

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
MICHAEL ROSENTHAL : DETERMINATION
for Revision of Determinations or for Refund of Sales and : DTA NO. 815433
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period December 1, 1992 through November 30, 1993. :

Petitioner, Michael Rosenthal, 1446 Park Street, Atlantic Beach, New York 11509, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1992 through November 30, 1993.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on July 17, 1997 at 1:15 P.M., with all briefs to be submitted by November 4, 1997, which date began the six-month period for the issuance of this determination. Petitioner appeared by Kase and Druker, Esqs., (James O. Druker, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Peter T. Gumaer, Esq., of counsel).

ISSUE

Whether petitioner was a person responsible to collect and remit sales taxes on behalf of Creative Lithographic Consulting Corporation for the period December 1, 1992 through November 30, 1993.

FINDINGS OF FACT

1. Prior to and during the period in issue, Creative Lithographic Consulting Corporation (“CLC”), located in New York City, was a graphic arts company which had on-site printing presses. CLC’s customers included printing brokers and corporations.

2. On October 28, 1994, the Division of Taxation (“Division”) issued to petitioner, Michael Rosenthal, a Notice of Estimated Determination of sales and use taxes due (L-009722417-5) for the period September 1, 1993 through November 30, 1993 for estimated tax due in the amount of \$27,950.68, penalty due of \$5,590.06 and interest due of \$3,018.73, for a total amount due of \$36,559.47.

This notice stated that petitioner was personally liable as an officer or responsible person of CLC under Tax Law § 1131(1) and § 1133 for taxes determined to be due in accordance with Tax Law § 1138(a). The notice also stated that the tax assessed had been estimated in accordance with Tax Law § 1138 because a required tax return had not been filed by CLC.

3. On the same date, the Division issued to petitioner three notices of determination of sales and use taxes due as follows: (1) Assessment No. L-009722420-3 for the period December 1, 1992 through February 28, 1993 for tax due of \$22,360.55, penalty due of \$4,499.25 and interest due of \$2,659.65, less payments or credits of \$10,710.32, for a total amount due of \$18,809.13; (2) Assessment No. L-009722419-3 for the period March 1, 1993 through May 31, 1993 for tax due of \$12,442.98, penalty due of \$2,635.10 and interest due of \$1,557.93, less payments or credits of \$4,000.00, for a total amount due of \$12,635.92; and (3) Assessment No. L-009722418-4 for the period June 1, 1993 through August 31, 1993 for tax due in the amount of \$21,087.91, penalty due of \$4,850.10 and interest due of \$2,987.02, for a total amount due of \$28,925.03.

Each of the notices stated petitioner was personally liable as an officer or responsible

person of CLC under Tax Law § 1131(1) and § 1133 for taxes determined to be due in accordance with Tax Law § 1138(a).

4. In or about 1987, petitioner began working at CLC as a production worker. In that capacity, petitioner wrote up the job order, assigned a production number and followed the particular job through the production process to completion. Petitioner estimated his salary at that time to be about \$600.00 to \$700.00 per week.

5. At some point in 1991, petitioner became general manager of manufacturing and operations. It was petitioner's responsibility to oversee the operation, the production personnel, and the manufacturing. His responsibilities also included overseeing manufacturing and printing problems, including scheduling the presses to meet CLC's customers' deadlines, as well as to maximize press efficiency. Throughout the period in issue, petitioner estimated that he received a yearly salary of between \$80,000.00 to \$100,000.00. Petitioner answered to CLC's owner, Stanley Knipl.

6. Mr. Knipl enjoyed spending time at his home in California and was frequently away from CLC's office. While away, Mr. Knipl would contact petitioner and direct him to do things on behalf of CLC. Petitioner testified that he would do whatever Mr. Knipl wanted him to do.

7. During the period in issue, petitioner had check signing authority on behalf of CLC. Petitioner would sign checks only when Mr. Knipl was out of town and only after Mr. Knipl directed him to do so. He estimated that he signed approximately 8 to 10 checks per year.

8. Petitioner did not own any stock in CLC or have any type of ownership interest in the corporation. He was not a director of the corporation and never attended any corporate meetings.

9. The record includes four quarterly sales and use tax returns filed on behalf of CLC for the periods June 1, 1988 through August 31, 1988; September 1, 1992 through February 28, 1993

and June 1, 1993 through August 31, 1993. Petitioner's signature, along with the title vice president, appears at the bottom of each of these returns. It is noted that the signature "Zee (Bookkeeper)" appears in the preparer box at the bottom of the sales and use tax return for the period June 1, 1988 through August 31, 1988.¹ The preparer boxes of the other three returns are blank.

10. At the hearing, petitioner confirmed that the signature on each of the returns was his, and that, in the case of the three returns covering the periods September 1, 1992 through February 28, 1993 and June 1, 1993 through August 31, 1993, he had also written the words "vice president." When asked why he had written vice president as his title, he responded that the bookkeeper wanted it that way to be consistent with the title which had been listed for him in the past.

11. Petitioner's testimony was vague as to whether or not Mr. Knipl had made him a corporate officer. Petitioner was sure he was "never" vice president, but Mr. Knipl might have made him "secretary-treasurer" (tr., p. 21).

12. The record includes the affidavit of Stanley Knipl sworn to on April 10, 1997. Prior to and during the period in issue, Mr. Knipl was "the owner of CLC and the person primarily responsible for directing CLC's affairs." Mr. Knipl's affidavit identifies the extent of petitioner's involvement in the financial affairs of CLC. According to Mr. Knipl, petitioner was not involved in the management of the company. Specifically, he was not responsible for either the collection or remittance of sales tax on behalf of CLC. Petitioner also "had no say or authority regarding anything to do with payroll and sales taxes." Petitioner's corporate check

¹The signature is somewhat illegible. Petitioner testified that Zee was the bookkeeper's first name; however he could not recall her last name.

signing authority was conferred solely for Mr. Knipl's convenience and petitioner did not exercise that authority unless Mr. Knipl was away from the office and only when directed to do so by Mr. Knipl. Petitioner was secretary-treasurer of CLC in name only, he did not make any decisions as to what corporate expenditures would be incurred. Mr. Knipl asserts that petitioner is not and was not a responsible officer or person of CLC.

13. The record also includes the affidavits of three former employees of CLC, George Gambella, Ottavio Gianetti and Brenda Overton.² Mr. Gambella held the position of "Prepoom [sic] Foreman", while Mr. Gianetti and Ms. Overton were employed in the production and purchasing departments respectively.³ In their affidavits, all three individuals acknowledge that they had dealings with petitioner while employed at CLC. Each states that petitioner did not have any financial authority, including the ability to issue checks, on behalf of CLC. None of these individuals recalls petitioner ever making any major decisions "financial or otherwise" without first obtaining authorization from Stanley Knipl. They also "never received a paycheck or other check" signed by petitioner.

14. Petitioner ceased working for CLC in July 1994.

15. In lieu of a Bureau of Conciliation and Mediation Services ("BCMS") conciliation conference, petitioner opted to have the matter decided by correspondence. After review of the evidence presented, the conferee issued a Conciliation Order (CMS No. 145454), dated August 2, 1996, sustaining the statutory notices (Notice numbers L009722418; L009722419; L009722420 and L009722417).

²The content of each affidavit is identical, with the exception of the introductory paragraphs.

³The exact length of each affiant's employment with CLC is not part of the record.

16. According to the BCMS conferee's tax conference report, the Tax Compliance Division determined petitioner to be a responsible person because he signed sales tax returns for the periods ending February 28, 1993 and August 31, 1993 listing himself as vice president.

17. Petitioner filed a petition, dated October 24, 1996, challenging the sales and use taxes asserted in the Notice of Estimated Determination and the three notices of determination issued in this matter. In his petition, petitioner asserts that the Commissioner erroneously determined that he was a responsible officer of CLC. Petitioner states that even though he had signatory authority, he "made no decisions regarding the payments of ('CLC's) taxes." Petitioner maintains that he did not prepare the returns and that "[h]e had nothing to do with the entire process." He asserts that "[t]he decisions were made by the President (and principal) Stanley Knipl, and were implemented by the Corporate controller, Vincent Poppiti."

18. Petitioner submitted proposed findings of fact letters a through k. In accordance with State Administrative Procedure Act § 307(1), all the proposed findings of fact have been substantially incorporated into the Findings of Fact except: proposed findings of fact "b" and "e" which state petitioner's position; and proposed findings of fact "g", "i" and "j" because they are ultimate findings of fact, more in the nature of conclusions of law.

CONCLUSIONS OF LAW

A. Tax Law § 1133(a) states that "every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article"

B. Tax Law § 1131(1) defines a "person required to collect any tax imposed by this article [Article 28]" 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 this article; and any member of a partnership.

C. It has been held that corporate office does not, per se, impose sales tax liability upon an officeholder (*see, Vogel v. New York State Dept. Of Taxation & Fin.*, 98 Misc 2d 222, 413 NYS2d 862; *Chevlowe v. Koerner*, 95 Misc 2d 388, 407 NYS2d 427, 430; *Matter of Unger*, Tax Appeals Tribunal, March 24, 1994, *confirmed sub nom Matter of Landau v. Tax Appeals Tribunal*, 214 AD2d 857, 625 NYS2d 343, *lv denied*, 86 NY2d 705, 632 NYS2d 498). Rather, whether a person is a responsible officer must be determined based upon the particular facts of each case (*see, Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022, 513 NYS2d 564; *Stacy v. State*, 82 Misc 2d 181, 368 NYS2d 448; *Chevlowe v. Koerner, supra*, 407 NYS2d at 429; *Matter of Hall*, Tax Appeals Tribunal, March 22, 1990, *confirmed* 176 AD2d 1006, 574 NYS2d 862; *Matter of Martin*, Tax Appeals Tribunal, July 20, 1989, *confirmed* 162 AD2d 890, 558 NYS2d 239; *Matter of Autex Corp.*, Tax Appeals Tribunal, November 23, 1988). 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]).

The Tax Appeals Tribunal, in *Matter of Constantino* (Tax Appeals Tribunal, September 27, 1990), stated:

[t]he question to be resolved in any particular case 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. The case law and the decisions of this Tribunal have identified a variety of factors as indicia of responsibility: the individual's status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual's knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; the individual's economic

interest in the corporation (*Cohen v. State Tax Commn.*, *supra*, 513 NYS2d 564, 565; *Blodnick v. State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536, 538, *appeal dismissed* 69 NY2d 822, 513 NYS2d 1027; *Vogel v. New York State Dept. Of Taxation & Fin.*, *supra*, 413 NYS2d 862, 865; *Chevlowe v. Koerner*, *supra*, 407 NYS2d 427, 429; *Matter of William D. Barton*, [Tax Appeals Tribunal, July 20, 1989]; *Matter of William F. Martin*, *supra*; *Matter of Autex Corp.*, *supra*).

The Tax Appeals Tribunal has also held that it is necessary to examine the total circumstances of the individual in the corporation to ascertain whether the individual had the power to control the acts he performed (*Matter of Pessa*, Tax Appeals Tribunal, May 1, 1997; *Matter of Moschetto*, Tax Appeals Tribunal, March 17, 1994; *Matter of Taylor*, Tax Appeals Tribunal October 24, 1991; *Matter of Constantino*, *supra*).

D. Petitioner admits that he was an authorized signatory on the corporate checking account. However, he contends that his authorization on the checking account was as a matter of convenience to Mr. Knipl, and that he never signed any checks unless directed to do so by Mr. Knipl and only when Mr. Knipl was away from the office. He also admits that he signed two of the sales and use tax returns filed on behalf of CLC during the period in issue. However, he contends that he signed these returns at the direction of Mr. Knipl and only because Mr. Knipl was away from the office. He also argues that even though he used the title vice president after his name on the returns, he was not, in fact, vice president of CLC. Rather, the bookkeeper directed him to use that title to be consistent with sales and use tax returns which had been filed in the past. Petitioner asserts that while Mr. Knipl may have made him secretary-treasurer of the company, Mr. Knipl had done so without petitioner's knowledge or consent. He argues that he was merely an employee who had neither independent authority concerning, nor responsibility for, the company's fiscal matters. Petitioner maintains that he was a supervisor who was only responsible for manufacturing and related operational matters.

Petitioner contends that the evidence establishes that he was neither an officer nor a person responsible for the payment of CLC's sales taxes. Furthermore, petitioner asserts that Stanley Knipl, in his affidavit, admitted that, during the period in issue, he was the person primarily responsible for all of CLC's affairs, including the authority to insure that the company's sales taxes were paid.

E. It is clear from the record that petitioner was not a responsible officer of CLC. Petitioner was a highly compensated supervisor who answered directly to the company's owner. While petitioner was, in fact, an officer of CLC, clearly it was a nominal title conferred solely for Mr. Knipl's benefit. Petitioner did not own any stock in CLC. Nothing in the record suggests that petitioner ever took part in or made any independent policy decisions on behalf of CLC. Furthermore, there is nothing in the record to show that petitioner had any independent authority to make management decisions on behalf of the company. Indeed, Mr. Knipl, in his affidavit, states that he was owner of CLC and the person primarily responsible for directing the company's affairs. Mr. Knipl also stated that petitioner was not responsible for the management of CLC, specifically he was not responsible for, nor did he have any authority over, the collection and remittance of sales taxes on behalf of the company. There is no evidence in the record which rebuts the statements made by Mr. Knipl in his affidavit.

Upon examination of the total circumstances of petitioner's role within CLC, it is clear that petitioner did not have independent authority and control over CLC's corporate affairs, and, therefore, was under no duty to act on behalf of the corporation in complying with Articles 28 and 29 of the Tax Law.

F. The petition of Michael Rosenthal is granted; and the notices of determination (Notice numbers L-009722420-3; L-009722419-3; and L-009722418-4) are canceled and the Notice of

Estimated Determination (Notice number L-009722417-5) is canceled.

DATED: Troy, New York
April 30, 1998

/s/ Winifred F. Maloney
ADMINISTRATIVE LAW JUDGE