STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ARTHUR WENDEL	:	DETERMINATION DTA NO. 816152
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1990 and 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 December 1, 1989 through November 30, 1990.	:	

Petitioner, Arthur Wendel, 230 Hamlet Drive, Jericho, New York 11753, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1990 and 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 December 1, 1989 through November 30, 1990.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on May 29, 1998 at 10:30 A.M., with all briefs to be submitted by November 6, 1998, which date commenced the six-month period for the issuance of this determination. Petitioners appeared by the Law Offices of Wallace Musoff (Wallace Musoff, Esq. and Michael J. Coyle, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Herbert M. Friedman, Esq., of counsel).

ISSUES

I. Whether petitioner was a person required to collect, truthfully account for and pay over withholding tax with respect to an entity known as MAG Investigation and Security Corp., who willfully failed to do so thus becoming liable for a penalty equal to such unpaid tax under section 685(g) of the Tax Law.

II. Whether petitioner's claim for refund of sales tax paid by him, under levy, with respect to MAG Investigation and Security Corp. is barred pursuant to Tax Law § 1138(former [a][1]) and § 1139(former [c]).

III. Whether, assuming his refund claim is not barred as untimely, petitioner had sufficient involvement in and control over the activities of MAG Investigation and Security Corp. so as 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).

IV. Whether, again assuming his refund claim is not barred as untimely, petitioner has established that penalty imposed for the untimely payment of sales tax by MAG Investigation and Security Corp. should be abated.

FINDINGS OF FACT

1. In or about January 1976, a domestic corporation known as MAG Investigation and Security Corp. ("MAG") was formed. MAG's initial shareholders and officers were Charles T. Grossberger, who died on April 3, 1996, and his son Kenneth J. Grossberger. MAG was a licensed investigation and security firm whose principal business involved providing investigative services and providing protective security guards for payroll deliveries, retail stores, cooperatives and other buildings. Charles Grossberger and Kenneth Grossberger held the required licenses without which MAG could not legally have conducted its business. Kenneth

Grossberger was the full-time salaried president of MAG from 1985 until it ceased doing business in November 1990.

2. In late 1977, petitioner, Arthur Wendel, his brother H.B. Wendel, and Ralph Larkin joined MAG. Petitioner had been involved in various businesses for a number of years and, in addition to providing capital to MAG, could also provide general business advice as well as specific advice on labor relations matters. Several MAG shareholders' agreements were entered into, including agreements dated August 2, 1977 and November 4, 1981, and an amendment dated August 24, 1982. While these agreements are not in evidence, the last MAG shareholders' agreement, dated August 17, 1984, is in evidence. This agreement indicates that MAG had a total of 180 issued and outstanding shares of stock which were held by five shareholders, to wit: Charles Grossberger and Kenneth Grossberger, each owning 45 shares of stock, and Arthur Wendel, H.B. Wendel, and Ralph Larkin, each owning 30 shares of stock.

3. The August 17, 1984 shareholders' agreement, which was in effect during the periods at issue in this proceeding, specified the members of MAG's board of directors and MAG's corporate officers, and detailed the authority and powers given to the directors, officers and shareholders of MAG. The directors of MAG were Charles Grossberger, Kenneth Grossberger, Arthur Wendel and H.B. Wendel, and these individuals held the corporate offices of president, vice-president and secretary, vice-president and treasurer, and vice-president, respectively. The agreement provided that these individuals would vote during the period of the agreement so as to insure that they would remain as MAG's directors and continue to be elected to hold the same corporate officer titles. The agreement provided that three-quarters of the directors constituted a quorum of the board, and that a vote of three-quarters of the directors was necessary in order to transact any business. Similarly, the agreement provided that three-quarters of the shareholders

constituted a quorum for purposes of shareholders' meetings and that a vote of three-quarters of all outstanding shares was required for a valid shareholders' vote, except to elect a director or to remove a director, which events required the unanimous vote of all shareholders.

4. Paragraph "1-d" of the Shareholders' Agreement specified that two signatures would be required on all of MAG's notes, checks, drafts, agreements and certificates of stock, with one of such signatures being that of either Arthur Wendel or H.B. Wendel and the other such signature being that of either Kenneth Grossberger or Charles Grossberger. Paragraph "2" of the Agreement provided that any of the stockholders could be employed by MAG, that Charles Grossberger and Kenneth Grossberger were to "devote their best efforts to the affairs of [MAG]," and that any of the stockholders could engage in any other business of any kind and nature except that they could not compete with MAG or with its business. Paragraph "4" of the Agreement provided that the shareholders were divided into two groups for purposes of transferring stock, or purchasing stock upon the death of a stockholder, with Group A consisting of Charles Grossberger and Kenneth Grossberger and Group B consisting of Arthur Wendel, H.B. Wendel and Ralph Larkin. Ensuing paragraphs specified in detail how shares of MAG stock could be transferred or purchased upon the death of a stockholder. Paragraph 17 of the Agreement provided that MAG was to keep full and accurate books and records and that each of the stockholders was entitled to have access to such records without limitation for inspection and copying.

5. Kenneth Grossberger and Charles Grossberger were most directly involved in carrying out the daily operation of MAG's business of providing security and investigations. Petitioner was not employed by MAG, did not receive a salary from MAG, and did not have a separate office at, or report to, MAG's offices on a daily or other set basis. Rather, petitioner stated that

his other businesses, which included a building maintenance business, took up most of his time. Petitioner was described as involved in providing general business advice to MAG directed toward sales, business growth, marketing, "client relations," "troubleshooting in the field" and union and other labor issues involving MAG's security employees. Petitioner's visits to MAG's offices were described as "a couple of times per month" to discuss the "state of the business."

6. MAG's board of directors met informally to discuss business matters, sometimes over lunches or when petitioner and his brother H.B. Wendel would visit MAG's offices. MAG employed an office manager and a bookkeeper, and engaged an accountant to periodically review its books and to assist in the preparation of financial statements. Payroll duties were generally handled by MAG's office manager or bookkeeper.

7. The two-signature requirement noted above was put in place when petitioner's group first invested in MAG and became stockholders. This provision was instituted for the general protection of the two described groups of stockholders. In practice, in order to comply with this two-signature requirement in the Shareholders' Agreement, rubber stamps bearing facsimile signatures of petitioner, and of his brother H.B. Wendel, were created to be used such that payroll and other checks could be issued as frequently as was needed notwithstanding the absence of one of the required signing parties from MAG's offices. Petitioner authorized the use of his signature stamp in this fashion, although he was not in fact advised of each particular instance when his signature stamp was used.

8. MAG's tax returns would be prepared by its office manager or bookkeeper and submitted to either Kenneth Grossberger or Charles Grossberger for signature. Petitioner undertook no responsibility for reviewing or signing MAG's payroll or its tax returns, nor did petitioner undertake to review the books and records of MAG. Petitioner never exercised any

authority to hire or fire any of MAG's employees.

9. According to petitioner, and to deposition testimony provided by Kenneth Grossberger, petitioner and his group were brought into MAG's business as investors while Kenneth Grossberger and Charles Grossberger were to handle the actual operation of MAG's business. In this regard, petitioner testified as follows:

> It was always the intent of the shareholders that Charles and Kenneth Grossberger would be the actual operators of the entire business and we would be strictly on the basis of helping to finance things and also to help them with any labor problems they had, because we had some experience in that field.

10. Sometime during 1989 MAG came to have financial difficulties, including problems in meeting its sales tax and withholding tax obligations, as a result of slowed collections on its accounts receivable. MAG's board of directors, including petitioner, discussed these problems. Petitioner lent, or contributed, money to MAG at various times when "collections were slow," and he noted that he was repaid in some although not all instances. Petitioner specified that he received nothing back on his investment in MAG from 1985 through 1990 when MAG ceased operations. His return on his investments in MAG between 1977 and 1985, if any, was not specified in the record. Similarly, the actual amounts of petitioner's investments in or loans to MAG are not detailed.

11. The Division of Taxation ("Division") determined that certain sales and withholding taxes had not been remitted by MAG during 1990. As a result, the Division issued the following notices to petitioner:

Notice Number	Tax Year or Period	Type of Tax	Amount [1]

[1]The amount column lists the penalty equal to the amount of unpaid withholding tax for the year 1990 and the amounts of unpaid sales tax for each of the noted sales tax quarterly periods. These listed amounts are exclusive of the amount of interest on the withholding tax penalty, and the amounts of penalty and interest on the unpaid sales tax amounts, which accrued until the dates of payment thereof (***compare*** Finding of Fact "13 " which specifies the

L-007031189-8	Year ended 12/31/90	Withholding	$3,644.28
L-007031160-8	Quarter ended 05/31/90	Sales	$5,002.12
L-007031161-7	Quarter ended 11/30/90	Sales	$9,353.11
L-007031162-6	Quarter ended 02/28/90	Sales	$5,665.20
L-0070311163-5	Quarter ended 08/31/90	Sales	$4,218.56

12. Each of the above described sales tax notices of determination issued to petitioner is dated February 16, 1993 on its face, explains that each such notice was issued to petitioner as an officer or person responsible for taxes owed by MAG, and specifies that "[petitioner] must file the Request for Conciliation Conference or a Petition For A Tax Appeals Hearing by 05/17/93."

13. According to the Division, petitioner failed to file a petition or a request for a conciliation conference within the 90-day period allowed therefor, and that the notices matured to assessments subject to collection. In the case of the sales tax assessments, petitioner's account at the Green Point Savings Bank was levied upon on April 16, 1996 in the amount of $51,153.25, representing the $24,238.99 aggregate amount of MAG's unpaid sales tax for the quarterly periods in issue, plus penalty and interest accrued thereon until the date of the payment by levy. In the case of withholding tax, petitioner paid the sum of $4,858.17 by a check dated May 2, 1996, representing the $3,644.28 amount of the penalty equal to MAG's unpaid withholding tax for the year 1990, plus interest accrued thereon until the date of such payment.

14. Petitioner filed an Application for Refund of Employer's Withholding Tax, seeking a refund of the $4,858.17 amount of withholding tax penalty and interest paid, and an Application for Credit or Refund, seeking a refund of the $51,153.25 amount of sales tax, penalty and interest paid plus interest thereon. Each of these refund applications is dated October 9, 1996, and each included a nearly identical attached statement in support of the refund claims providing, in

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total amounts paid by petitioner).

relevant part, as follows:

> On June 17, 1993 a protest was filed (attached hereto). Although no response denying the protest was issued, collection was enforced . . . .
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> The assessment and collection against the taxpayer of the liability involved was made upon the erroneous basis that the taxpayer was a responsible person for the tax obligations of Mag Investigation & Security Corp., 280 Degraw St., Brooklyn, N.Y. 11231, ID # 13-2848065, when the taxpayer was only a minority shareholder of the corporation and was not permitted to exercise discretion with respect to whom corporate disbursements should be made or in what amount.
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> The same issue was raised by the Internal Revenue Service, which agency, after investigation, determined that the taxpayer was not a responsible person of the corporation (IRS letter attached).

15. The June 17, 1993 protest referred to in the statements attached to petitioner's refund claims appears to be a June 17, 1993 letter to the Division under the letterhead of petitioner's former representative. This letter refers to the underlying notices at issue in this proceeding according to their specific notice numbers and respective periods at issue, and explains that the IRS had ultimately determined that petitioner was not responsible for MAG's federal tax obligations. It is noteworthy that this letter specifically protests "the 'attached notice and demand for payment of tax due,'" as opposed to the sales tax notices of determination or withholding tax notice. [2]

16. The Division denied petitioner's refund claims in full, as set forth in letters dated December 6, 1996 and February 21, 1997. Petitioner, in turn, commenced these proceedings by filing a timely petition challenging the denial of the refund claims and asserting that he was not a person responsible for the collection and remittance of either sales or withholding taxes on behalf of MAG.

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[2]The record does not include the Notice and Demand for Payment of Tax Due referred to as "attached" to the June 17, 1993 letter.

17. In addition to the substantive issue of whether petitioner should be held responsible for the tax, penalties and interest at issue herein, the Division also amended its answer at the commencement of the hearing to raise the issue of whether Tax Law § 1139(former [c]) poses a bar to reaching the substantive merits of petitioner's claim for refund of sales tax paid. More specifically, the Division argues that in this case petitioner failed to file either a petition or a request for a conciliation conference challenging the sales tax notices of determination within 90 days after the February 16, 1993 date on the face of such notices. Accordingly, the Division maintains that such notices thus became fixed and final assessments subject to collection after 90 days from February 16, 1993, that the Division properly collected on the same by bank account levy on April 16, 1996 as described, and that petitioner was barred from filing a claim for refund of such levied amount pursuant to Tax Law § 1139(former [c]). The Division notes that petitioner's only reference to a protest is to the June 17, 1993 letter from his former representative protesting certain notices and demands and that such protest letter is not timely since its date falls more than 90 days after the February 16, 1993 date of the notices of determination. The Division goes on to point out that the language of Tax Law § 1139(former [c]) specifically precludes entitlement to a refund where, under the circumstances alleged here, a taxpayer has failed to timely challenge a sales tax notice of determination. Accordingly, the Division argues that there is a statutory bar to addressing the merits of petitioner's sales tax refund claim.

18. Petitioner, in response, argues that he has not exhausted his administrative remedies, that it would be inequitable to allow the requested amendment to the pleadings to afford the Division an opportunity to raise this timeliness issue at the last moment given that petitioner has been under the belief that his protest (the petition) would be heard on the merits, and that in any

event the statute provides for discretion to hear and decide the matter notwithstanding the lateness of any protest.

CONCLUSIONS OF LAW

A. Treated first is the Division's argument that petitioner's refund claim is barred under the provisions of Tax Law § 1138(former [a][1]) and § 1139(former [c]). Tax Law § 1138(former [a][1]) authorized the Division to issue a notice of determination to the person liable for the collection or payment of sales or use taxes. This section also specified that such determination "shall finally and irrevocably fix the tax" unless the person against whom it is issued files a petition with the Division of Tax Appeals within 90 days after the issuance of the notice seeking revision thereof. As an alternative to filing a petition with the Division of Tax Appeals challenging a notice of determination, a taxpayer was entitled to request a conciliation conference with the Division of Taxation's Bureau of Conciliation and Mediation Services ("BCMS"). However, the time period for filing such a request for a conference was the same as that for filing a petition with the Division of Tax Appeals, to wit, within 90 days after the issuance of the notice (Tax Law § 170[3-a][a]; 20 NYCRR 4000.5[c][4]). It is well settled that the filing of a petition (or a request for a conciliation conference) within the 90-day period is a prerequisite to the jurisdiction of the Division of Tax Appeals (***Matter of Roland***, Tax Appeals Tribunal, February 22, 1996). Thus, under Tax Law § 1138(former [a][1]), when a taxpayer failed to timely file a petition or a request for a conciliation conference, the notice of determination became a fixed and final assessment subject to collection, with no further right to contest the same.

B. The Division is correct in its assertion that Tax Law § 1139(former [c]) precluded entitlement to a refund of sales tax where a notice of determination under Tax Law

§ 1138(former [a][1]) had become a fixed and final assessment for lack of a timely challenge thereto (***see, Matter of Shoreline Oil Co., Inc.***, Tax Appeals Tribunal, April 8, 1993). In this regard, Tax Law § 1139(former [c]), applied such rule by its first sentence, which provided that:

> a person shall not be entitled to a refund or credit under this section of a tax, interest or penalty which had been determined to be due pursuant to the provisions of section eleven hundred thirty-eight [i.e., by the issuance of a statutory notice of determination] where all opportunities for administrative and judicial review as provided in article forty of this chapter have been exhausted with respect to such determination. [3]

C. It is clear that the Division is not precluded from raising the issue of whether there is jurisdiction in this forum to hear the merits of petitioner's sales tax challenge. In this case, the matter has come on by way of petitioner's challenge to the denial of his claim for refund of monies taken by bank account levy in payment of sales tax. However, the underlying issue is whether petitioner had the right to file such a claim for refund in the first place, or whether such a post-payment challenge was precluded because the underlying assessments (the notices of determination) had, as the result of petitioner's failure to have protested within 90 days of their issuance, ripened into fixed and final assessments against which Tax Law § 1139(former [c])

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[3]Tax Law § 1139(former [c]) provided an exception to this general rule prohibiting challenge where certain circumstances were met, as follows:

> However, a person filing with the commissioner of taxation and finance a signed statement in writing, as provided in subdivision (c) of section eleven hundred thirty-eight, *before a determination assessing tax pursuant to subdivision (a) of section eleven hundred thirty-eight is issued,* shall, nevertheless, be entitled to apply for a refund or credit pursuant to subdivisions (a) and (b) of this section, as long as such application is made . . . within two years of the date of payment of the amount assessed in accordance with the consent filed . . . but such application shall be limited to the amount of such payment.

In plain terms, Tax Law § 1138(former [c]) and § 1139(former [c]) allowed a taxpayer to acknowledge and consent to an amount of sales or use tax liability prior to the issuance of a notice of determination, while at the same time preserving the right to challenge any tax so consented to and paid within the two-year period following such payment. In this case there is neither any claim nor any evidence that petitioner consented to a liability before the notices of determination were issued, and thus the quoted exception provision of Tax Law § 1139(former [c]) would not apply.

precluded any further challenges. Stated differently, the question is whether petitioner, by a failure to have filed a petition or a request for a conciliation conference within 90 days of the issuance date of the notices of determination, exhausted his administrative remedies and was therefore faced with a payable, fixed and final sales tax liability. Resolution of this jurisdictional issue turns, therefore, on whether a timely protest was filed against the notices of determination.[4]

D. It is well established that in a case were the timeliness of a protest is at issue, the Division bears the burden of establishing the commencement date for the 90-day protest period specified under Tax Law 1138(a)(1) (***see***, ***Matter of Novar TV & Air Conditioner Sales & Serv.***, Tax Appeals Tribunal, May 23, 1991). Such commencement, or triggering, date is the issuance, i.e., mailing, date of the notice, and the Division bears the burden of proving both the fact and date of mailing (***id.***; ***see Matter of Katz***, Tax Appeals Tribunal, November 14, 1991). In this case, there is no evidence in the record from which to establish the date of issuance, i.e., mailing, of the underlying notices of determination. In turn, with no proof of such issuance, or triggering date, it is not possible to conclude, as the Division asserts in its amended answer, that petitioner did not file either a petition or a request for a conciliation conference in a timely manner, i.e., within 90 days thereafter. It may well be that the underlying notices of determination were in fact issued to

[4] As described, Tax Law § 1139 (former [c]) specifically precluded a taxpayer, who had failed to challenge a notice of determination within 90 days, from paying the amount due and thereafter challenging the liability by filing a claim for refund which, upon denial, could be challenged by a petition contesting such denial. In contrast, current Tax Law § 1138(a)(1), as amended by Laws of 1996 (ch 267) deleted the language in the former statutory provision which finally and irrevocably fixed sales tax determined due when no timely protest was made. As a result of this amendment, the sales tax law is now in the same posture as the income tax law, with both allowing for payment of a liability followed by a claim for refund and a hearing on the merits upon denial of such refund claim. In fact, the Division has raised no jurisdictional challenge to hearing the merits of the withholding tax part of this proceeding (***see***, Tax Law § 687[a]; ***Matter of Rosen***, Tax Appeals Tribunal, July 19, 1990). However, the amendment to Tax Law § 1138(a)(1) was effective July 2, 1996, but was made applicable to taxable years commencing on and after January 1, 1997, as specified in section 3 of Laws of 1996 (ch 267). Consequently, the amendment may not be given retroactive effect to the periods at issue (***see***, McKinney's Cons Law of NY, Book 1, Statutes § 51[b]).

petitioner on February 16, 1993, the date on their faces. However, with no proof of this fact, it is equally possible that the notices were not so issued, or were not in fact delivered to petitioner and that petitioner's first notice occurred via the referenced notices and demands. In any event, the Division has not introduced evidence of the date or fact of the mailing of the notices of determination, and therefore has not established the triggering date from which the timeliness of a protest would be measured. Accordingly, it is not possible to conclude that there was no timely protest, that the notices of determination ripened into fixed and final assessments, and that petitioner as a result was precluded from challenging the collection and payment by levy of such assessments. In sum, the Division's assertion that there is a jurisdictional bar to hearing the sales tax portion of this case and deciding the same on the merits is rejected.

E. Having disposed of the jurisdictional issue leaves for resolution petitioner's potential liability for unpaid sales and use taxes, and attendant penalty, as well as his potential liability for a penalty equal to the unpaid withholding taxes owed by MAG.[5] The relevant statutory bases and case law from which such exposure to liability arises will be presented first.

F. With regard to sales and use taxes, 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. . . ."

Tax Law § 1131(former [1]), in turn, defined "persons required to collect tax" and a "person required to collect any tax imposed by this article [Article 28]" to include any officer or employee of a corporation who, as such officer or employee, is "under a duty to act for such corporation in complying with any requirement of [Article 28]."

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[5]As noted, the amounts in question have been collected by means of levy, and thus this matter involves a refund of the amounts so collected.

G. The mere holding of 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*** 214 AD2d 857, 625 NYS2d 343, ***lv denied*** 86 NY2d 705, 632 NYS2d 498). Rather, whether a person is an officer or employee liable for tax 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; ***Stacey 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 to be considered, as set forth in the Commissioner's regulations, include 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]). As summarized in ***Matter of Constantino*** (Tax Appeals Tribunal, September 27, 1990):

> [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 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 at 865; ***Chevlowe v. Koerner***, ***supra***, 407 NYS2d at 429; ***Matter of William D. Barton***, [Tax Appeals Tribunal, July 20, 1989]; ***Matter of William F. Martin***, ***supra***; ***Matter of Autex***, ***supra***).

H. With regard to the withholding tax penalty asserted against petitioner, Tax Law § 685(g) provides:

> Willful failure to collect or pay over tax.--Any person required to collect, truthfully account for, and pay over the tax imposed by this article who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat the tax or the payments thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

Tax Law § 685(n), in turn, furnishes the following definition of "persons" subject to the section 685(g) penalty:

> The term person includes an individual, corporation or partnership or an officer or employee of any corporation (including a dissolved corporation), or a member or employee of any partnership, who as such officer, employee or member is under a duty to perform the act in respect of which the violation occurs.

I. The question of whether someone is a "person" under a duty to collect and pay over withholding taxes is a factual one, similar in scope and analysis to the question of whether one is a responsible individual for sales and use tax purposes. Factors which should be considered are, *inter alia*, whether the particular individual signed tax returns, derived a substantial part of his income from the corporation, or had the right to hire and fire employees (***Matter of Malkin v. Tully***, 65 AD2d 228, 412 NYS2d 492, 494, ***affd*** 49 NY2d 920, 428 NYS2d 675). Other pertinent areas of inquiry include the person's official duties, the amount of corporation stock he owned, and his authority to pay corporate obligations (***Matter of Amengual v. State Tax Commn.***, 95 AD2d 949, 464 NYS2d 272,273; ***see, Matter of McHugh v. State Tax Commn.***, 70 AD2d 987, 417 NYS2d 799, 801).

J. Summarized in terms of a general proposition, the issue 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 person under a duty to collect and remit the unpaid taxes in

question (***Matter of Constantino, supra; Matter of Chin***, Tax Appeals Tribunal, December 20, 1990). In addition, with respect to withholding tax, and unlike the sales and use tax situation, if petitioner is held to be a person under a duty as described, it must then be decided whether his failure to withhold and pay over such taxes was willful. The question of willfulness is related directly to the question of whether petitioner was a person under a duty, since clearly a person under a duty to collect and pay over the taxes is the one who can consciously and voluntarily decide not to do so. However, merely because one is determined to be a person under a duty, it does not automatically follow that a failure to withhold and pay over income taxes is "willful" within the meaning of that term as used in Tax Law § 685(g). As the Court of Appeals indicated in ***Matter of Levin v. Gallman*** (42 NY2d 32, 396 NYS2d 623), the test is:

> [w]hether the act, default, or conduct is consciously and voluntarily done with knowledge that as a result, trust funds belonging to the Government will not be paid over but will be used for other purposes . . . . No showing of intent to deprive the Government of its money is necessary but only something more than accidental non-payment is required (***id***., 396 NYS2d at 624-625; ***see***, ***Matter of Lyon***, Tax Appeals Tribunal, June 3, 1988).

Finally, "corporate officials responsible as fiduciaries for tax revenues cannot absolve themselves merely by disregarding their duty and leaving it for someone else to discharge" (***Matter of Ragonese v. State Tax Commn.***, 88 AD2d 707, 451 NYS2d 301).

K. Upon review of the entire record, it becomes clear that petitioner was properly held responsible for the sales and withholding tax obligations of MAG. The principle argument against responsibility advanced by petitioner is that he was simply a passive investor who had nothing to do with the daily operations of MAG's business and had no authority over such operations. However, in order to prevail in this case, "petitioner was required to establish by clear and convincing evidence that he was not an officer having a duty to act on behalf of the

corporation, i.e., that he lacked the necessary authority or he had the necessary authority, but he was thwarted by others in carrying out his corporate duties through no fault of his own (citations omitted)" (***Matter of Goodfriend***, Tax Appeals Tribunal, January 15, 1998). Neither of these circumstances accurately describes the facts of this case.

L. It is true that the timing under which petitioner, his brother, and Ralph Larkin were brought into MAG, that is within two years after the Grossbergers formed MAG, might in isolation lend some strength to petitioner's position that he came into MAG only as a passive investor. However, notwithstanding that a primary purpose for petitioner coming into MAG may have been for his ability or willingness to infuse capital, petitioner was more than merely a totally uninvolved passive investor. First, petitioner was a MAG shareholder and, while he was a minority shareholder, so too were all of MAG's other shareholders (***see***, Finding of Fact "2"). Specifically, each of the Grossbergers owned 45 shares; petitioner, his brother, and Ralph Larkin each owned 30 shares; and thus each of the identified shareholder groups (the Grossberger group and the Wendel group) together held exactly one-half of MAG's issued and outstanding shares of stock. Thus, none of MAG's shareholders could, either individually or as a group as set forth in the shareholders' agreement, unilaterally override the other shareholders so as to control the corporation. Carried to its logical extreme, petitioner's argument that he had no responsibility simply because of his minority shareholder status could be applied equally to any of MAG's shareholders, so as to leave no one in a position of authority or responsibility.

In addition to being a shareholder, petitioner was a member of MAG's board of directors, and held the office of MAG's vice-president and treasurer. It is clear that the shareholders' agreement was structured so as to maintain a balance of power between the two groups of shareholders, the Grossbergers and petitioner's group. Thus, while petitioner may not have

undertaken direct involvement in the daily operational aspects of MAG's business, he had no less actual ability or power than the Grossbergers to be involved. Rather, it seems that the business was simply structured such that the Grossbergers, who held the requisite licenses, would oversee the security provision part of the business, with petitioner providing financing, apparently as needed, and providing general business advice, as well as specific advice in labor relations and union matters, as needed.

M. Petitioner also argues that he did not physically sign payroll or other checks, and was not necessarily apprised of any instances when his signature stamp was used to affix his signature to such checks in accordance with the two-signature requirement of the shareholders' agreement. However, the authorized use of a stamped signature rather than a handwritten signature is no bar to potential liability (***see, Lorenzo v. Rivera***, 504 NYS2d 955), and it is undisputed that petitioner authorized the creation and general use of a stamp bearing his signature. In fact, petitioner explained that the use of a stamp was necessary because he was not available to sign as frequently as was needed. It follows, then, that if circumstances had allowed, petitioner simply would have physically signed MAG's checks and other documents as required.

In addition to the foregoing, petitioner was in contact with the other shareholders of MAG as to ongoing business matters and was made aware of the corporation's difficulties in meeting its payment obligations including, specifically, its sales tax and withholding tax obligations. Petitioner continued to advance monies to MAG, apparently in the form of loans which were not, in all cases, repaid. In sum, while the Grossbergers were the shareholders with the background of experience and the requisite licenses to carry out the ongoing daily operations of MAG's security business, petitioner was not simply an uninvolved passive investor. Instead, petitioner was a shareholder and officer of MAG, had at least an ongoing knowledge of the status

of MAG's finances and its business, was involved in advising MAG in general and specifically as to labor relations issues, and advanced monies to MAG when needed. The shareholders' agreement placed no restrictions on petitioner's ability or authority to inspect the corporate books and records, and was drafted to include a two-signature requirement and other language aimed at protecting the two shareholder groups. All of these factors, taken together, constitute more than mere passive investment in a business concern, and it would be an oversimplification to conclude that such was petitioner's only involvement.

N. Petitioner argues that his involvement with MAG was limited to his investment and to a few instances of providing advice, specifically with regard to labor relations issues, and points to others in the corporation who were responsible officers. Even if the Grossbergers were responsible, the same would not excuse petitioner from responsibility, for liability with respect to sales taxes, as well as unpaid withholding taxes, is joint and several (***see, Matter of Phillips***, Tax Appeals Tribunal, May 11, 1995; Tax Law §§ 685[g], 1133[a]). Similarly, the fact that the IRS concluded that petitioner was not a responsible person with regard to MAG's unpaid Federal withholding taxes is not binding or dispositive in this proceeding (***Matter of Volpe***, Tax Appeals Tribunal, September 15, 1988) In sum, petitioner had the ability to be less involved in MAG's daily security operations and chose to be less involved. However, he had no less actual authority over the affairs of MAG than any of the other shareholders, he was neither unaware of nor misled about MAG's business condition, and there is no evidence that he was in any manner restricted, limited or precluded, other than by the manner in which the parties chose to organize and operate the business, from being involved in MAG's affairs. Petitioner had knowledge of the corporation's financial condition including, specifically, the problems with collections of receivables and payment of sales and withholding taxes (***Matter of Risoli v. Commissioner of***

Taxation and Finance, 237 AD2d 675, 654 NYS2d 218). Simply put, the record does not support the conclusion that petitioner did not have or could not have exercised sufficient authority and control over corporate affairs (***see, Matter of Harshad Shah***, Tax Appeals Tribunal, February 25, 1999). Accordingly, petitioner was properly held responsible for MAG's sales and withholding tax payment obligations, including the penalty imposed with regard to MAG's nonpayment of sales taxes for the quarterly periods in issue.

O. The petition of Arthur Wendel is hereby denied and the denials of petitioner's refund claims are sustained.

DATED: Troy, New York
April 22, 1999

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE