

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
FRANK S. CONSTANTINO, : DETERMINATION
OFFICER OF JORDAN ELEVATOR CO., INC. :
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, 1983 :
through November 30, 1984. :

Petitioner, Frank S. Constantino, 37 Bailey Avenue, East Meadow, New York 11554, filed a petition 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, 1983 through November 30, 1984 (File No. 802335).

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on July 26, 1989 at 1:15 P.M., with all briefs filed by September 26, 1989. Petitioner appeared by Pauline A. Constantino, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

ISSUE

Whether petitioner is liable for the sales and use taxes due on behalf of Jordan Elevator Co., Inc. as a person responsible for the collection and payment of sales tax pursuant to Tax Law §§ 1131 and 1133.

FINDINGS OF FACT

On April 18, 1985, the Division of Taxation issued to Frank S. Constantino, petitioner herein, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due setting forth tax due of \$82,527.02, penalty of \$13,076.81 and interest of \$9,741.06, for a total amount due of \$105,344.89. The tax due is stated to be for the period March 1, 1983 through November 30, 1984 and the explanation offered on said notice was as follows:

"This tax has also been determined by Notice Numbers D8308271080 dated 11/20/84, D8312133443 dated 11/20/84, D8403054810 dated 10/10/84, D8405265170 dated 11/20/84, D8409011453 dated 11/20/84, S8411203344 dated 11/20/84, and S8502184828 dated 2/18/85, against Jordan Elevator Company, Inc., which is now in an arrangement and of which the taxpayer is an officer."

Petitioner, Frank S. Constantino ("Constantino"), has been in the elevator business for approximately 38 years. His career began as an instructor for The General Electric Company after his discharge from the Navy in 1951. Immediately prior to joining Jordan Elevator Co.,

Inc. ("Jordan") in 1977, Constantino worked as a service manager for Universal Elevator Company ("Universal") dealing with employees, customers and various superintendents of buildings in the New York City area. At Universal, petitioner had no administrative duties in the financial affairs of the company. One of the 50% owners of Universal was one Jordan Danziger who provided an expertise in the elevator industry and also a knowledge of financial management.

In 1977, Mr. Danziger sold his shares of Universal and organized Jordan, which corporation is the source of the derivative liability assessed against petitioner herein. Jordan began with four shareholders, three of whom were Jordan Danziger, petitioner and Joseph Drlicka. The fourth shareholder remained with the company for only a brief period and his shares were purchased by petitioner. Jordan Danziger was the majority shareholder with 55% of the stock, while petitioner owned 30% and Mr. Drlicka 15%.

Although Constantino held an office with the corporation, it is not clear from the record precisely which office he held. The corporation franchise tax reports filed for the periods in issue indicate two different offices held. The reports filed for the fiscal years ended March 31, 1983 and March 31, 1984 indicate that Constantino held the office of vice president, while the corporation franchise tax report for the fiscal year ended March 31, 1985 indicated that Constantino was the secretary of the corporation. A sales tax return filed for the period June 1, 1982 through August 31, 1982, outside of the period in issue, merely indicates that Constantino was an "officer".

During the period in issue, Constantino received the following salaries from the corporation for his services as a supervisor of the maintenance and repair departments of the elevator company and as a liaison with customers:

<u>FISCAL YEAR ENDED</u>	<u>SALARY</u>
3/31/83	\$38,340.00
3/31/84	41,518.00
3/31/85	34,016.00

Constantino chose to join the new company, hoping to make an investment in a company he hoped would grow with his future. Besides the \$30,000.00 capital investment Constantino made in Jordan, Constantino brought with him to Jordan his vast experience and knowledge of elevator maintenance and repair and his numerous contacts with former clients and building superintendents throughout New York City.

At Jordan, Constantino was principally engaged in supervising field work, preparing estimates of work to be done and meeting with customers. At no time did his duties include the financial management of the company, the keeping of books and records, or the preparation of any tax returns. The company was managed and controlled by its majority shareholder and president, Jordan Danziger.

Jordan maintained two checking accounts, a general corporate account and a payroll account. All bills were paid on checks drawn from the general corporate account and said drafts required the signatures of two officers of the corporation. Therefore, petitioner alone could not execute any check drawn on the general corporate account.

All decisions with regard to which bills were paid were made by the president and majority shareholder, Jordan Danziger. The corporation's general practice was for its bookkeeper to prepare a list of outstanding bills which would be reviewed by Mr. Danziger who would determine which were to be paid and in what amount. Although petitioner could

recommend the payment of certain outstanding debts, the final determination was always with Mr. Danziger. Constantino could order material for some projects, but significant orders required Mr. Danziger's approval.

It should be noted that petitioner signed no sales tax returns or corporate franchise tax reports during the period in issue. He did sign payroll checks but only as a convenience to the corporation and as a courtesy to the employees, since Constantino was often the only officer authorized to sign said checks who was in the office at an early hour. During the audit period, the corporation employed anywhere between 5 and 20 employees at any given time.

During the years 1983 and 1984, the corporation lost money and underwent financial hardship. Constantino and the other officers and their wives executed personal guarantees for a corporate debt with Chemical Bank.

Petitioner was aware during these years that Jordan was having financial problems even though he never inspected the books and records of the corporation. He was asked by Jordan Danziger to loan the corporation money in the form of cash advances, which were explained as necessary for the continuation of the business. As with the funds in the general operating account, Constantino had no control over which creditors received these further advances to the corporation. That determination was made by Mr. Danziger.

In 1983 and 1984, the relationship between Constantino and the other officers grew strained and Constantino made his intent known that he would not sign any tax returns which were not accompanied by the proper payment of tax, even though the decision as to whether or not taxes would be paid was made by Mr. Danziger. In the month following the close of this audit period, December 1984, Jordan filed for bankruptcy under Chapter 11 of the Bankruptcy Code. In that same month, Mr. Danziger and the other officer of Jordan, Mr. Drlicka, became partners in a dormant company, Jordelco, and endeavored to continue the business of Jordan in 1985. In early January 1985, Mr. Danziger informed Constantino that his services were no longer required with Jordan.

Although Constantino was not denied access to the books and records of the corporation, any such request would have been interpreted by Mr. Danziger as a sign of mistrust and a cause for animosity between the two men and an obvious threat to Mr. Constantino's job security. Therefore, petitioner was constructively barred from free access to the books and records of the corporation.

In fact, during the years 1983 and 1984, when Jordan was experiencing difficult financial times, Mr. Danziger made the conscious decision not to pay Federal or State tax prior to other creditors in order to ensure the continuation of business.

The period in issue contained seven fiscal quarters for which sales and use tax returns were due. Those for the first five quarters commencing March 1, 1983 and ending on May 31, 1984 were received late by the Division on October 12, 1984 and were not accompanied by any payment. The final two returns for the period, the quarters June 1, 1984 through August 31, 1984 and September 1, 1984 through November 30, 1984, were presumably received on time but likewise without remittance. As set forth above, none of these returns were signed by petitioner herein. Petitioner stated, with regard to the nonremittance, that he was unaware that the returns were not filed or that payment was not being submitted with said returns.

Although petitioner did have supervisory control over employees on the job, he did not have the authority to hire or fire employees. This authority rested in the president, Mr. Danziger.

CONCLUSIONS OF LAW

A. Tax Law § 1133(a) provides that every person required to collect tax imposed by Article 28 shall be personally liable for the tax imposed, collected or required to be collected under said article. Tax Law § 1131(1) defines "persons required to collect tax" as every vendor of tangible personal property or services including any officer or employee of a corporation who as such officer or employee is under a duty to act for such corporation. Therefore, the critical question presented in this case is whether Constantino was an officer of Jordan Elevator Co., Inc. who was "under a duty to act for such corporation."

B. It has been held that the holding of corporate office does not, per se, impose liability upon the office holder (see Chevlowe v. Koerner, 95 Misc 2d 388, 407 NYS2d 427).

In its own regulations, 20 NYCRR 526.11(b)(1) and (2), the Division of Taxation recognizes that the personal liability of a corporate officer for unpaid sales taxes imposed on the corporation is a factual question in every instance. The resolution of whether an officer is under a duty to act turns on this factual determination.

In Vogel v. Department of Taxation and Finance (98 Misc 2d 222, 413 NYS2d 862), some of the facts to be examined were set forth as follows:

"Indicia of this duty would include factors which directly relate to compliance with article 28, such as the officer's day-to-day responsibilities and involvement with the financial affairs and management of the corporation, his knowledge of such matters, the officer's duties and functions outlined in the certificate of incorporation and the by-laws, and the preparation and filing of sales tax forms and returns [citation omitted]. Furthermore, in situations involving closely-held corporations, as in the present case, an officer's knowledge of the corporate affairs and his benefits received from corporate profits would be extremely important considerations."

C. In view of all the evidence presented herein, including the credible testimony of petitioner, petitioner was not a person under a duty to collect tax on behalf of Jordan Elevator Co., Inc. Petitioner's background, training and area of expertise is in the field of elevator repair and maintenance, not in business management. Petitioner's prior role at Universal Elevator remained the same when he joined Jordan in 1977, i.e., he was a field supervisor and estimator without any responsibility for or control over the corporation's financial affairs and management. Although he supervised various numbers of employees during the audit period, it is clear that he had no right to hire or fire employees.

Constantino was an officer in name only, whose actual role in the corporation was that of a subordinate employee who took all his orders from the majority shareholder and president, Mr. Jordan Danziger. Although Constantino had check-signing authority and did sign checks, it was only because there was a two-signature requirement imposed on the corporation's operating account and his signature on said checks was merely pro forma. He did not have the authority to decide which bills or creditors were to be paid and which were to be ignored. He never prepared or signed any tax returns or reports during the period in issue nor was he aware of the fact that five of the seven returns for the period were filed late and that none of them were filed with the tax stated to be due thereon. He also had nothing to do with keeping the books and records of the business.

Constantino's day-to-day responsibilities involved working in the field, supervising the maintenance and repair departments of the corporation, estimating projects to be performed and dealing with customers. Although he did have the authority to order material for projects, any

significant orders required the approval of the president, Jordan Danziger. Given the animosity which developed among the three shareholders during 1983 and 1984, Constantino was constructively prohibited from inspecting the books and records of the business and therefore was unaware of the poor financial condition of the corporation and its failure to pay sales taxes or file returns during the period in issue.

His lack of knowledge of the corporate affairs and the fact that Constantino was a salaried employee of the corporation, never receiving any distribution of profits therefrom, weigh heavily in demonstrating that Constantino was not a person "under a duty to act for such corporation."

Constantino's authority was, in fact and in his own perception, always subordinate to that of Jordan Danziger, and his office, be that as a vice-president or secretary of the corporation, was in name only and carried with it no authority to act.

D. The Division of Taxation cites the case of D & W Auto Service Center, Inc. and Paul Wehr, as Officer (Tax Appeals Tribunal, April 20, 1989) in support of its assessment of Constantino as a responsible officer. However, in that case the petitioner was one of two persons who ran a gas station and repair business and owned 50% of the stock. He was a required signatory on all corporate checks, signed tax returns, including one for a quarter within the audit period which was presumably accompanied by a check signed by him. He also operated the station alone for a part of each day.

In the instant matter, Constantino was only a 30% stockholder with no authority to conduct or manage any segment of the business without the express authority of Mr. Danziger. His salary from the corporation was merely remuneration for services rendered as an employee. He did not sign any sales tax returns or corporation tax returns within the audit period. Further, this was not a case of one person taking advantage of another as in D & W Auto, but one where the truly responsible individual, Mr. Danziger, retained total authority for all the managerial duties including the payment of creditors, the hiring and firing of employees, the filing of tax returns with the proper tax and the maintenance of corporate books and records.

E. The petition of Frank S. Constantino, officer of Jordan Elevator Co., Inc., is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated April 18, 1985, is cancelled.

DATED: Troy, New York
December 7, 1989

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE