

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

PETER COPPOLA :

DECISION
DTA NO. 819261

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, 1999 through November 30, 2000. :

Petitioner Peter Coppola, c/o Law Offices of Carol M. Luttati, 150 East 58 Street, 12th Fl., New York, New York 10155, filed an exception to the determination of the Administrative Law Judge issued on August 12, 2004. Petitioner appeared by Carol M. Luttati, Esq. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Barbara J. Russo, Esq., of counsel).

Petitioner filed a brief in support of his exception and the Division of Taxation filed a brief in opposition. Petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on March 16, 2005 in New York, New York.

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

ISSUES

I. Whether petitioner was a person responsible for the collection and payment of sales and use taxes on behalf of Coppola N.Y.C., Inc., within the meaning and intent of Tax Law §§ 1131(1) and 1133(a) and is, therefore, personally liable for payment of the taxes, penalties and interest due from the corporation.

II. Whether petitioner has established reasonable cause for the abatement of penalties.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact “6,” “8,” “9,” “10,” “11,” “13,” “14,” “17,” “19,” “20,” “21,” “22,” “23,” “24,” “25,” “29” and “30” which have been modified. The Administrative Law Judge’s findings of fact and the modified findings of fact are set forth below.

1. On June 18, 2001, the Division of Taxation (“Division”) issued four notices of estimated determination to petitioner, Peter Coppola, as an officer of Coppola N.Y.C., Inc. (“Coppola N.Y.C.” or “the salon”) as follows:

Notice Number	Period Ended	Tax	Interest	Penalty	Payments/ Credits	Balance Due
L-019641802	11/30/00	\$47,276.37	\$3,324.03	\$7,564.20	\$0.00	\$58,164.60
L-019641804	05/31/00	47,276.37	6,455.60	10,400.76	0.00	64,132.73
L-019641805	08/31/99	40,129.44	9,620.80	12,440.06	0.00	62,190.30
L-019641806	05/31/99	40,129.44	11,016.17	12,440.08	0.00	63,585.69

The amount of tax asserted to be due in each of the foregoing notices was estimated because the salon did not file sales and use tax returns for the periods assessed in the notices.

2. Thereafter, the parties stipulated that the amount of tax due for the foregoing periods was revised as follows:

Notice Number	Period Ended	Tax
L-019641802	11/30/00	\$29,882.71
L-019641804	05/31/00	33,798.49
L-019641805	08/31/99	34,093.71
L-019641806	05/31/99	35,987.56

3. On June 18, 2001, the Division of Taxation also issued two notices of determination to petitioner which assessed a deficiency of sales and use taxes as a responsible officer of the salon as follows:

Notice Number	Period Ended	Tax	Interest	Penalty	Payments/ Credits	Balance Due
L-019641807	11/30/99	\$34,246.13	\$6,908.84	\$10,681.33	\$0.00	\$51,854.30
L-019641808	02/29/00	37,407.99	6,580.05	9,481.66	0.00	53,469.70

4. The sales and use tax returns for the periods covered by the second set of assessments are unsigned, several are undated, several do not list the name and address of the tax preparer, and all are stamped "LATE RECEIVED." There is no documentary evidence in the record establishing when the returns were mailed.

5. At the time of the hearing, Mr. Coppola had been a resident of Florida for nearly 20 years. During the periods in issue, he spent a significant portion of his time operating a hair salon near his Florida residence.

We modify finding of fact "6" of the Administrative Law Judge's determination to read as follows:

6. Coppola N.Y.C. was a hair salon located at 746 Madison Avenue, New York, New York. During the period in issue, Mr. Coppola was President and owner of 100 percent of the stock of the corporation. Mr. Coppola was authorized to sign checks without a cosigner and had the authority to open bank accounts on behalf of the corporation, make withdrawals from the corporate account and lease equipment on behalf of the corporation. He also had the authority to take out loans and sign contracts on behalf of the corporation. Mr. Coppola also negotiated leases for real property locations on behalf of the business. As a regular practice, he signed checks on the account of Coppola N.Y.C. including

checks made payable to himself. Moreover, during the subject period, he signed the corporate tax returns of the salon as president. Mr. Coppola had authority to hire and fire employees. Mr. Coppola hired the corporate attorney, Ms. Carol Luttati and the company's accountant, Robert Edelstein, as well as Mr. Edelstein's predecessor. As President and owner of the corporation, there was no one senior to Mr. Coppola in the corporate chain of command.¹

7. In 1999, Mr. Coppola received wage income of \$15,000.00 from Coppola N.Y.C.² and income from his salon in Boca Raton, Florida of \$10,656.00. In 2000, he received a salary of \$130,000.00 from Coppola N.Y.C.³ During the periods in issue, Mr. Coppola also received amounts from an operating account of Coppola N.Y.C. in repayment of a loan to the salon.

We modify finding of fact "8" of the Administrative Law Judge's determination to read as follows:

8. In 1999, Coppola N.Y.C. was recovering from a difficult financial position. Previously, a Mr. Pine, who held the office of corporate secretary and owned one third of the business, had been running the salon on a daily basis. Unbeknownst to Mr. Coppola, over a period of three-and-a-half to four years, Mr. Pine had embezzled a significant sum of money. As a result, the salon had incurred significant debt, and loans and leases were past due.⁴

¹We modified finding of fact "6" to more fully reflect the record.

² The New York franchise tax return of Coppola N.Y.C. for 1999 reports that Mr. Coppola had wage income of \$17,500.00 for 1999. The discrepancy is probably due to the fact that the corporation reported its wage expense on an accrual basis while Mr. Coppola's wage and tax statement reflects wages paid on a cash basis. That is \$2,500.00 of additional wages were earned by Mr. Coppola but not yet paid by the corporation.

³ Mr. Coppola's New York Nonresident and Part-Year Resident Income Tax Return for 2000 reported that the Federal amount of wages was \$182,000.00 and the New York amount of wages was \$16,250.00. However, Mr. Coppola's wage and tax statement from Coppola N.Y.C. reported wages of \$130,000.00 and the wage and tax statement from the salon in Boca Raton, Florida stated that no wages were paid to Mr. Coppola in 2000. The most likely explanation is that the wage and tax statement from the salon in Florida was erroneous and that Mr. Coppola received \$52,000.00 in wages from the salon in Florida.

⁴We modified finding of fact "8" to more accurately reflect the extent of Mr. Pine's former ownership.

We modify finding of fact “9” of the Administrative Law Judge’s determination to read as follows:

9. In 1998, Mr. Pine was dismissed by Mr. Coppola, and Mr. Pine’s check signing authority was terminated. Thereafter, Erin Sartain, who had been hired by Mr. Coppola to serve as Mr. Pine’s assistant, was promoted to Mr. Pine’s position of office manager or salon manager. The position of office manager was a full-time job, and she reported to Mr. Coppola. At this time, Ms. Sartain was given check signing authority. Petitioner claims that at this time Ms. Sartain was also made secretary to the corporation.⁵

We modify finding of fact “10” of the Administrative Law Judge’s determination to read as follows:

10. Ms. Sartain graduated from high school. She received wages of approximately \$75,000.00. Ms. Sartain does not have any business experience outside of working for Coppola N.Y.C. In 1999 and 2000 there were about 63 people working at the salon. With regard to Ms. Sartain’s status as an officer of the corporation, Ms. Sartain testified that she had no knowledge of being a corporate officer. At some point after 1999, Ms. Luttati prepared an affidavit for Ms. Sartain to sign in support of Mr. Coppola in a Supreme Court matter involving Mr. Pine. In that affidavit, Ms. Luttati referred to Ms. Sartain as “secretary/office manager” of Coppola N.Y.C. It appears from Ms. Sartain’s testimony, that the words used in that affidavit were Ms. Luttati’s, and that Ms. Sartain did not, at that time, place any particular significance on the use of the term “secretary.”⁶ We find significant, in this regard, Ms. Sartain’s incredulous response to Ms. Luttati’s cross examination when asked if she had not been promoted into the office of secretary:

You mean, you have been calling me a secretary.
No, I don’t know. I have never seen any order of
the corporation. I have never seen or have a

⁵We modified finding of fact “9” to more fully reflect the record.

⁶Nor does it appear that anyone explained it to her when the document was signed (*see*, Hearing Tr., pp. 152-155, 165-166).

document on it. I have never been in a meeting with you or the CPA's or Peter [Coppola], so I still thought of myself as a manager (Hearing Tr., p. 153).

Ms. Sartain's credible testimony⁷ was that no one had ever discussed her being a corporate officer and she had no knowledge of being listed in any corporate documents as an officer. There are no corporate documents or resolutions in the record evidencing Ms. Sartain's appointment as an officer of the corporation. There is also no corporate resolution or other document delegating authority to Ms. Sartain in any capacity. Coppola N.Y.C.'s corporate returns do not list Ms. Sartain as an officer on Schedule E, and she is not listed as an officer on the corporation's Statement of Financial Condition signed by Mr. Coppola and filed with the Division in support of the company's application for a payment agreement. In short, there are no corporate or tax documents evidencing that the corporation had any officer other than Mr. Coppola. The only documents in the record which refer to Ms. Sartain as secretary of the corporation were a bank signature card and the affidavit for the court proceeding prepared by the corporation's attorney, Ms. Luttati. Both of these documents were signed by Ms. Sartain at the urging of Ms. Luttati and Mr. Coppola. A third document prepared by Ms. Luttati was the agreement signed by Mr. Coppola wherein he agrees to hold Ms. Sartain harmless for any taxes found due in this matter.⁸

We modify finding of fact "11" of the Administrative Law Judge's determination to read as follows:

11. Ms. Sartain, as manager of the salon, was asked by Mr. Coppola and Ms. Luttati to sign a bank signature card which designated her as secretary, because they needed someone at the salon who could accept deliveries requiring payment "cash on delivery" so the salon could continue to operate (Hearing tr., pp. 126, 155). Mr. Coppola came to the salon every couple of

⁷We find Ms. Sartain's testimony credible and consistent with her level of education and experience. This conclusion is buttressed by the fact that Peter Coppola, on behalf of Coppola N.Y.C., entered an indemnification agreement dated August 8, 2002, agreeing to indemnify Ms. Sartain if she were to be found liable for the subject taxes in dispute. We view this agreement as lending added credence to her testimony, since Ms. Sartain would have nothing to gain by fabricating her testimony.

⁸We modified finding of fact "10" to clearly set forth Ms. Sartain's employment with Coppola N.Y.C.

months for a couple days at a time in 1999. It was more frequent in 2000 (Hearing tr., pp. 128-130). During these trips, corporate meetings were held between Mr. Coppola, the corporation's lawyer, Ms. Luttati and the accountants. Mr. Coppola testified he met with the accountants whenever he had the opportunity (Hearing tr., p. 71). Bills submitted to the salon for payment show that these meetings took place both in Florida and New York. Ms. Sartain was never included in any corporate meetings (Hearing tr., pp. 125, 127, 145). Ms. Sartain did not have access to the corporate books and records, but her belief was that those records were maintained at the offices of the corporation's attorney, Ms. Luttati (Hearing tr., p. 149).⁹

12. During at least a portion of the period that Mr. Pine was managing the salon, Federal withholding taxes fell into arrears. In order to resolve the difficulty, Mr. Coppola and the attorney for the salon, Ms. Luttati, arranged a payment plan which required monthly payments of approximately \$5,000.00 a month for a period of 13 ½ years. In accordance with the plan, the penalties were abated. The agreement with the Internal Revenue Service ("IRS") provided that as long as the salon continued to pay its liability, the IRS would not pursue personal liability against Mr. Coppola. After entering into this agreement, Ms. Luttati contacted petitioner and the corporation's accountants to advise them to send out a check every month. Periodic payments are also being made to New York State although the details of the underlying liability were not brought out at the hearing.

We modify finding of fact "13" of the Administrative Law Judge's determination to read as follows:

13. As manager, Ms. Sartain was responsible for the operation of the business, subject to Mr. Coppola's instructions in daily phone calls (Hearing tr., pp. 123-124, 127-132, 141). She had authority to pay C.O.D. bills for daily deliveries, color order bills and termination notices from Con Edison in order to keep the

⁹We modified finding of fact "11" to more completely reflect the record.

salon operating (Hearing tr., pp. 66-167). Ms. Sartain made bank deposits and transferred funds between the operating account and the payroll account as needed to meet the payroll. She also ensured that clients were moving from the check-in location to the proper station and she dealt with clients that had problems. She managed the inventory and supplies received by the business. Each morning, Ms. Sartain reconciled the business receipts with the contents of the cash register drawer. At the end of the week, the salon's accountants would review the reconciliations for Mr. Coppola. The accountants decided what checks needed to go out, but it was Mr. Coppola who told Ms. Sartain which bills she should pay (Hearing tr., p. 132).¹⁰

We modify finding of fact "14" of the Administrative Law Judge's determination to read as follows:

14. The authority of Ms. Sartain to hire and fire depended upon the level of the employee. Ms. Sartain and Mr. Coppola would confer before deciding whether to hire a stylist, colorist or other employee who would generate revenues. Only one "higher-up" was fired during Ms. Sartain's tenure and that was done by Mr. Coppola. Ms. Sartain could hire or fire assistants, receptionists or cleaning staff, but it was still her practice to discuss such matters with Mr. Coppola before doing so (Hearing tr., p. 151).¹¹

15. Drafting checks was part of Ms. Sartain's daily responsibilities. She had the authority to issue checks to vendors and third parties for the business. However, other than a late bill termination notice from Consolidated Edison, color orders and items which were payable upon delivery, Ms. Sartain did not have authority to determine which bills should be paid. The remaining bills would be processed on a reconciliation form for the week and highlighted through telephone calls to Mr. Coppola and the accountants. Ms. Sartain would then be told what checks to draft and mail. It was unnecessary for Ms. Sartain to call petitioner about issuing

¹⁰We modified finding of fact "13" to more accurately reflect the record.

¹¹We modified finding of fact "14" to more clearly reflect the record.

a check for color orders or for items on the 30-day account, since they would have been on the reconciliation form and known to the accountants. Similarly, the items that were payable upon delivery were already known to petitioner and the accountants.

16. When Ms. Sartain arrived at the salon in the morning, she would find out who called in sick. If a stylist called in sick, Ms. Sartain would ensure that the client was contacted. Ms. Sartain would also make sure that each cash drawer had \$500.00, that the assistants were on the floor ready for work, that the clients were attended to and that everything was ready for business.

We modify finding of fact “17” of the Administrative Law Judge’s determination to read as follows:

17. Petitioner and Ms. Sartain both testified that the corporate books and records were kept at the office of Mr. Coppola’s lawyer. Mr. Coppola claims he did not review them in 1999 or 2000. However, he admitted he was not prevented from doing so. Similarly, although he could have done so, Mr. Coppola claims he did not review the salon’s financial records or corporate financial statements (Tr., p. 88). Further, although he could have done so, Mr. Coppola denies ever reviewing the salon’s bank statements for the subject period (Tr., pp. 80-81).¹²

18. When Mr. Coppola learned about the embezzlement loss, he decided to change accountants. The accounting firm of Lowey, Solzenberg & Edelstein was retained to perform accounting services and the prior accountant was replaced. During December 1999, the prior accountant oversaw the new firm’s continuation of services.

We modify finding of fact “19” of the Administrative Law Judge’s determination to read as follows:

19. The new accounting firm prepared the sales tax returns as of the end of 1999, when it was retained, and continued to

¹²We modified finding of fact “17” to more fully reflect the record.

prepare the sales tax returns through November 2000. It also oversaw the bookkeeping process and filed the annual Federal, New York State and New York City corporate returns for the subject periods. These Federal and State corporate returns were signed by Mr. Coppola.¹³

We modify finding of fact “20” of the Administrative Law Judge’s determination to read as follows:

20. It was the usual practice of Mr. Edelstein’s accounting firm to ask its client for payment of the monthly sales tax. Generally, petitioner’s accounting firm would prepare the sales tax return and mail it with a check from its office. After he completed the sales tax returns of Coppola N.Y.C., Mr. Edelstein, the salon’s accountant, would mail them by regular mail, without a signature from anyone at the corporation and without payment (Hearing tr., p. 107).¹⁴ Some of these returns did not include the name of the preparer and were undated (id., Ex. “Q,” “R,” “S,” and “T”). Since the liability was not being satisfied, Mr. Edelstein also inserted a letter which asked the Division to contact Lowey, Solzenberg & Edelstein in order to establish a payment plan.¹⁵

We modify finding of fact “21” of the Administrative Law Judge’s determination to read as follows:

21. The sales and use tax returns for the periods March 1, 1999 through March 31, 1999, April 1, 1999 through April 30, 1999, March 1, 1999 through May 31, 1999, June 1, 1999 through June 30, 1999, July 1, 1999 through July 31, 1999, June 1, 1999 through August 31, 1999, September 1, 1999 through November 30, 1999, March 1, 2000 through March 31, 2000, April 1, 2000 through April 30, 2000, March 1, 2000 through May 31, 2000 and September 1, 2000 through November 30, 2000 were filed late and

¹³We modified finding of fact “19” to clarify that the corporate returns were signed by petitioner.

¹⁴It is unclear from the record why Mr. Edelstein did not follow his firm’s “usual practice” in this case.

¹⁵We modified finding of fact “20” to more fully reflect the record.

unsigned. Mr. Edelstein admitted that he had no documents to prove that these returns were timely filed (Hearing tr., p. 110).¹⁶

We modify finding of fact “22” of the Administrative Law Judge’s determination to read as follows:

22. Mr. Coppola signed the sales tax returns of Coppola N.Y.C. prior to the periods in issue and continued to have the authority to sign the sales tax returns for Coppola N.Y.C. during the periods in issue. Ms. Sartain was never given any sales tax returns to sign and, at the hearing, did not know who had the authority to sign them. Mr. Coppola claimed he never told Ms. Sartain not to pay sales taxes which is consistent with Ms. Sartain’s testimony that he never discussed taxes with her until April 2002. The record does not reflect that Mr. Coppola ever directed Ms. Sartain to pay sales taxes and that she failed to do so.¹⁷

We modify finding of fact “23” of the Administrative Law Judge’s determination to read as follows:

23. Despite the numerous meetings reflected in the record between the taxpayer, Mr. Edelstein and the corporation’s lawyer,¹⁸ Mr. Edelstein claims that during 1999 and 2000 he never discussed the corporation’s sales tax returns with Mr. Coppola or the fact that sales taxes were not being paid until June, 2001, at which point Mr. Coppola had received the assessments (Hearing tr., pp. 96, 107). Ms. Sartain, however, testified that she saw bills from the corporate attorney, Ms. Luttati, covering the subject period. These bills for attorney time charged the corporation for meetings between Mr. Coppola, Ms. Luttati and the CPAs to confer on New York sales tax issues (Hearing tr., p. 138).¹⁹

¹⁶We modified finding of fact “21” to clarify that it was not established that these returns were timely filed.

¹⁷We modified finding of fact “22” to more accurately reflect the record.

¹⁸The record shows these meetings were held both in New York and in Florida.

¹⁹We modified finding of fact “23” to more fully reflect the record.

We modify finding of fact “24” of the Administrative Law Judge’s determination to read as follows:

24. Ms. Sartain first learned that Coppola N.Y.C. was having sales tax problems in April 2002 when she received notices. Prior to receiving the notices, Ms. Sartain did not have any discussions with Mr. Coppola about sales taxes. After she received the notices, Ms. Sartain asked Mr. Coppola what was being done. By April, 2002, Mr. Coppola had been aware for at least ten months that the business was having sales tax problems, since he had received his own tax notices in June 2001.²⁰

We modify finding of fact “25” of the Administrative Law Judge’s determination to read as follows:

25. Prior to the receipt of the notices of determination, Mr. Coppola’s accountants came to the salon once a month. However, upon receipt of the notices, Mr. Coppola asked Mr. Edelstein if his accounting firm could come to the salon on a more frequent basis. Thereafter, Mr. Edelstein and other personnel from his office started going to the salon on a weekly basis.²¹

26. The payroll tax returns were handled by a separate company. Ms. Sartain’s duties included calling the payroll company to provide information regarding the payroll and withholding. The payroll checks that were subsequently issued were stamped with Mr. Coppola’s signature.

27. In 1999, Mr. Coppola went to the salon every couple of months for approximately two days at a time. In 2000, petitioner contemplated relocating the salon, and as a result, he was in New York City more frequently for meetings to consider this option. When he was in New York

²⁰We modified finding of fact “24” to more fully reflect the record.

²¹We modified finding of fact “25” to delete a finding relating to Mr. Coppola’s state of mind as unnecessary. We also deleted the last sentence relating to sales tax deficiencies since the inception of more frequent visits by the accountants as not supported by the evidence.

City, petitioner would meet with his employees at the salon, his attorney and his accountants. Ms. Sartain discussed business operations during her meetings with Mr. Coppola. Petitioner wanted breakfast and dinner meetings with his staff in order to find out what was going on and to maintain contact with his employees.²²

28. When petitioner was in Florida, Mr. Coppola and Ms. Sartain had daily conversations over the telephone. Mr. Coppola would ask Ms. Sartain what was going on and whether the salon was busy. Mr. Coppola would also concern himself with what needed to be paid, how much money was generated to take care of the business and making sure that payroll was covered. If there was a problem with the business or a valued employee wanted to leave or an important legal document was coming in, Ms. Sartain would contact Mr. Coppola in Florida.

We modify finding of fact “29” of the Administrative Law Judge’s determination to read as follows:

29. Ms. Sartain reviewed the business mail, which consisted mostly of the weekly bills, and then placed them into an envelope for the accountants. Thereafter, the accountants entered the bills into a computer and prepared a printout of the bills. The accountants and Mr. Coppola would then decide what bills should be paid and Ms. Sartain would write the checks and send them out (Hearing tr., pp. 131-132). The accountants would also leave a note as to what deposits Ms. Sartain needed to make.²³

We modify finding of fact “30” of the Administrative Law Judge’s determination to read as follows:

30. The bank statements were sent to the salon, which Ms. Sartain set aside for the accountants. The accountants and Mr. Coppola had the authority and opportunity to review the bank statements (Hearing tr., pp. 80, 88, 142). Since Ms. Sartain did not

²²Hearing transcript, pp. 55, 88, 127-130.

²³We modified finding of fact “29” to more accurately reflect the record.

perform the bank reconciliations, she did not open the bank statements.²⁴

31. When he was in New York, Mr. Coppola picked up and reviewed the business mail. If a legal notice was delivered to the salon, it would be sent to the salon's attorney. The notices in issue in this matter were sent to Ms. Luttati.

32. Ms. Sartain saw bills from Ms. Luttati that reflected services for tax issues for the period 1998 through 2001. The bills mentioned conferring with Mr. Coppola and the accountants regarding New York State sales tax. Ms. Sartain's name was not mentioned on the bills. She also saw an invoice, dated April 24, 1999, from Absolute Managers LLC referring to a trip to Boca Raton, Florida which was paid for by Coppola N.Y.C.

33. Ms. Sartain was assessed by the Division for sales and use taxes as a responsible officer of Coppola N.Y.C.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted that the Tax Law imposes personal liability for taxes required to be collected under Articles 28 and 29 of the Tax Law upon a person required to collect such tax. For purposes of Article 28, a person required to collect such tax is "any officer, director or employee of a corporation . . . who as such officer, director or employee . . . is under a duty to act for such corporation . . . in complying with any requirement of [Article 28]" (Tax Law § 1131[1]).

In determining whether a person is a responsible officer or employee, the question to be resolved 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 (*see, Matter of*

²⁴We modified finding of fact "30" to more fully reflect the record.

Constantino, Tax Appeals Tribunal, September 27, 1990). The Administrative Law Judge pointed out several factors to be considered in determining responsible officer status under Article 28, including: (i) whether the person had authorization to hire and fire employees; (ii) the individual's day-to-day responsibilities in the business; and (iii) involvement with, and his/her knowledge of and control over the financial affairs and management of the business. Also to be considered, the Administrative Law Judge noted, are the duties and functions of the officers and directors as outlined in the certificate of incorporation, corporate bylaws and minutes of corporate meetings, and the preparation and filing of sales tax returns, the individual's economic interest in the corporation and whether he/she had authority to sign tax returns and write checks on behalf of the corporation. Another factor, the Administrative Law Judge pointed out, is the individual's simultaneous status as an officer, director, and in a closely-held corporation, as in the present matter, the individual's knowledge of the affairs of the firm and the firm's profits.

The Administrative Law Judge found that Mr. Coppola satisfied the foregoing criteria for being a responsible officer. He was the president of the corporation and owned 100 percent of the stock. He hired the accountants and attorney for the corporation and participated in meetings with them. He was authorized to hire and fire the other employees of the salon, to sign tax returns for the corporation and, in fact, signed the corporate returns during the period in issue. Further, petitioner was authorized to sign checks on the bank account of the corporation and occasionally drafted checks payable to himself. The Administrative Law Judge found that the evidence supports the conclusion that petitioner was directly involved in the daily operations of the business.

Petitioner argued that he was not under a duty to act and, therefore, cannot be held personally liable for the salon's sales taxes, but the Administrative Law Judge disagreed. The Administrative Law Judge found that Mr. Coppola was involved with the salon's day-to-day operations, including its tax matters. The Administrative Law Judge noted that petitioner signed sales tax returns for prior quarters and signed corporate tax returns during the period in issue. He also helped work out a payment plan for tax arrearage with the IRS.

Petitioner's attempt to place responsibility upon Ms. Sartain was also rejected by the Administrative Law Judge. The Administrative Law Judge noted that petitioner's argument fails to take into account that the potential liability of others does not relieve petitioner of his own liability as a responsible officer (*see, Matter of LaPenna*, Tax Appeals Tribunal, March 14, 1991). Further, the Administrative Law Judge rejected petitioner's argument that he cannot be held liable as a responsible officer, because he was unaware that sales taxes were not being paid. The Administrative Law Judge noted that while knowledge that the sales taxes were not being paid is a factor that may be considered, since it may demonstrate the degree of knowledge of the financial affairs of the firm (*see, Vogel v. New York State Dept. of Taxation & Fin.*, 98 Misc 2d 222, 413 NYS2d 862), it is not a requirement. Lastly, the Administrative Law Judge noted, that here, as in *LaPenna*, there is no evidence that petitioner was prevented from exercising his authority as President and 100% owner of the corporation.

The Administrative Law Judge also rejected petitioner's argument that the embezzlement from the salon constitutes reasonable cause for the abatement of the penalty pursuant to Tax Law § 1145(a)(1)(iii). The Administrative Law Judge noted that the embezzlement took place prior to the periods at issue here. Under these circumstances, the Administrative Law Judge

concluded, the embezzlement does not excuse the failure to pay over the monies that should have been collected after the departure of Mr. Pine. Further, the Administrative Law Judge found that the testimony of his accountant, Mr. Edelstein, without more, was insufficient to establish that the returns were timely filed. Therefore, the Administrative Law Judge concluded that petitioner failed to establish reasonable cause for the abatement of penalty.

ARGUMENTS ON EXCEPTION

Petitioner takes exception to one premise of the Administrative Law Judge's determination which states that the question to be resolved is whether petitioner had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer. Petitioner argues that he was not active in managing the corporation and had no knowledge of its financial affairs. Therefore, he urges, he cannot be held liable for the corporation's sales tax.

Petitioner also disagrees with the finding of the Administrative Law Judge that he satisfied the criteria to be held as a responsible officer of the corporation. Petitioner argues that he was not actively involved in and had no knowledge of the day-to-day financial affairs and management of the corporation, specifically the non-payment of sales taxes. Without such knowledge and involvement, he urges, he cannot be held liable for the sales taxes of his corporation.

Petitioner argues that it is Ms. Sartain, not he, who is liable here, and that the Administrative Law Judge erred in concluding that Mr. Pine's embezzlement of funds in earlier years did not constitute reasonable cause for nonpayment of sales taxes in 1999 and 2000.

Further, petitioner urges, the late filing penalty should be abated because Mr. Edelstein testified that he prepared and timely filed the salon's sales tax returns.

OPINION

The question to be resolved 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. In *Matter of Autex Corp.* (Tax Appeals Tribunal, November 23, 1988), the factors for determining whether an individual is a person or officer under a duty to act for a corporation were set forth as follows:

The determination that an individual is a responsible officer depends upon the particular facts of each case (*Stacy v. State*, 82 Misc 2d 181, 368 NYS2d 448). Factors stated by the Division's regulations are whether the person was authorized to sign the corporate tax return, was responsible for managing or maintaining the corporate books or was permitted to generally manage the corporation (20 NYCRR 526.11[b] [2]).

Other indicia developed by the case law are: the authorization to hire or fire employees, the derivation of substantial income from the corporation or stock ownership (*Blodnick v. State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536, *appeal dismissed* 69 NY2d 822, 513 NYS2d 1027); the individual's possible shared status as an officer, director or stockholder (*Cohen v. State Tax Commn.*, 128 AD2d 1022, 513 NYS2d 564); the individual's day-to-day responsibilities, involvement with, knowledge of and control over the financial affairs and management of the corporation, the duties and functions as outlined in the certificate of incorporation and the bylaws, the preparation and filing of sales tax forms and returns (*Vogel v. NY Tax & Finance*, 98 Misc 2d 222, 413 NYS2d 862); and the payment, including the authorization to write checks on behalf of the corporation, of other creditors other than the State of New York and the United States (*Chevlowe v. Koerner*, 95 Misc 2d 388, 407 NYS2d 427). Within closely held corporations, "an officer's knowledge of the corporate affairs and his benefits received from corporate profits [are] extremely important considerations" (*Vogel v. NY Tax & Finance*, *supra*, 413 NYS2d, at 865)

As petitioner has noted, the holding of corporate office does not in and of itself impose liability on the office holder for the sales taxes of the corporation. We have concluded in several cases that an officer that had apparent authority within a corporation was not a responsible officer after an examination of the circumstances within the corporation revealed that the officer was actually precluded from exercising his authority (*see, Matter of Russack*, Tax Appeals Tribunal, February 8, 1996; *see also, Matter of DeFeo*, Tax Appeals Tribunal, March 9, 1995; *Matter of Taylor*, Tax Appeals Tribunal, October 24, 1991; *Matter of Constantino, supra*).

However, corporate officers responsible as fiduciaries for tax revenues cannot absolve themselves of liability by merely disregarding their duty and leaving it to someone else to discharge (*see, Matter of Ragonesi v. State Tax Commn.*, 88 AD2d 707, 451 NYS2d 301, quoted in *Matter of Blodnick v. New York State Tax Commn., supra; Matter of Laschever*, Tax Appeals Tribunal, March 23, 1989).

The essence of petitioner's case here appears to be that he must not be held liable as a responsible officer of Coppola N.Y.C. because the responsibility to prepare his company's tax returns and pay applicable taxes had been delegated to Ms. Sartain. Assuming that this argument has merit, we would expect a showing of some credible testimony or documentary evidence regarding: (1) the specifics of the delegation of authority, when it occurred, the extent of the delegation and its duration and (2) that as a result thereof, somehow the taxpayer had been deprived of his authority to act on behalf of the corporation or that his ability to act for the corporation had somehow been hindered. Petitioner also urges that he cannot be held liable as a responsible officer because he had no knowledge that the sales taxes had not been paid.

The burden of proof is on petitioner (*see, Matter of Philipp Bros.*, Tax Appeals Tribunal, June 4, 1992; *Calder v. Graves*, 261 App Div 90, 24 NYS2d 797, *lv denied* 261 App Div 1025, 27 NYS2d 475). To prevail in this case, petitioner was required to demonstrate by clear and convincing evidence that, despite being President and 100% owner of Coppola N.Y.C., he still lacked sufficient authority and control to be held personally liable as an officer responsible for the tax collected, but not remitted by the corporation to the State of New York.

Petitioner has made Ms. Sartain's role in the company a central element to his case, so we address that issue at the outset. We can find no credible evidence showing that a delegation of authority occurred to Ms. Sartain or, if it did, the extent of the delegation or its duration.

Petitioner has offered no corporate books, records, resolutions, or bylaws as evidence of such a delegation. We only have petitioner's self-serving testimony, and that of his accountant, that Ms. Sartain was responsible for paying sales taxes which, without more, is unpersuasive.

Petitioner has not shown a single tax form or document that Ms. Sartain signed, nor is there any corporate document granting her any role or authority in the preparation or filing of sales tax returns. Further, there is no evidence that she was directed to prepare checks to pay such taxes, but failed to do so. In fact, Ms. Sartain testified she was never included in the meetings when taxes were discussed and never had a discussion with Mr. Coppola about taxes until 2002 when she herself was assessed. We find it highly unlikely, given Ms. Sartain's limited education and the fact that Mr. Coppola was the only person that had access to the corporation's bank statement, financial records and corporate books and records, that Ms. Sartain was responsible for the filing and paying of the corporation's taxes. We do not find the testimony of petitioner or his accountant credible in this regard. We note that even if Ms. Sartain were to be held liable for

the subject taxes, it would not absolve petitioner from potential liability, since the liability for sales and use tax is joint and several (*see, Matter of Pais*, Tax Appeals Tribunal, July 18, 1991; *Matter of LaPenna, supra*; Tax Law §§ 1131[1] and 1133[a]). There has also been no showing by petitioner that he had somehow been misled, hindered or deprived of his authority to act on behalf of the corporation.

With regard to Ms. Sartain's status as an officer, petitioner's evidence is, at best, ambiguous. It is reasonable to infer from the facts in this record, based upon Ms. Sartain's lack of knowledge that she held any position other than manager and based upon her lack of independent authority to act on behalf of the corporation, that Ms. Sartain was given the title of "secretary" as a matter of business convenience for Mr. Coppola. Petitioner's evidence does not show any corporate records appointing Ms. Sartain as secretary or that that title, if there was such an appointment, carried any corresponding independent authority to act on behalf of the corporation. As petitioner has pointed out, even if Ms. Sartain were found to be secretary to the corporation, the holding of corporate office does not in and of itself impose liability on the office holder for the corporation's sales taxes (*see, Matter of Blodnick v. New York State Tax Comm, supra*).²⁵ Given the dearth of credible evidence presented by petitioner to show that Ms. Sartain was an officer or that she had been delegated responsibility for filing and paying the corporation's taxes, we do not find his argument compelling.

We now address Mr. Coppola's role in the company. Mr. Edelstein, the corporation's accountant, testified that he never discussed the corporation's sales tax obligations with Mr. Coppola until after the notices of determination were issued in June 2001. That is a

²⁵We need not decide here the liability, or lack thereof, of Ms. Sartain for the corporation's disputed sales tax.

remarkable admission by a professional, if true. Even more remarkable is Mr. Coppola's testimony that he never inquired into the company's tax obligations. We find it difficult to fathom how a tax professional like Mr. Edelstein could prepare the corporation's State and Federal corporate returns on behalf of Coppola N.Y.C., obtain Mr. Coppola's signature on those documents, but never mention that there were outstanding sales tax obligations that needed addressing. This testimony is even more incredible when other evidence shows that there were meetings in 1999 and 2000 between Mr. Coppola, Mr. Edelstein and Ms. Luttati to discuss sales tax matters.²⁶ The fact that all of the signed tax returns in the record contain Mr. Coppola's signature also militates against a conclusion that Ms. Sartain was responsible for filing the corporation's sales tax returns.

The record shows that Mr. Coppola, as sole owner and President of Coppola N.Y.C., was fully involved and had full knowledge and control over the financial affairs and management of the corporation acting through Mr. Edelstein and Ms. Luttati and his daily phone calls with Ms. Sartain. Mr. Coppola also controlled the major hires for the company. Mr. Coppola hired the corporate attorney and the corporate accountants. He derived substantial income from the corporation, negotiated the corporation's contracts, equipment leases and real property leases. He signed New York State Corporate Franchise Tax Returns and Federal Corporate Income Tax Returns for the subject period, established the corporate bank account and signed checks on that account, including checks payable to himself. He controlled the company's payments to creditors through his daily phone calls to Ms. Sartain, who executed his instructions. The

²⁶We find it significant that Ms. Sartain was never included in these meetings.

corporation's books and records, bank statements and financial records were always available to him for review at the offices of his corporation's attorney and accountants.

Mr. Coppola made several trips a year to New York City and testified that he visited his accountants whenever he had the opportunity. However, he also testified that he never asked his accountants whether sales tax returns were being filed or whether sales taxes were being paid. Although he could have done so, Mr. Coppola testified that he did not review the corporate books and records maintained at his attorney's office in 1999 or 2000, nor did he review the salon's financial records or corporate financial statements maintained at the offices of Mr. Edelstein. We find Mr. Coppola's lack of curiosity telling. Given petitioner's failure to inquire whether his corporation's sales taxes were being paid, his failure to review his company's financial records, and the fact that there is no evidence that petitioner was hindered or prevented from carrying out his fiduciary duties as officer of the corporation, we conclude that Mr. Coppola was an individual who had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee (*see, Matter of Martin v. Commissioner of Taxation & Fin.*, 162 AD2d 890, 558 NYS2d 239; *see also, Matter of Goodfriend*, Tax Appeals Tribunal, January 15, 1998; *Matter of Plant Place*, Tax Appeals Tribunal, March 20, 1997; *Matter of Klein*, Tax Appeals Tribunal, January 25, 1996; *Matter of Napoli*, Tax Appeals Tribunal, July 13, 1995; *Matter of Pais, supra*).

Petitioner also argued that he should not be held responsible for the sales taxes because he had no knowledge that they were not paid. This argument is rejected. We note petitioner's admission that he never reviewed the salon's bank statements, financial records or corporate financial statements. He also never inquired whether the corporation's sales and use taxes were

being paid. A taxpayer cannot insulate himself from that duty and potential liability by the simple expedient of failing to inquire whether the taxes are being paid.

On the issue of penalties, we affirm the determination of the Administrative Law Judge for the reason stated therein.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of Peter Coppola is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Peter Coppola is denied; and
4. The notices of estimated determination dated June 18, 2001, as adjusted by the stipulation, and the notices of determination, dated June 18, 2001, are sustained together with penalty and interest.

DATED: Troy, New York
September 15, 2005

/s/Donald C. DeWitt

Donald C. DeWitt
President

/s/Carroll R. Jenkins

Carroll R. Jenkins
Commissioner

/s/Robert J. McDermott

Robert J. McDermott
Commissioner