

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

RICHARD TOPOREK :

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, 1998 through August 31, 1999. :

DECISION
DTA NOS. 818906
AND 818907

In the Matter of the Petition :

of :

RICHARD TOPOREK :

for Redetermination of a Deficiency or for Refund of New :
York State and New York City Personal Income Taxes
under Article 22 of the Tax Law and the New York City :
Administrative Code for the Period March 1, 1999
through June 30, 1999. :

Petitioner Richard Toporek, 2840 Lindenmere Drive, Merrick, New York 11566, filed an exception to the determination of the Administrative Law Judge issued on February 19, 2004. Petitioner appeared *pro se*. The Division of Taxation appeared by Mark F. Volk, Esq. (Justine Clarke Caplan, Esq., of counsel).

Petitioner filed a brief in support of his exception and the Division of Taxation filed a letter in lieu of a formal brief in opposition. Petitioner filed a reply brief. Petitioner's request for oral argument was denied.

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

ISSUES

I. Whether petitioner was personally liable for sales tax due on behalf of Liberty Truck Sales and Leasing, Inc., as a person required to collect and pay tax under Tax Law §§ 1131 and 1133.

II. Whether petitioner is liable for penalties under Tax Law § 685(g) for the unpaid withholding taxes of Liberty Truck Sales and Leasing, Inc.

FINDINGS OF FACT

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

DTA # 818907

The Division of Taxation (“Division”) issued the following notices of determination to petitioner, Richard Toporek, dated November 6, 2000, indicating he was being held responsible as an officer of Liberty Truck Sales & Leasing, Inc. (“Liberty”) for sales and use taxes:

(a) For the period ended May 31, 1998, Assessment No. L-018695484-5 was issued asserting additional sales and use tax in the amount of \$23,712.57, plus interest and penalty of \$5,492.29 and \$5,983.33, respectively, less payments and credits of \$13,521.82, for a balance due of \$21,666.37. The tax assessed was derived from a sales tax return filed late by Liberty, where the taxes reported due in the amount of \$23,647.91 were increased by the Division’s denial of a vendor credit of \$64.66 improperly taken by Liberty. The tax reported due was not

paid by the corporation, and was thereafter assessed against the corporate officer, Richard Toporek.

(b) For the period ended August 31, 1998, Assessment No. L-018695483-6 was issued asserting additional sales and use tax in the amount of \$17,405.93, plus interest and penalty of \$4,314.62 and \$4,729.41, respectively, less payments and credits of \$3,786.46, for a balance due of \$22,663.50. The tax assessed was derived from a sales tax return filed late by Liberty, where the taxes reported due in the amount of \$17,305.93 were increased by the Division's denial of a vendor credit of \$100.00 improperly taken by Liberty. The tax reported due was not paid by the corporation, and was thereafter assessed against the corporate officer, Richard Toporek.

(c) For the period ended February 28, 1999, Assessment No. L-018695482-7 was issued asserting additional sales and use tax in the amount of \$22,383.24, plus interest and penalty of \$4,844.20 and \$6,491.09, respectively, for a balance due of \$33,718.53. The tax assessed was derived from a sales tax return filed by Liberty, where taxes due in the amount of \$22,220.46 were increased by the Division's denial of a vendor credit of \$162.78 improperly taken by Liberty. The tax reported due was not paid by the corporation and was thereafter assessed against the corporate officer, Richard Toporek.

(d) For the period ended August 31, 1999, Assessment No. L-018695481-8 was issued asserting additional sales and use tax in the amount of \$20,392.25, plus interest and penalty of \$2,957.46 and \$4,690.18, respectively, for a balance due of \$28,039.89. The tax assessed was derived from a sales tax return timely filed by Liberty, where the taxes reported due of \$20,392.25 were not paid by the corporation, and were thereafter assessed against the corporate officer, Richard Toporek.

DTA # 818906

The Division issued the following two notices of deficiency to petitioner, dated December 7, 2000, indicating he was being held liable as an officer or responsible person of Liberty for a penalty in an amount equal to withholding taxes not paid by Liberty:

- (a) For the period ended March 31, 1999, Assessment No. L-018902316-8 was issued asserting a penalty equal to unpaid withholding tax in the amount of \$3,852.32.
- (b) For the period ended June 30, 1999, Assessment No. L-018902315-9 was issued asserting a penalty equal to unpaid withholding tax in the amount of \$2,711.84.

In mid-1997, Philip Capodiferro approached petitioner to become a partner in a new venture selling unified diesel trucks, a Nissan product. Philip Capodiferro had been involved in a prior dealership in the same location which had gone out of business. At the time he was approached by Philip Capodiferro in 1997, petitioner was already involved in the operations of two other businesses, one of which was RIT Auto Leasing. Philip Capodiferro requested the assistance of petitioner for Liberty in the following ways: the use of petitioner's credit to obtain financing for the business, petitioner's knowledge of the leasing industry and the contacts which resulted from petitioner's former and current business endeavors.

During the audit period Liberty operated a truck sales and leasing business and, in doing so, was engaged in the purchase and sale of tangible personal property in New York State.

Liberty's U.S. Corporation Income Tax Return, Form 1120, for the fiscal period ended June 30, 1998, listed the officers of Liberty as Philip Capodiferro, a 50% stockholder devoting full time to the business and earning compensation in the amount of \$36,000.00, and petitioner, a 50% stockholder devoting part time to the business and earning no compensation.

A document dated July 1, 1997 referenced as a “directors consent” form was signed by both petitioner and Philip Capodiferro, authorizing them as officers to execute all documents as necessary to carry on Liberty’s business.

A Chase Financing Application, where the lender was Associate [sic] Commercial Corporation (“Associates”), listed petitioner and Philip Capodiferro as president and vice president, respectively, and partners of an entity not named (though identified as Liberty through testimony), 50% of which was owned by each.

An affidavit in opposition in an action in the Supreme Court of the State of New York, by Associates against Liberty, Philip Capodiferro and petitioner indicates that petitioner was a 50-percent shareholder of the defendant corporation, Liberty, and alleges that Associates failed to account for collateral it repossessed and the sales proceeds therefrom, when it disposed of the collateral vehicles to satisfy a balance due on a security agreement. The affidavit was signed by petitioner, notarized and dated May 15, 2000.

Copies of the following checks drawn on Liberty’s accounts, signed by petitioner, were introduced into the record:

- (a) A check payable to MCM Tax Service dated October 7, 1998, in the amount of \$1,100.00;
- (b) A check payable to Spaton, Parsoff Siegal dated October 7, 1998, in the amount of \$1,000.00;
- (c) A check payable to Discover, dated September 29, 1997, in the amount of \$1,000.00;
- (d) A check payable to RIT Auto Leasing Group dated April 7, 1998, in the amount of \$1,500.00;

(e) A check payable to RIT Auto Leasing Group dated December 10, 1997, in the amount of \$23,000.00;

(f) A check payable to RIT Auto Leasing dated December 9, 1997, in the amount of \$2,337.00;

(g) A check payable to RIT Auto Leasing dated June 11, 1998, in the amount of \$1,500.00; and

(h) A check payable to RIT Auto Leasing dated June 11, 1998, in the amount of \$1,500.00.

A foreclosure sale report listing Liberty as the debtor and Philip Capodiferro and petitioner as guarantors, indicated that a public sale was to take place on December 17, 1999, and the property that was the subject of the foreclosure sale was sold to Associates.

A certified copy of Liberty's corporate resolutions dated August 12, 1997, signed by both petitioner and Philip Capodiferro, as president and vice president, respectively, set forth a wide array of powers bestowed upon them as officers of Liberty, including authorization to sell, assign, negotiate and grant a security interest to Associates for inventory, to borrow from Associates secured or unsecured funding that Liberty might require for its operations, to execute on behalf of Liberty any promissory notes, security agreements, mortgages and documents of any nature including without limitation master loan agreements providing for borrowing on a revolving basis, and to enter into any leasing agreements of equipment or vehicles with Associates.

A copy of a continuation of an examination before trial ("EBT") of Peter Hart, appearing on behalf of Associates, dated August 7, 2002, in an action by Associates against Liberty, Philip

Capodiferro and petitioner was submitted as part of the record. In questions posed to Mr. Hart during the EBT, he had no recollection of communicating with petitioner or seeing him on site at Liberty during Associate's collateral checks of vehicles, a procedure which matches physical vehicles with an inventory list of collateral for loaned money.

A copy of the "Minutes of the Special Meeting of Directors of Liberty Truck Sales & Leasing Inc.," dated July 10, 1998, tendered as proof of petitioner's resignation as an officer of Liberty at that time, states that notice of the meeting was waived, and those present included petitioner, Philip Capodiferro and Mark Caulo, Liberty's accountant. Petitioner expressed disappointment with the manner in which Liberty was being run by Philip Capodiferro as well as the financial status of the company. Pursuant to this document, petitioner resigned as officer of Liberty, and Philip Capodiferro was instructed to notify the New York State Department of Motor Vehicles, the New York State Department of Taxation and Finance, the Internal Revenue Service, Chase Manhattan Bank, EAB Bank and any and all other parties with whom the corporation was doing business of this resignation. Petitioner signed the bottom of the form as shareholder and a signature appears above the line designated for Philip Capodiferro's signature as president, chairman and secretary. The Division raised questions about the authenticity of Philip Capodiferro's signature and the validity of the document. Petitioner had full access to books and records as president of Liberty until his purported resignation on July 10, 1998.

Petitioner introduced into evidence copies of more than 25 checks payable to Associates, the Internal Revenue Service, Chase Manhattan Bank and New York State Income Tax, between August 13, 1997 and August 4, 1999, all of which were signed by Philip Capodiferro; a Power of Attorney executed by Philip Capodiferro on behalf of Liberty, granting Mark Caulo, CPA, the

power to represent Liberty on a Federal employment tax matter during periods in 1998; a New York State Sales Tax Return for the period ended May 31, 1998; extensions to file various tax forms; and correspondence between Liberty and New York State Department of Taxation and Finance, all of which were signed by or had checks attached thereto signed by Philip Capodiferro.

While an officer of Liberty, petitioner did not check to see if withholding tax returns were filed, and he relied upon the outside payroll company hired to properly withhold and file. As to sales tax returns, petitioner did not inquire of Philip Capodiferro if they were properly filed. Petitioner believed the responsibility for such filings was that of Philip Capodiferro who was operating Liberty on a daily basis and who hired a comptroller and accountant to assist him. The first time petitioner became aware of taxes due and owing to New York State was when he received a notice during 1999 or 2000.

The Division introduced as part of its field audit record two newspaper accounts containing a brief account of the circumstances of the arrest of petitioner for criminal activity involving the Internet solicitation of a minor child. When objected to by petitioner and after a failure by the Division to show relevance to the issue of petitioner's credibility, the administrative law judge denied their admission. Two similar articles dealing with the criminal charges were included in the record as part of a larger group of documents, not individually identified.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

In her determination, the Administrative Law Judge noted that corporate officers and employees who are under a duty to act for their corporation in complying with the requirements

of Article 28 of the Tax Law are personally liable for the tax imposed, collected or required to be collected. The Administrative Law Judge reviewed relevant case law providing criteria for determining personal liability pursuant to Article 28. The Administrative Law Judge also observed that Tax Law § 685(g) imposes liability on those persons responsible for the collection and remittance of withholding taxes who willfully fail to collect or remit such funds. Such persons include an officer or employee of any corporation who, as such officer or employee, is under a duty to perform the act in respect of which the violation occurs. The Administrative Law Judge reviewed case law establishing criteria for determining personal liability pursuant to Tax Law § 685(g).

After examining the record in this case, the Administrative Law Judge determined that petitioner was properly held responsible for the sales and withholding tax obligations of Liberty. She found that petitioner had failed to meet his burden to establish by clear and convincing evidence that he was not an officer having a duty to act on behalf of the corporation; i.e., that he lacked the necessary authority or he had the necessary authority, but was thwarted by others in carrying out his corporate duties through no fault of his own.

The Administrative Law Judge concluded that:

Petitioner was the president of Liberty and he and Philip Capodiferro each owned 50% of the stock of the company. Petitioner had authority to sign checks for Liberty and in fact did so, as indicated by copies of checks introduced into evidence. Liberty's corporate tax return for the fiscal period ended June 30, 1998 indicated petitioner was devoting part time to the business and was a 50% shareholder collecting no compensation for that period. He and Philip Capodiferro executed a director's consent authorizing them as officers to execute all documents necessary to carry on Liberty's business. In conjunction with such authorization, petitioner signed a financing application with Associates and became a guarantor for Liberty. The corporate resolutions extended petitioner's powers even further (*see*, Finding of Fact "11"). The day-to-day running of the business seems to have been in the hands of Philip Capodiferro. From the

evidence submitted, it does not appear that petitioner signed tax returns or hired employees. Petitioner believed that Mr. Capodiferro was responsible for the tax filings and payment of taxes, and was under the impression all financial matters were being properly handled. However, petitioner was not prevented from inquiring or verifying that all matters were being properly handled; he merely did not make such inquiry. Petitioner clearly possessed a financial interest in Liberty, and the evidence indicates that he had the authority and ability to pay the company's obligations. Furthermore, petitioner knew that Philip Capodiferro had been involved in a prior dealership in the same location which had gone out of business. Petitioner knew that Mr. Capodiferro's credit was poor. Yet petitioner blindly relied upon him to take care of these important matters without any inquiry. Petitioner's preoccupation with his other businesses is not a valid excuse for his failure to exercise his duties as officer of Liberty, no matter how much "in name only" he professes his position to have been. Although petitioner may not have been aware that the tax obligations were not being met, he recklessly disregarded any duty on his part to be sure they were paid (Determination, conclusion of law "F").

The Administrative Law Judge rejected petitioner's assertion that he tendered his resignation at a special meeting of the directors of Liberty on July 10, 1998, as evidenced by the minutes of that meeting. The Administrative Law Judge examined the purported signature of Mr. Capodiferro on the minutes as well as on the checks submitted into evidence by petitioner. The Administrative Law Judge also viewed other documents submitted by the Division bearing Mr. Capodiferro's signature. The Administrative Law Judge found "sufficient key differences in the letter formation of the signature to question its authenticity, and thus the validity of the document" (Determination, conclusion of law "G"). The Administrative Law Judge found petitioner's claim that checks dated October 7, 1998 were signed in advance as an accommodation to Philip Capodiferro to be unreliable. The Administrative Law Judge held that it was not credible that petitioner signed checks months in advance of his purported resignation, leaving amounts and payees blank. Accordingly, the Administrative Law Judge found that

petitioner was properly held responsible for the tax obligations of Liberty for the periods in issue.

The Administrative Law Judge determined that the Division's claim that it was improperly denied its right to impeach petitioner's credibility by establishing that certain criminal charges were brought against petitioner to be moot. The Administrative Law Judge found such criminal charges to be irrelevant to the issue of petitioner's credibility.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that documents submitted into evidence did not prove that he was a person responsible for sales and withholding taxes on behalf of Liberty. Petitioner claims that the documents indicate he was a shareholder and director but not an officer of Liberty. Further, petitioner claims that he had no responsibility for running the day-to-day operations of Liberty, he had no control over Liberty's finances and he did not have any involvement in collecting or paying taxes on behalf of Liberty. Petitioner maintains that he signed checks in blank prior to his resignation as an officer of the corporation which were issued after the effective date of his resignation.

In opposition, the Division argues that petitioner's exception argues facts not contained in the record of hearing. The Division maintains that the determination of the Administrative Law Judge was correct and should be sustained.

OPINION

We find that the Administrative Law Judge completely and adequately addressed the issues presented to her and we see no reason to modify them in any respect. Petitioner has offered no evidence below, and no argument on exception, which demonstrates that the

Administrative Law Judge's determination is incorrect. As a result, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Richard Toporek is denied;
2. The determination of the Administrative Law Judge is sustained;
3. The petition of Richard Toporek is denied;
4. The notices of determination dated November 6, 2000 are sustained; and
5. The notices of deficiency dated December 7, 2000 are sustained.

DATED: Troy, New York
October 14, 2004

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner