STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of SAMUEL V. EDENS, OFFICER OF TELEFILE COMPUTER PRODUCTS, 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 Periods March 1, 1983 through May 31, 1983 and September 1, 1983 through November 30, 1983.	: : : : : :	DETERMINATION DTA NO. 809607

Petitioner, Samuel V. Edens, officer of Telefile Computer Products, Inc., 13331 Mt. Hood Drive, Santa Ana, California 92714, 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 periods March 1, 1983 through May 31, 1983 and September 1, 1983 through November 30, 1983.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on June 30, 1993 at 1:15 P.M., with all briefs to be submitted by October 15, 1993. Petitioner, appearing by Siegel, Sommers & Schwartz, Esqs. (Eric Haber, Esq., of counsel), submitted a brief on August 20, 1993. The Division of Taxation, appearing by William F. Collins, Esq. (John E. Matthews, Esq., of counsel), submitted a responding brief on September 24, 1993. Petitioner's counsel submitted a reply brief on October 13, 1993.

ISSUES

I. Whether petitioner had sufficient involvement in and control over the activities of Telefile Computer Products, Inc. to be considered a person responsible to collect and remit sales tax on behalf of such corporation pursuant to Tax Law §§ 1131(1) and 1133(a).

II. Whether, under circumstances where a bankruptcy court sustains a trustee's objection to a proof of claim for taxes owed by a corporate taxpayer, the Division of Taxation is thereafter estopped from proceeding against allegedly responsible officers of that corporation for the claimed taxes so disallowed (notwithstanding that the Division of Taxation did not appear in the bankruptcy matter to contest the trustee's objection).

III. Whether language in a sales contract stating that the purchaser, as opposed to the seller, shall be responsible for any and all sales taxes due on equipment purchases serves to insulate the seller from liability for such taxes.

IV. Whether Telefile Computer Products, Inc. had sufficient nexus with New York State to support an obligation to collect and remit taxes on its sales of tangible personal property to New York State customers.

FINDINGS OF FACT

Telefile Computer Corporation ("TCC") was a publicly-held corporation incorporated in the State of Delaware on November 26, 1968. During the years in question, TCC's principal executive offices and production facilities were located at 17131 Daimler Street, Irvine, California. TCC's primary business centered around the operation of its wholly-owned subsidiary, Telefile Computer Products, Inc. ("TCPI").[1] TCPI, in turn, was a Delaware corporation serving as the principal operating company within the TCC family of companies. TCPI owned 100% of the capital stock of Telefile Computer Products GMBH, a West German company, and 100% of

the capital stock of Telefile Computer Products, Ltd. and Telefile Computer Services, Ltd., English companies.[2]

Telefile's original business purpose was to serve the data communication and computer enhancement markets. A significant portion of its business was manufacturing and marketing

[1]In addition to TCPI, TCC also owned all of the outstanding stock of Peripherals Journal, Inc., a nonoperational Delaware corporation.

[2]Unless otherwise specified, the group of corporations described above will be called, generically, Telefile.

add-on equipment for Xerox computers. When Xerox announced its withdrawal from the computer business in 1975, Telefile embarked on a program to enter the medium- to large-scale main frame computer business and supply total computer systems to fill the void left by Xerox. According to petitioner's Exhibit "1", "The Telefile Story", Telefile provided "total capability in hardware, system software, application programs, customer training, and maintenance." This same document indicated Telefile's total consolidated revenues for, inter alia, the fiscal years ended September 30, 1980 through September 30, 1983 to be $9,700,000.00, $8,300,000.00, $8,200,000.00, and $9,500,000.00, respectively.[3]

TCPI was audited for sales and use tax purposes by the Division of Taxation ("Division") for the period December 1, 1979 through November 30, 1983. This audit was completed in November 1984 and, as a result, two notices of determination and demands for payment of sales and use taxes due were issued to Telefile on December 20, 1984. The first of such notices covered the period December 1, 1979 through May 31, 1983 and assessed tax due in the amount of $143,230.01, plus interest. The second notice covered the period June 1, 1983 through November 30, 1983 and assessed tax due in the amount of $14,668.26, plus interest. During the period under audit, Telefile was not registered with the Division as a vendor (for sales and use tax purposes).

In turn, TCPI challenged the Division's assessments by filing a petition with the former State Tax Commission on March 15, 1985. A prehearing conference was held with the conference unit of the former State Tax Commission's Tax Appeals Bureau. At this conference, the Division agreed to reduce the total amount assessed against TCPI from $157,898.27 to $107,084.48, apparently based on TCPI's submission of certain documents establishing that a portion of its sales to New York customers represented exempt sales. In turn, TCPI's executive

[3]The parties to this proceeding, by their representatives, executed a stipulation agreeing to certain facts relevant to this case. Such stipulated facts are included within the Findings of Fact set forth herein.

vice-president, one Chris B. Reehl, executed a Withdrawal of Petition and Discontinuance of Case ("the Withdrawal") whereunder TCPI's petition was withdrawn. This Withdrawal, dated November 3, 1986, specified that the reduced amount of tax assessed ($107,084.48) should be further reduced to reflect TCPI's May 23, 1985 payment of $67,431.53, thus leaving a balance due from TCPI in the amount of $39,652.95.

On September 12, 1989, the Division issued two notices of determination and demands for payment of sales and use taxes due against petitioner, Samuel V. Edens, as a person responsible to collect and remit sales and use taxes on behalf of TCPI. The first of these notices assessed tax due for the sales tax quarterly period ended May 31, 1983 in the amount of $31,917.87, plus interest, while the second such notice assessed tax due for the sales tax quarterly period ended November 30, 1983 in the amount of $7,735.08, plus interest. These notices together assessed tax in the amount of $39,652.95, the same total amount as remained due from TCPI pursuant to the Withdrawal described hereinabove.

Petitioner protested the above-described responsible person assessments and, on December 13, 1990, a conciliation conference was held before the Division's Bureau of Conciliation and Mediation Services ("BCMS"). On March 1, 1991, a Conciliation Order (BCMS Order No. 10150)[4] was issued to petitioner reducing the assessments to $8,204.75 for the period ended May 31, 1983 and to $7,718.85 for the period ended November 30, 1983. These reduced amounts correspond to the amounts appearing in the Division's audit report with respect to TCPI for the sales tax quarterly periods ended May 31, 1983 and November 30, 1983, respectively. Petitioner continues to challenge the reduced amounts resulting from the conciliation conference.

On September 27, 1987, TCPI filed a petition with the U.S. Bankruptcy Court, Central District of California, seeking reorganization under Chapter 11 of the Bankruptcy Code.

On April 12, 1988, the Division filed a proof of claim in the TCPI bankruptcy

[4]Although the parties stipulated to the fact that the BCMS Order No. was "10150", in fact it was BCMS Order No. 101504.

proceeding seeking the balance due on the above-described sales tax assessments against TCPI (per the Withdrawal) plus other taxes due. More specifically, the Division's initial proof of claim totalled $93,987.14, of which $39,652.95 represented sales tax, with the balance consisting of corporation franchise tax and withholding tax.

In November 1988, all of TCPI's assets were sold and its operations were discontinued. On June 19, 1989, the Division filed an amended proof of claim seeking $94,641.19 in the bankruptcy proceeding against TCPI. The Division's claim was subsequently amended a second time on September 29, 1989, with such amended total set at $93,946.14. At all times, the sales tax portion of the Division's proof of claim totalled $39,652.95 (the amount of the sales tax assessment against TCPI after the Withdrawal).

On September 16, 1989, TCPI's Chapter 11 bankruptcy proceeding was converted to a Chapter 7 liquidation proceeding. Thereafter, on April 13, 1991, the Chapter 7 trustee filed an objection to the Division's proof of claim. This objection alleged that no debt remained due and owing from TCPI, and, alternatively, that any such debt asserted was owed by parties other than TCPI with TCPI at best only secondarily liable after such parties.

By a letter to the Division dated April 14, 1991, notice was given of a scheduled hearing on the trustee's objection to the Division's proof of claim. This letter noted, per Local Bankruptcy Rule 111(1)(g) regarding the manner and time for responding to the objection filed by the trustee, that:

> "Should you fail to appear at the hearing on said objection to proof of claim, the Court is authorized to enter a <u>default</u> judgment against you and to grant the relief requested by the Trustee in the objection to proof of claim." (Emphasis added.)

On May 14, 1991, a hearing was held on the trustee's objection to the Division's proof of claim. The Division did not respond to the notice of hearing or make an appearance at hearing, nor did it file any written response or opposition. On May 22, 1991, the bankruptcy court judge signed an order sustaining the trustee's objection and disallowing the Division's proof of claim.

The majority of TCPI's New York sales were made to two companies, Telestat and CRC

Information Systems, Inc. ("CRC"). The $67,431.53 reduction for payment specified in the Withdrawal (see, Finding of Fact "4") represents sales tax payments made by Telestat to TCPI (upon TCPI's request to Telestat) which were, in turn, remitted to the Division by TCPI. Although TCPI also attempted to obtain payments from CRC, it was unsuccessful in such efforts.

During the periods at issue, TCPI's standard sales contract, including the sales contract it used for New York customers, included a tax clause, at section A, paragraph 5, which provided as follows:

> "Buyer agrees to pay all taxes, however designated, levied or based on the purchase price, and all taxes or amounts in lieu thereof paid or payable by Telefile in respect of the foregoing, exclusive, however, of taxes based on Telefile's net income. Any and all personal property taxes assessable on the Equipment after delivery shall be paid by Buyer."

During most of the audit period, and during both of the specific sales tax quarterly periods under assessment herein, petitioner was president and chairman of the board of TCC.[5] Securities and Exchange Commission ("SEC") filings included in evidence list petitioner as TCC's chief executive officer, chief financial officer and chief accounting officer, and also indicate petitioner as the holder of secured debt in excess of $3,000,000.00 owed by TCC. Petitioner signed checks and made

financial decisions on behalf of Telefile. With regard to check signing, during some of the period, petitioner was the only authorized signator, at other times petitioner as well as other persons were, individually, authorized signators, and at other times petitioner was an authorized signator in combination with certain other authorized signators. Petitioner had the authority to

[5] Petitioner first became involved with TCC in 1971 as a consultant to its president. Thereafter, he became its president in 1972, remaining in such position until leaving in 1978. Petitioner returned as president in 1979, again left TCC in 1980, and thereafter returned as president in early 1981. Petitioner remained as TCC's president from early 1981 until his resignation in September 1987. The record does not specify who was president and/or chairman of the other Telefile entities.

hire and fire employees. Petitioner also authorized Price Waterhouse to represent TCPI in the appeal of its sales and use tax assessments noted above. Petitioner described Telefile as a company with approximately 90 to 100 employees and $9,000,000.00 of revenue per annum, and described his job as bearing the responsibility to "manage that far-flung organization", meaning TCC and its subsidiary corporations as described.

Petitioner explained that his activities for Telefile included negotiating with banks to get money for Telefile's operations, signing off on audit reports, and reviewing the actions of Telefile's vice-president of finance. He explained that he could sign tax returns or reports, noting however that such task was usually performed by a subordinate employee. Petitioner explained that he lost a substantial amount of his own money as a result of Telefile's bankruptcy. In this regard, the secured Telefile debt of more than $3,000,000.00 held by petitioner, as noted above, resulted from a debt restructuring undertaken by Telefile in the late 1970's or early 1980's under which the Telefile debt was assigned to petitioner in exchange for his personal guarantee of other (unspecified) obligations (presumably new or restructured Telefile debt). With regard to signing or co-signing all of Telefile's sales contracts (and specifically all contracts in excess of $50,000.00), petitioner explained that since Telefile had only several hundred customers, such signing was "not an outstanding chore". Petitioner likened such activity to a pro forma act.

During the periods at issue, petitioner Samuel V. Edens took no active part in soliciting customers in New York or negotiating contracts with New York customers. Such duties were primarily the responsibility of Chris B. Reehl, Telefile's executive vice-president, and other subordinates. Petitioner did, however, sign all of Telefile's contracts, as approved.

Petitioner resigned from his position as Telefile's president and chief executive officer by letter dated September 12, 1987.

During the audit period, Telefile solicited customers in New York State (and apparently elsewhere) by the use of direct mailers and, to a lesser degree, by telephone calls. In these activities, Telefile utilized a list of "users" supplied to Telefile by Xerox when Xerox withdrew from the computer business (see, Finding of Fact "2"). The users on the list were organized into a user's group known as Exchange, later reorganized under the name Telexchange, and Telefile mailed each user a bi-monthly publication entitled Teleflyer. Petitioner explained that Telefile became the main source for items needed by former Xerox customers. He noted that the customers on the user list were aware of Telefile's ability to fill the void left by Xerox's departure from the computer business, and that the Telefile mailings described what was happening in the business and what was available in terms of equipment. He further explained that the user/customers would often respond to the mailings by contacting Telefile to purchase existing equipment or to see if Telefile could make a particular piece of equipment for the customer.

Telefile was not registered to do business in New York nor was Telefile registered as a vendor for sales tax purposes. Telefile did not maintain offices in New York or have any employees based in New York. Approval of sales orders by New York customers and signing of contracts therefor by Telefile occurred in California. Shipments of merchandise to New York purchasers were made FOB, Irvine, California. Customer training was provided in Telefile's education center located in California, and none of Telefile's salesmen maintained offices in New York. Telefile provided installation and maintenance of its equipment through the use of field service personnel, who were based outside of New York State. Such personnel would travel into New York State to install and maintain equipment purchased by New York customers. Petitioner noted that maintenance services could be performed on an as-needed basis or under contractual arrangement. All of Telefile's New York customers were informed by Telefile that it was not acting as a collector of New York sales tax and that such tax could be imposed upon the customers by New York State.

CONCLUSIONS OF LAW

A. The fact that the bankruptcy court sustained the trustee's objection and disallowed the Division's claim for taxes against the corporation (see, Finding of Fact "12") does not serve to estop or otherwise preclude the Division from pursuing petitioner as a person responsible for the corporation's unpaid taxes. While petitioner disputes the same, the court essentially issued a default judgment based on the Division's nonappearance. In this regard, the notice sent to the Division with respect to the hearing on the trustee's objection to the Division's proof of claim clearly states that nonappearance could result in the entry of a default judgment (see, Finding of Fact "11"). Notwithstanding that the court's order does not use the word "default", it is evident that the Division's nonappearance simply resulted in a default judgment.

In addition to the foregoing, it is well established that the liabilities of a corporation and its officers are separate and independent, and the Division has the discretion to pursue its claim against any responsible party without being obliged to pursue all of such parties or estopped by its failure to pursue any particular party (see, Matter of Yellin v. State Tax Commn., 81 AD2d 196, 440 NYS2d 382; Matter of Kadish, Tax Appeals Tribunal, November 15, 1990; Matter of Mustafa, Tax Appeals Tribunal, December 27, 1991). In this regard, carrying petitioner's argument to its logical conclusion would require the Division, in many instances, to futilely expend resources by pursuing collection where ultimate collection might well be practically impossible. More specifically, for whatever reason, the Division may have determined that pursuing the corporation in bankruptcy would not result in a collectible judgment. Therefore, the Division may have chosen not to expend resources by appearing and contesting the trustee's objection, in favor of pursuing other, presumably more viable, avenues of ultimate collection. The instant matter does not present a case in which a bankruptcy court has determined the amount of a State tax claim (see, 11 USC § 505), nor is the subject case one which involves a specific reduction of the corporate liability the benefit of which would inure to any other persons deemed responsible for such corporate obligation (see, Matter of Halperin v. Chu, 134 Misc 2d 105, 509 NYS2d 692, affd 138 AD2d 915, 526 NYS2d 660, dismissed in part, denied in part 72 NY2d 938, 532 NYS2d 845; Tax Law § 1138[a][3][B]). Petitioner has cited no authority, nor does there appear to be any, in support of the proposition that the Division's failure to appear and contest an objection to a proof of claim in a bankruptcy proceeding against a corporation serves to estop the Division from proceeding with collection against an alleged responsible officer of such corporation. This State's highest court has consistently held that "an issue is not actually litigated if, for example, there has been a default, a confession of liability, a failure to place a matter in issue by proper pleading or even because of a stipulation" (Kaufman v. Eli Lilly & Co., 65 NY2d 449, 492 NYS2d 584, 589; see, Matter of Planit, Tax Appeals Tribunal, February 7, 1991.)

B. Treated next is the issue of whether Telefile was a "vendor" for sales tax purposes having sufficient connection or nexus with New York to support an obligation to collect taxes, and, by extension, support imposition of liability for noncollection or nonremittance thereof upon responsible officers of Telefile. Based on the evidence in the record, it is clear that Telefile's activities with respect to selling its products in New York State were carried out in such a manner that Telefile was a vendor and had sufficient nexus with New York State so as to be considered under a duty to collect and remit New York State sales tax. Petitioner admitted that Telefile solicited (and obtained) business in New York State through direct mailings and via some telephone calls to potential customers (see, Finding of Fact "19"). It is undisputed that Telefile made sales to New York State customers. Furthermore, Telefile's technical employees, though located out of New York State, travelled to New York State both for the purpose of installing equipment sold by Telefile to New York customers, and thereafter for the purpose of maintaining such equipment (see, Finding of Fact "20"). Under these circumstances, Telefile clearly met the definition of "vendor" under the Tax Law and related regulations (see, Tax Law former § 1101[b][8][i][C]; 20 NYCRR former 526.10). In addition, Telefile's contacts with and physical presence in New York, through its sales solicitations and through its field service employees who came to New York to install and thereafter provide ongoing service on the equipment Telefile sold, constituted sufficient contact with New York State to overcome petitioner's arguments regarding lack of nexus (Matter of Stainless, Inc., Tax Appeals Tribunal, April 1, 1993; Matter of Vermont Information Processing, Tax Appeals Tribunal, January 21, 1993; Matter of Orvis, Inc., Tax Appeals Tribunal, January 14, 1993).

C. Tax Law § 1131(1) defines "persons required to collect tax" to include:

> "Any officer, director or employee of a corporation or of a dissolved corporation, any employee of a partnership or any employee of an individual proprietorship who as such officer, director or employee is under a duty to act for such corporation, partnership or individual proprietorship in complying with any requirement of [Article 28] . . . ."

Tax Law § 1133(a), in turn, imposes liability as follows:

> "every person required to collect any tax imposed by [Article 28] shall be personally liable for the tax imposed, collected or required to be collected under [Article 28]."

D. Matter of Autex Corp. (Tax Appeals Tribunal, November 23, 1988) summarizes the factors which are considered relevant in determining whether an individual is responsible for the sales and use taxes due from a corporation, 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, 183). 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); the individual's possible shared status as an officer, director or stockholder (Cohen v. State Tax Commn., 128 AD2d 1022, 1023); 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. New York Tax and Finance, 98 Misc 2d 222, 225-226); 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, 391)" (Matter of Autex Corp., supra).

E. Summarized as a general proposition, the issue to be resolved is whether petitioner had or could have had the ability, in fact as well as in law, to control the affairs of the corporation so as to be considered a person under a duty to collect and remit the unpaid taxes in question (Matter of Constantino, Tax Appeals Tribunal, September 27, 1990; Matter of Chin, Tax Appeals Tribunal, December 20, 1990).

F. Petitioner clearly was a person responsible to collect and remit taxes on behalf of Telefile within the contemplation of Tax Law §§ 1131(1) and 1133(a). Petitioner's argument that he was not personally involved in soliciting, negotiating or executing the sales in question is fully overcome by petitioner's activities, duties and authority within Telefile as its president and chief executive officer, as a majority stockholder, as a large debt-holder, and as a person who was generally charged with the overall operation of the entire corporate organization. Petitioner's title, authority and activities fall squarely within the indicia developed by the case law, as set forth above, and the Division's assessment against petitioner as a person responsible for collection of tax is sustained.

G. Finally, the standard wording in Telefile's sales contracts to the effect that the purchasing customer would be responsible for the payment of sales tax does not relieve either Telefile or, as a responsible officer, petitioner from liability for collecting and paying such tax. Such language in a contract, while perhaps giving recourse to a seller as against its purchaser, does not change the seller-vendor's obligation to collect and remit tax on its sales. In short, a corporation cannot simply contract away its responsibility as a vendor to collect and remit taxes due the State of New York.

H. The petition of Samuel V. Edens, as officer of Telefile Computer Products, Inc., is hereby denied and the notices of determination and demands for payment of sales and use taxes due, dated September 12, 1989, as revised and reduced pursuant to Conciliation Order No. 101504, together with interest, are sustained.

DATED: Troy, New York
April 7, 1994

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE