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUE

Whether petitioner was a person required to collect and pay over sales and use taxes on behalf of City Chrysler & Plymouth, Inc. within the meaning and intent of Tax Law §§ 1131(1) and 1133(a).

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "21" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

During the period in issue, City Chrysler & Plymouth, Inc. ("City Chrysler") was a firm which sold new and used automobiles. It also repaired automobiles and sold automobile parts.

The Division of Taxation ("Division") issued a series of notices of determination and demands for payment of sales and use taxes due, dated October 12, 1990, which assessed sales and use taxes against petitioner,Salvatore A. Moschetto. Each of the notices stated that petitioner was liable individually and as officer for the taxes determined to be due from City Chrysler. The notices assessed sales and use taxes as follows:

Period Ending	Tax	Penalty	Interest	Total
8/31/87	$ -0-	$ 2,285.88	$ -0-	$ 2,285.88
2/29/88	30,290.44	9,232.41	11,090.86	50,613.71
5/31/88	84,927.12	26,327.16	28,525.48	139,779.76
8/31/88	72,837.99	22,579.62	21,383.58	116,801.19
5/31/89	8,944.10	2,968.93	2,002.87	13,915.90
8/31/89	167,955.48	21,834.20	6,681.39	196,471.07
11/30/89	51,729.76	10,348.97	5,862.88	67,941.61
2/28/90	111,970.32	15,115.99	4,122.95	131,209.26

Petitioner entered into the automobile business in 1978. At that time he was hired by Kenneth Devereaux to work in the service and parts department at a firm known as Car Village Buick Opal ("Car Village"). In this position, petitioner was responsible for the service and parts department. Among other things, petitioner was expected to see to it that the obsolete parts in the parts department were returned for credit. He was also expected to make sure that customers were satisfied.

In or about 1982 or 1983, petitioner left Car Village and began working for ADS Recovery, a firm which engaged in repossessions.

After working for ADS Recovery for about a year, Mr. Devereaux offered petitioner a position at City Chrysler. It was contemplated that petitioner would perform the same tasks at City Chrysler as he performed at Car Village. At the time of the job offer, the stockholders of City Chrysler were Kenneth Devereaux and Sheldon Reynolds.

In or about January of 1986, Mr. Devereaux offered petitioner an opportunity to invest in the business. Mr. Devereaux was interested in another person investing in City Chrysler

because he wanted to spend more time at a home he had purchased in Rhode Island. Petitioner was told that, for $75,000.00, he would acquire one-third of the stock. Further, $5,000.00 of the $75,000.00 investment was to be paid immediately.

Petitioner accepted this offer and in July 1986 the sale of the stock was completed. Thereafter, petitioner became an owner of one-third of the stock of City Chrysler. He also acquired the title of secretary- treasurer. After adjusting the equity accounts, Kenneth Devereaux and Sheldon Reynolds each also owned one-third of the corporation's stock.

A couple of years after petitioner became a stockholder, Mr. Devereaux asked Mr. Reynolds and petitioner to invest an additional $50,000.00 in the business. Since petitioner wished to remain in the business, he invested the money as requested. Thereafter, Mr. Devereaux took $25,000.00 for himself and invested the remaining $25,000.00 in the business.

After petitioner acquired his interest in City Chrysler, Mr. Devereaux's participation in the business was sporadic. At times, he would be active in the business five days a week and at other times one day a week. When he was at the business premises, Mr. Devereaux might stay for as little as 15 minutes or as long as eight hours. However, important changes in the business were not made without Mr. Devereaux's involvement.

When petitioner became an investor in the business, he continued to function as the manager of service and parts. In addition, his salary of $600.00 a week remained the same. Petitioner never received any dividends from City Chrysler.

In July 1987, the sales manager was fired and petitioner was given the former sales manager's office. Further, Mr. Reynolds began teaching petitioner the retail aspects of the used car business. A procedure was devised that when an offer was made for a used car, the salesman would go to petitioner for approval. Petitioner then asked Mr. Reynolds whether the offer should be accepted.

If Mr. Reynolds was busy or unavailable, a salesman would go to Mr. Moschetto to approve the sale. However, Mr. Reynolds had the final say on whether a deal would be accepted.

Petitioner attended auctions where automobiles were bought and sold. On two occasions, petitioner purchased an automobile by completing checks which had been previously signed by Mr. Reynolds. Petitioner obtained Mr. Reynolds's approval prior to the purchase.

City Chrysler's sales tax returns were prepared by a Jean Cromsie from journals which recorded the sales of new and used automobiles. The completed return was then left with Bernice Reynolds, who served as the officer manager. Mrs. Reynolds then prepared the check to accompany the return. Thereafter, the sales and use tax returns were signed by Mr. Reynolds.

Petitioner did not have any office functions at City Chrysler. He neither provided any information on the New York State sales and use tax returns nor signed any of the corporation's sales and use tax returns.

On a daily basis, an individual who worked in the office collected the previous day's cash receipts from the service department. The receipts from the service department were combined with the funds that were delivered by mail and the receipts from the sale of automobiles. After the deposit receipt was prepared, Mr. Reynolds took the money to the bank.

Mr. Reynolds held the title of president. In this position, he was responsible for City Chrysler's financial matters and for the sale of new automobiles. Mr. Reynolds's duties included supervising the salesmen who sold new automobiles and hiring office personnel.

In or about 1987 or 1988, petitioner observed that several individuals had a discussion with Mr. Reynolds at the corporate premises. When he asked Mr. Reynolds who the people were, petitioner was told that they were from the New York State Department of Taxation and Finance. Petitioner was also told that the matter was closed and that petitioner should do his job.

The first time petitioner became aware that the corporation was liable for sales tax was in January 1990. Mr. Reynolds approached petitioner at this time and stated that the next day petitioner would have to work without taking a break for lunch. Mr. Reynolds explained that he had to go to the New York State Department of Taxation and Finance. On the day after the trip, Mr. Reynolds told petitioner that City Chrysler owed $300,000.00 and that the Department of Taxation and Finance wanted City Chrysler to pay $100,000.00 each week. Further, City Chrysler did not have the money to meet this demand. Mr. Reynolds then explained that he and Mr. Devereaux knew what to do to straighten out this matter. On January 22, 1990, City Chrysler filed a petition in bankruptcy.

City Chrysler maintained a bank account at the Poughkeepsie office of the Marine Midland Bank, N.A. The signature card on this account listed Kenneth Devereaux, Sheldon Reynolds and petitioner and required any two signatures. However, checks were frequently negotiated with one signature. In practice, a majority of the checks were signed by Mr. Reynolds. Petitioner also had check-signing authority on a City Chrysler account which was located at the Bank of New York. Only one signature was required to draw funds on this account.

We modify finding of fact "21" of the Administrative Law Judge's determination to read as follows:

> It was petitioner's practice to sign checks pertaining to the service and parts department. However, petitioner needed Mr. Reynolds's approval to spend more than $350.00 on merchandise for cars that were not under warranty. City Chrysler's payroll checks were co-signed by Mr. Moschetto and Mr. Reynolds. Generally, petitioner did not sign checks pertaining to the corporation's sales tax liability. However, on one occasion petitioner did sign a check for the payment of sales tax. The only evidence in the record about this sales tax check comes from petitioner's admission that he signed a tax check in the amount of $12.00 (Tr., pp. 84, 120).[1]

To the best of petitioner's knowledge, City Chrysler did not have a separate account for payroll taxes or sales taxes.

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[1] We modified the Administrative Law Judge's finding of fact by adding the last sentence. We did this to reflect the record in more detail.

When petitioner became a stockholder of City Chrysler, he agreed not to hire or fire employees without Mr. Reynolds's approval. Subsequently, petitioner adhered to this agreement. In practice, petitioner delegated his authority to conduct employment interviews to the service manager.

Mr. Devereaux and Mr. Reynolds referred to petitioner as a "junior partner." This term was intended to make it clear to petitioner that he was unfamiliar with the sales aspect of the automobile business and was therefore expected to do what he was told. On one occasion, petitioner was told that if he did not do what he was told, his investment would be returned and he could leave the premises.

Generally, petitioner followed Mr. Devereaux's direction on how things should be done because Mr. Devereaux was a successful businessman and petitioner felt that if he did things the same way he would also be successful. Petitioner also abided by what Mr. Devereaux said because of his prior experience of working for Mr. Devereaux at Car Village and at City Chrysler.

Petitioner reviewed the books and records of City Chrysler at the time he invested in the business. Thereafter, he did not ask to review the books and records. When petitioner asked Mr. Reynolds how "things" were, he was told "That's not your worry. That's my worry." In or about July 1988, petitioner was given the combination to the safe where the records were stored. However, Mr. Reynolds stated that unless something happened to him, it was not necessary for petitioner to go into the safe. Mr. Reynolds warned petitioner that if something were missing and the police were called, they did not want to find out that one of the "partners" had been in the safe.

Mr. Reynolds executed a Floor Plan Agreement with Marine Midland Bank, N.A. which was dated September 26, 1985. On the same day, Mr. Reynolds and his wife executed an Unlimited Continuing Guarantee with the same bank. On October 3, 1985, Mr. Devereaux and his wife executed an Unlimited Continuing Guarantee to Marine Midland

Bank, N.A. Petitioner signed an Unlimited Continuing Guarantee on February 23, 1987. However, he never signed a Floor Plan Agreement because he was never asked to do so.

At some juncture, the Internal Revenue Service sought to hold petitioner responsible for withholding taxes due from City Chrysler for the period July 1, 1989 through March 31, 1990. Eventually, the Internal Revenue Service concluded that petitioner was not responsible for said taxes.

After City Chrysler ceased operating, the Attorney General of the State of New York commenced a lawsuit against, among others, petitioner, Mr. Reynolds and City Chrysler for civil fraud on the basis that liens were not paid on cars that were sold. Later, the Attorney General stipulated to a discontinuance of the proceeding.

In March 1990, Marine Midland Bank, N.A. commenced a lawsuit against petitioner for selling automobiles out of trust. At the time of the hearing, this litigation was still in progress.

OPINION

The Administrative Law Judge determined that petitioner was responsible for the taxes due from City Chrysler. The Administrative Law Judge based this conclusion on several specific factors and his determination that the facts of this case were similar to those in Matter of Kropf (Tax Appeals Tribunal, March 21, 1991).

It is axiomatic that the holding of corporate office does not, per se, impose tax liability upon an officeholder (Chevlowe v. Koerner, 95 Misc 2d 388, 407 NYS2d 427) and that whether a person has a duty to collect sales tax must be determined based on an examination of the particular facts of the case (Matter of Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564). As we stated in Matter of Constantino (Tax Appeals Tribunal, September 27, 1990):

> "[t]he question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and the decisions of this Tribunal have identified a variety of factors as indicia of responsibility: the individual's status as an officer, director, or shareholder; authorization

> to write checks on behalf of the corporation; the individual's knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; the individual's economic interest in the corporation" (Matter of Constantino, supra).

We have also established that it is necessary to examine the total circumstances of the individual in the corporation to ascertain whether the individual had the power to control the acts he performed (Matter of Taylor, Tax Appeals Tribunal, October 24, 1991).

We reverse the determination of the Administrative Law Judge because we conclude that the facts relied on by the Administrative Law Judge are not sufficient, given the entire circumstances of petitioner's involvement in City Chrysler, to sustain the conclusion that petitioner had a duty to act for the corporation in complying with the requirements of the sales tax law. We stress that our reversal is based on the facts as found by the Administrative Law Judge; therefore, we are not overruling the Administrative Law Judge's conclusions as to the credibility of the witnesses. In addition, we believe that the facts of this case are significantly different from those in Matter of Kropf (supra).

We will first review the specific factors considered significant by the Administrative Law Judge.

The Administrative Law Judge found it important that petitioner received substantial income from City Chrysler. However, he received the same salary after he became a shareholder in the corporation as he had when he was only manager of service and parts, and continued to function in this capacity after becoming an investor. Further, petitioner received no dividends or other payments from his investment in the corporation. Thus, we do not see that the amount of income received by petitioner suggests that he was a responsible officer.

Next, the Administrative Law Judge found it important that petitioner managed the parts and repair department, exercised influence over hirings in this department and supervised the car salesmen. However, the Administrative Law Judge found that petitioner had agreed at the time he became an investor not to hire and fire employees without the approval of Mr. Reynolds and that petitioner had abided by this agreement. Further, the facts state that petitioner's

supervision over the salesmen did not extend to approving their sales. These facts indicate that although petitioner had some management responsibilities in the corporation, these responsibilities did not extend to the highest levels of corporate decision making.

Other factors relied on by the Administrative Law Judge were petitioner's check signing authority and check signing activities. However, the Administrative Law Judge found that this authority was circumscribed. Checks on one of the two bank accounts to which petitioner was a signatory required two signatures. The payroll checks were drawn on this account. Further, although it was petitioner's responsibility to sign checks relating to the service and parts department, this authority was limited to checks under $350.00 for parts on unwarranted cars. Finally, the Administrative Law Judge found it significant that petitioner had signed one sales tax check. However, the only evidence in the record about this sales tax payment was an admission by petitioner that he had signed a tax check in the amount of $12.00.

The other factors considered important by the Administrative Law Judge were that petitioner was a shareholder, an officer, a member of the board of directors and that he signed the unlimited guarantee. Although these factors are often telling indicia of responsibility, we conclude that they are not in this case because of other facts which indicate that petitioner did not have actual authority commensurate with his titles. The Administrative Law Judge found that the other shareholders of the corporation referred to petitioner as a "junior partner" "to make it clear to petitioner that he was unfamiliar with the sales aspect of the automobile business and was therefore expected to do what he was told" and that petitioner was told that that if he did not comply with this advice "his investment would be returned and he could leave the premises" (Determination, finding of fact "24"). The Administrative Law Judge also found that petitioner was told the general condition of the corporation was not his worry, that he should not access the corporation's records, and that the sales tax problems of the corporation would be handled by the other shareholders. These facts indicate that these other two shareholders, who together owned 66 2/3% of the corporation, acted together in controlling the

corporation and in precluding petitioner from having any actual authority over the corporation's affairs, in spite of his titles and investment.

Petitioner's lack of authority is also evidenced by the actions petitioner did not take: he did not sign any sales and use tax returns and he performed no office functions. Petitioner did not even purchase cars at auctions without obtaining approval from Mr. Reynolds.

Considered together, the facts of this case are significantly different from that of the petitioner in Matter of Kropf (supra). The petitioner in Kropf had the authority to fire employees in the department he supervised and he was authorized, with just his own signature, to sign the corporation's checks and this authority was not limited in amount. Further, the petitioner in Kropf had signed a check to pay sales tax in the amount of $2,569.14 and had signed at least one sales tax return and at least one check payable to the Internal Revenue Service. In addition, the petitioner in Kropf participated in authorizing the corporation to borrow funds and in trying to resolve the corporation's sales tax problems by executing a deferred payment agreement with the Division. Finally, the record in Kropf, as we specifically stated, did not indicate that the petitioner was precluded from acting by the majority shareholder. Instead, we found that the petitioner in Kropf and the majority shareholder had agreed to a division of responsibilities with respect to the running of the corporation.

The instant case is also different in significant ways from Matter of Hall (Tax Appeals Tribunal, March 22, 1990, affd 176 AD2d 1006, 574 NYS2d 862) which was relied upon by the Division in their brief on exception. The petitioner in Hall had authority to hire and fire certain employees, was authorized with just his signature to sign the corporation's checks, controlled inventory and paid the recurring bills, signed all of the sales and use tax returns for the period December 1, 1975 through November 30, 1977 and commingled the funds of the corporation with his own after the corporation's checking account was frozen. Finally, the Administrative Law Judge in Hall specifically rejected the petitioner's contention that he had no authority, except with the permission of the president of the corporation, to make payment of the sales tax.

We agree with petitioner that the facts of this case are much more like those in Matter of Constantino (supra) than like those in Matter of Kropf (supra). In Constantino, the significant facts were that:

> "except for payroll checks which he routinely signed as a convenience, all checks to pay debts or make purchases required two signatures; the majority shareholder made all the decisions as to what checks were to be written, petitioner, as one of first three and then two minority shareholders, did not have the power to overrule such decisions; and the majority shareholder made all the final decisions as to the hiring and firing of employees and most purchases for the corporation, petitioner could only make recommendations" (Matter of Constantino, supra).

From these facts, which appear strikingly similar to the present case, we concluded that "petitioner's role was essentially that of a minority investor and supervising employee who was precluded from taking actions with regard to the financial and management activities of the corporation" (Matter of Constantino, supra). We think the same conclusion is required here and that petitioner cannot be held liable for the taxes of the corporation.

Accordingly it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Salvatore A. Moschetto, Officer of City Chrysler & Plymouth, Inc., is granted;

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

3. The petition of Salvatore A. Moschetto, Officer of City Chrysler & Plymouth, Inc., is granted; and

4. The notices of determination and demand dated October 12, 1990 are cancelled.

DATED: Troy, New York
March 17, 1994

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

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