

STATE OF NEW YORK  
TAX APPEALS TRIBUNAL

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In the Matter of the Petition	:	
of	:	
<b>KEITH FELDMAN, OFFICER OF</b>	:	DECISION
<b>ITALIAN PIER RESTAURANT, INC.</b>	:	DTA No. 811459
	:	
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 March 1, 1989 through May 31, 1990.	:	

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Petitioner Keith Feldman, Officer of Italian Pier Restaurant, Inc., 1177 McClellan Street, Schenectady, New York 12309, filed an exception to the determination of the Administrative Law Judge issued on August 4, 1994. Petitioner appeared by Donald M. Matusik, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Robert J. Jarvis, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a brief in opposition. Any reply brief by petitioner was due on December 2, 1994, which date began the six-month period for the issuance of this decision. Petitioner's request for oral argument was denied.

Commissioner Koenig delivered the decision of the Tax Appeals Tribunal. Commissioner Dugan concurs.

***ISSUE***

Whether petitioner was personally liable for sales tax due on behalf of Italian Pier Restaurant, Inc. as a person required to collect and pay tax under Tax Law §§ 1131 and 1133.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

Italian Pier Restaurant, Inc. ("Italian Pier"), d/b/a Oakwood Inn, was a restaurant located in Troy, New York. In February of 1988, 120 shares of stock in the restaurant were issued to the

following officeholders in the following amounts:<sup>1</sup>

John Leddick, President/Director	- 40 shares
John J. Cioffi, Vice-President/Director	- 20 shares
Michael Cioffi, Treasurer/Director	- 40 shares
Carol J. Cioffi, Secretary/Director	- 20 shares

John Leddick is the brother of Carol J. Cioffi, who is married to John J. Cioffi. Michael Cioffi is the brother of John Cioffi.

During the audit period in question, petitioner, Keith Feldman, worked full time as an assistant vice-president of the Hudson Armored Car & Courier Service, Inc. ("Hudson Armored"). John Leddick, who worked as an assistant to Mr. Feldman at Hudson Armored, convinced petitioner to invest in the restaurant by purchasing his and John Cioffi's shares in the restaurant. Based on a visit to the restaurant and John Leddick's representations, petitioner hoped that once a bar/lounge was constructed, the restaurant would become a profitable investment.

In June of 1988, petitioner agreed to purchase John Leddick's 40 shares and John Cioffi's 20 shares for the total amount of \$17,700.00. The actual agreements of sale were dated October 24, 1988. In the respective sale agreements, it was stated that the sale was "contingent upon approval of the New York State Liquor Authority for the amendment to the liquor license."

Petitioner also loaned to Italian Pier \$15,000.00 to construct a lounge with a bar next to the restaurant. Petitioner obtained the money by taking out a home equity loan against his house. In return, Carol Cioffi signed a promissory note, dated September 1, 1988, on behalf of Italian Pier agreeing to repay over a five-year period the \$15,000.00, plus interest, for the total amount of \$19,099.80.

Shortly thereafter, petitioner made a second loan from his personal funds in the amount of \$8,000.00 to Italian Pier, at Carol Cioffi's request, in order to pay certain creditors. The second promissory note, dated October 1, 1988, was again signed by Carol Cioffi on behalf of Italian

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<sup>1</sup>The number of shares authorized was 200; however, only 120 shares had been issued.

Pier for \$8,000.00 at no interest. According to the note, this amount was to be paid "within a reasonable amount of time."

According to petitioner's testimony, he took the title of president of the restaurant corporation because he was told he "should be president" inasmuch as he owned 50% of the stock issued. He also stated that another reason for his title was that "they said if I was president I would be more secure with my investment because I have a title with the stockholders" (Tr., p. 27).

In October of 1988, petitioner signed, on behalf of Italian Pier, an application for a corporate change to the liquor license listing himself as the new president and stockholder. John Leddick and John Cioffi were no longer listed as officers or shareholders. On the application form, petitioner responded "no" to the printed question, "Will you take an active part in the operation of the business to be licensed?" In the investigative report by the Division of Alcoholic Beverage Control concerning the application, it was stated that:

"Mr. Feldman will maintain his present employment (Assistant Vice-President of Hudson Armored Car & Courier Service, Inc.) and be active only in a management capacity at the licensed premises."

At the hearing held on October 15, 1993, petitioner testified as follows concerning the liquor license application and his position as president and director of the restaurant corporation:

Q. "Did you go to the Liquor Board in Albany?"

A. "Yes, I went there and signed some papers."

Q. "And, again, were you advised by someone to sign those papers?"

A. "Yes, when I went to the Liquor Authority I had asked the question, I explained to them the situation, that I was an investor in the restaurant. She said, are you a shareholder; I said, yes. She said, you have to be put on the liquor license, which I did."

Q. "The SLA or ABC person from the State of New York so advised you?"

A. "Correct. The lady that was at the counter."

Q. "At that time were you involved in any of the operations whatsoever of the Oakwood Inn?"

A. "No, I just thought I had to be on the liquor license." (Tr., pp. 35-36.)

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Q. "Did there come a time when you became aware that you had been appointed a Director of the corporation?"

A. "Yes."

Q. "And how did that transpire?"

A. "At the time of application for the liquor license they asked, they told us we had to put down who the officers were. And I explained to them that I was, I had 60 shares of stock. And he said, you have to put yourself down as an officer. And that's when I spoke with Carol and it was agreed upon that since I had the 60 shares I would be down as president and her as the secretary, since she wrote out the checks."

Q. "Do you recall ever having a shareholders meeting with this corporation concerning any documents, or waiving a meeting?"

A. "No." (Tr., pp. 67-68.)

On the checking account signature cards for Italian Pier, petitioner signed and was listed as one of the persons who could make withdrawals on behalf of the restaurant. Petitioner testified that he signed the signature cards because he was asked to and that Carol Cioffi explained to him that Michael Cioffi "was never around" so that if anything happened to her, petitioner could make withdrawals.

Petitioner testified that he was not involved in any of the everyday operations of the restaurant and that, instead, Carol Cioffi managed the restaurant. He stated that his only contact with the restaurant besides the liquor license application and signature cards was to visit the restaurant a couple of times a month on weekends for dinner. The nature of these visits was described by petitioner as follows:

Q. "When you went there for dinner were you offered any information about the operation or management interest of the business?"

A. "No. I just asked how things were going."

Q. "Well, let's inquire or stop at this point. Did you from time to time make any inquiry as to how the business was going?"

A. "At the time when I went there for dinner I would see Carol Cioffi and I would just, she'd sit down with me for a few minutes and I would ask how things were going."

- Q. "Did you ever get any money from them?"
- A. "No. They made a couple payments on that promissory note to the bank that we, that she had signed and I signed for the home equity loan."
- Q. "Did you ever inquire whether or not the taxes were being paid?"
- A. "No. Because I wasn't aware that it was out of hand like that." (Tr., pp. 51-52.)

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- Q. "Did you ask her specifically about whether the business was making money?"
- A. "No. I just asked in general how things are going, what's going on. I didn't get into specifics."
- Q. "So you never asked her specifically whether there's a problem with any of the bills of the corporation or whether they were falling behind or anything?"
- A. "No. She didn't tell me that. The only thing she said was the time when she needed the eight thousand dollars, she inquired about that and said that if they had some more money they'd get caught up. And once the lounge got set up and started we'd be in good shape."
- Q. "So at the time that she requested you invest the eight thousand she did indicate to you there were some financial problems?"
- A. "At that time, yes. That was prior to the lounge being put up."
- Q. "Did you inquire about the nature and the scope of the financial problems?"
- A. "She had said that -- yes, I did ask, and she had said they had owed, the seafood vendor had to be paid and a produce vendor had to be paid and the rent had to be paid."
- Q. "Did you at that point in time ask to see the books and records of the corporation to see if there were any other outstanding liabilities?"
- A. "No."
- Q. "Why not?"
- A. "I just didn't. I just didn't. I took her word that that is what the problems were."
- Q. "Did you ask her whether all of the employee withholding taxes were being paid on time?"
- A. "No."
- Q. "Did you ask her whether the corporation's taxes were being paid on time?"

- A. "No. I never discussed taxes with her until I started finding out that they weren't paying them."
- Q. "Did you ask her why the corporation wasn't making enough money to pay its bills even to the vendors?"
- A. "The answer I got was once, because of the lounge, people want to come in and have a drink and once the lounge was built we'd be able to have people come in, sit down, have a drink prior to dinner. So the big push was getting the lounge set up."
- Q. "Were you ever denied access to any of the corporate books or records?"
- A. "I never asked, so I guess I would imagine I wouldn't be denied. But I didn't ask. You know, I thought it was a simple run a restaurant, you know, type thing." (Tr., pp. 72-74.)

During the audit period in question, petitioner worked on a full-time basis for Hudson Armored first in Albany, and then in February of 1989 he was transferred to the Poughkeepsie office. According to his testimony, once petitioner was transferred, he visited the restaurant on a less frequent basis or on the average of once a month. Petitioner testified that he had no experience in the restaurant business prior to his investment and that his responsibilities at Hudson Armored included the day-to-day operations such as the dispatching of trucks, security and other personnel issues, but did not involve any of the finances of the company.

Petitioner testified that in April or May of 1990, John Leddick, with whom petitioner spoke on the telephone daily with respect to the armored car business, informed petitioner by telephone that the restaurant was closing. Although John Leddick was no longer involved with the restaurant, he kept in regular contact with his sister, Carol Cioffi, and based on this contact he was aware of the restaurant closing. The restaurant closed on April 15, 1990. When petitioner became aware of the closing, he inquired about his investment and was informed by Carol Cioffi that she was going to pay certain creditors and employee payrolls first. Petitioner never received any dividends or any other return on his investment and also received only a few payments on his two loans prior to the restaurant closing. Petitioner stated that he did not know what happened to the corporate assets.

The Division of Taxation ("Division") issued to petitioner, as a corporate officer of Italian Pier, five notices of determination and demands for payment of sales and use taxes due, dated

March 8, 1991, in the following amounts:

<u>Period Ending</u>	<u>Tax Due</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total Amount</u>
5/31/89 <sup>2</sup>	\$6,963.30	\$1,821.43	\$1,288.51	\$10,073.24
8/31/89	5,234.46	1,203.87	778.86	7,217.19
11/30/89	2,502.74	853.53	443.02	3,799.29
2/28/90	5,324.69	905.18	438.97	6,668.84
5/31/90	8,766.62	1,139.66	308.39	10,214.67

The sales tax deficiencies with respect to the first four quarters were based on returns filed by Italian Pier without remittance of the tax. Italian Pier did not file a sales tax return for the last quarter it was in operation. Thus, in contrast to the notices for the first four quarters, sales tax asserted in the notice for the quarter ending May 31, 1990 was based on the Division's estimation of sales tax due. However, the Division submitted no evidence concerning how the taxes for the last quarter were estimated.

Petitioner testified that his first knowledge of the outstanding sales tax liabilities was by notice from the Division and that, after seeking advice and explanation from the Division, he made two payments in the amount of \$1,000.00 and three payments in the amount of \$50.00. Petitioner submitted a District Office Case Activity Sheet from the Tax Compliance Division verifying that petitioner made payments of \$1,000.00 and \$50.00 in June of 1990 with respect to Italian Pier. Petitioner explained the reason for making those payments as follows:

"[J]ust so you understand why I gave the thousand dollars and started making payments, I worked for Hudson Armored Cars, I was the operations manager. I had access to roughly forty-five million dollars in currency; not myself, but I could go into the vault without being supervised and open up cabinets that had currency in it. They didn't look kindly on people who had problems with the State or have problems with their finances, or whatever you want to call it. They periodically did credit checks on the employees that had access to all this money.

"I felt my job would be at stake if they found out I owed all this money, and then if something turned up missing in the vault they would look at me. So, I was there ten years at the time this all started and I just didn't want to lose my job. And

The copy of the notice for this period mistakenly has printed on it the wrong tax period of 5/31/90 instead of 5/31/89. There is no challenge to this notice for the error. The notice attached to the petition has the printed date of "5/31/90" crossed out and above which is the handwritten notation "5/31/89."

even though my credentials were I was a good worker and all that, they would still look at me if something came up missing in the vault. And things did come up missing in the vault periodically. But I was in fear of losing my job. So I started making some payments. And I had assumed and thought, which I shouldn't have, that the other officers would make some kind of payments to try to get this resolved. And they didn't." (Tr., pp. 43-44.)

Petitioner also stated that at the time of these payments he had not sought the advice of a lawyer.

A conciliation conference was held on May 11, 1992 and the conferee issued a Conciliation Order, dated September 11, 1992, sustaining the five statutory notices.

Petitioner testified that Mr. Pauquette, who represented the Division at the conciliation conference, advised petitioner that because no sales tax return was filed for the last quarter and the sales tax asserted in the notice for the last quarter was estimated, he might be able to reduce that amount by filing a tax return with documentation for that quarter. Thus, petitioner signed and filed a sales tax return on behalf of Italian Pier for the quarter ending May 31, 1990. According to that return, which was dated December 8, 1992, the amount of sales and use tax owed for that quarter was \$633.92, in contrast to the \$8,766.62 estimated in the notice of determination. Petitioner testified that he based the information provided in that return on the only records he could recover from Carol Cioffi. Ultimately, he used the checking account statements to reconstruct the amount of tax due.

Petitioner filed a petition, dated December 8, 1992, along with the tax return for the quarter ending May 31, 1990, arguing that: (1) copies of the bank records indicated that the amount owed for that quarter was only \$633.92; (2) the Division had not reflected in the balance due monies collected from the other principals of the corporation; and (3) that he was not a person required to collect tax as defined in Tax Law § 1131(1) because he:

"never received a single penny from the corporation as salary, wages, dividends, profits or interest, . . . never wrote a check from the corporation's account [and] never participated in the day to day operation of the business, nor was kept informed of same."

The Division filed an answer, dated February 26, 1993, stating, inter alia, that no sales tax return was filed for the quarter ending May 31, 1990; that the amount assessed for that quarter



was based upon the corporation's reported sales tax figures for the previous quarters; and that petitioner has the burden of proving that the Division's assertion of tax was erroneous or improper.

### ***OPINION***

In the determination below, the Administrative Law Judge first reviewed Tax Law § 1133(a) relating to the personal liability of those required to collect tax imposed by Article 28 and Tax Law § 1131(1) which defines those persons required to collect tax imposed by Article 28.

The Administrative Law Judge held that the facts in each case must be considered when determining whether an individual is personally liable under these tax statutes and, further, being an officer of a corporation does not in itself make that individual personally liable, the question being "whether the officeholder had a 'duty to act' for the corporation or had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee" (Determination, conclusion of law "A").

The Administrative Law Judge, after reviewing the factors to be considered, held that petitioner's economic investment in the restaurant was substantial, he was president of the corporation owning 50% of the outstanding stock, he had the authority to withdraw funds on behalf of the corporation and he had as much control over the business as he might choose to exercise, but chose not to concern himself with the corporate finances in any responsible manner. The Administrative Law Judge concluded that these facts contradicted petitioner's claim that he had no authority over the business' finances or was misled about them.

The Administrative Law Judge reviewed cases where the taxpayer was the sole shareholder and officer as well as cases where there were several officeholders. The Administrative Law Judge held that the failure of an officeholder to exercise his or her share of the responsibility by leaving such duties for someone else to discharge does not absolve the taxpayer from tax liability and, in the matter at hand, held that because of the evidence or lack thereof in the record, petitioner is a "person required to collect tax" within the meaning of Tax

Law § 1131(1).

The Administrative Law Judge rejected petitioner's reliance on Vogel v. New York State Dept. of Taxation & Fin. (98 Misc 2d 222, 413 NYS2d 862) and Chevlowe v. Koerner (95 Misc 2d 388, 407 NYS2d 427) holding that because petitioner had both a fiduciary duty and authority to act on behalf of the corporation but instead relied on others to perform his duty as president, he cannot now avoid tax liability due to the conduct of those he relied on.

Finally, the Administrative Law Judge: 1) held petitioner's request that the Division provide him with updated information as to payments is beyond the jurisdiction of the Division of Tax Appeals as said information must be sought directly from the Division of Taxation; 2) sustained the notices of determination dated March 8, 1991 for the period March 1, 1989 through February 28, 1990; and 3) reduced to \$633.92 the amount of tax due for the period March 1, 1990 through May 31, 1990 as well as reducing the penalty and interest accordingly.

On exception, petitioner argues that while the Administrative Law Judge held that petitioner had authority to act in the payment of taxes and should be held liable even though he may not have exercised actual control over the corporation, she was unable to distinguish the case of Vogel v. New York State Dept. of Taxation & Fin. (supra) and similar cases in favor of cases more in line with those cited by the Division.

Petitioner also cites to Country Manor Caterers (State Tax Commn., May 25, 1984), in support of his interpretation of Tax Law § 1131 and in arguing he is not a person required to collect tax, and "[t]o rule otherwise would mean that each stockholder/officer is personally liable for tax deficiencies regardless of their participation in the day to day management of the corporation, so long as they had the authority to act" (Petitioner's brief on exception).

Petitioner also argues: "[i]f the legislature had intended to make each officer with check signing power personally liable for payment of all tax deficiencies, it could easily have done so. It did not and the Administrative Law Judge should not impose a greater responsibility upon petitioner than that imposed by the words of the statute" (Petitioner's brief on exception).

Petitioner further argues: 1) he was an investor who never recovered his investment, and

the testimony and exhibits admitted into evidence at the hearing show he was not a person required to collect tax under section 1131(1) of Article 28 of the Tax Law; 2) he made a good faith effort to learn of unpaid taxes due by the corporation; and 3) the determination of the Administrative Law Judge should be reversed, his petition should be granted and all payments made by him should be refunded in full.

The Division in reply argues that petitioner bears the burden of proving that the audit division's determination was in error or improper and further, "petitioner had sufficient authority over the affairs of Italian Pier to be charged with responsibility for its sales tax obligations" (Division's brief, p. 6).

The Division also argues that corporate by-laws are a relevant factor in determining an officer's responsibility as such duties and responsibilities are outlined therein. In the matter at hand, the Division argues, petitioner failed to produce the corporation's articles of incorporation and its by-laws as requested prior to hearing and, therefore, "since petitioner has not provided any proof to the contrary it must be presumed that these documents gave the president broad power to act for the corporation, and imposed ultimate responsibility on the president for ensuring that the corporation's duties and obligations were fulfilled" (Division's brief, p. 8).

The Division further argues that: 1) petitioner had the legal authority to direct the corporation's activities and to see to it that Italian Pier satisfied all of its tax obligations; 2) pertinent case law shows that it is not necessary for a person to be involved in the day-to-day operation of a corporation or its finances in order to be held a responsible officer; 3) petitioner may delegate his authority to others, but doing so does not absolve him of his responsibility for the tax obligations of the corporation; 4) the evidence in the record establishes that petitioner did not inquire specifically into the status of the corporation's sales tax filings and payments; and 5) neither the evidentiary record nor pertinent case law supports petitioner's position that he was not liable for the taxes owed by the corporation.

The thrust of petitioners argument is that the Administrative Law Judge erred when citing Matter of Martin v. Commissioner of Taxation & Fin. (162 AD2d 890, 558 NYS2d 239) and

Matter of Blodnick v. New York State Tax Commn. (124 AD2d 437, 507 NYS2d 536) in determining he had the authority to act in the payment of the corporation's taxes and was liable for same, notwithstanding the fact that he may not have exercised actual control over the corporation.

Petitioner cites to Vogel v. New York State Dept. of Taxation & Fin. (supra), Chevlowe v. Koerner (supra) and Country Manor Caterers (supra) to support his position of not being a person required to collect tax per Tax Law § 1131.

We have carefully reviewed these three cases and find that the Administrative Law Judge adequately addressed Vogel and Chevlowe and point out that in Country Manor, the president, a 50% stockholder of the corporation, was held responsible as a person required to collect tax within the meaning and intent of section 1131(1) of the Tax Law and personally liable for the taxes in accordance with section 1133(a) of the Tax Law.

We affirm the determination of the Administrative Law Judge.

In addition, because we find that the Administrative Law Judge completely and adequately addressed the issues before her, we see no reason to analyze these issues further; nor do we see any reason to hold otherwise and, therefore, affirm the Administrative Law Judge based on her determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Keith Feldman, Officer of Italian Pier Restaurant, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Keith Feldman, Officer of Italian Pier Restaurant, Inc. is granted to the extent indicated in conclusion of law "D" of the Administrative Law Judge's determination, but such petition is otherwise denied; and

4. The Division of Taxation is directed to modify the notices of determination and demand for payment of sales and use taxes due dated March 8, 1991 in accordance with paragraph "3" above, but such notices are otherwise sustained.

DATED: Troy, New York  
May 25, 1995

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

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