

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PHILIP J. PRIANTI	:	
	:	DETERMINATION
	:	DTA NO. 818144
for Revision of Determinations or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Periods March 1, 1985 through May 31, 1985	:	
and December 1, 1985 through February 28, 1987.	:	

Petitioner, Philip J. Prianti, 1831 Coleman Street, Brooklyn, New York 11234, 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 periods March 1, 1985 through May 31, 1985 and December 1, 1985 through February 28, 1987.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on May 3, 2001 at 10:30 A.M., with all briefs to be submitted by August 6, 2001, which date began the six-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Barbara G. Billet, Esq. (Andrew S. Haber, Esq., of counsel).

ISSUE

Whether petitioner was a person responsible for the collection and payment of sales and use taxes on behalf of Di Franco Gifts, Ltd. within the meaning and intent of Tax Law §§ 1131(1) and 1133(a) and is, therefore, personally liable for payment of the taxes, penalties and interest due from the corporation.

FINDINGS OF FACT

1. For each of the sales tax quarters ended May 31, 1985, February 28, 1986, May 31, 1986, August 31, 1986 and November 30, 1986, Di Franco Gifts, Ltd. ("Di Franco") filed sales and use tax returns without remitting the tax due. The return for the quarter ended May 31, 1985 bore the signature of Helen Sullivan, manager of Di Franco. The return for the quarter ended February 28, 1986 was unsigned. The other three returns bore a signature purporting to be that of Philip Prianti ("petitioner"). On the "Title" line of each of the returns, underneath the signature line, "President" was hand-printed. On the return signed by Helen Sullivan, the title "President" was crossed out; the title remained on each of the other returns including the unsigned return for the quarter ended February 28, 1986.

2. On May 20, 1987, the Division of Taxation ("Division") issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner which assessed tax due in the amount of \$31,523.70, plus penalty and interest, for a total amount due of \$42,148.31 for the periods March 1, 1985 through May 31, 1985 and December 1, 1985 through November 30, 1986. The notice explained that petitioner was being held liable individually and as an officer of Di Franco for the taxes assessed pursuant to Tax Law §§ 1131(1) and 1133.

For the periods December 1, 1985 through November 30, 1986 (four sales tax quarters), the amounts of tax assessed were the amounts reported (but not remitted) by Di Franco on its sales tax returns filed for each of these quarters. For the period March 1, 1985 through May 31, 1985, the amount of tax assessed (\$4,765.47) was less than the amount reported on Di Franco's return for that sales tax quarter (\$5,180.59); the discrepancy resulted from an offset of a personal income tax refund of petitioner in the amount of \$415.12 which the Division applied to the tax due for this quarter.

3. On May 20 , 1987, the Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner which assessed tax in the amount of \$15,633.47, plus penalty and interest, for a total amount due of \$17,941.22 for the period December 1, 1986 through February 28, 1987. At the hearing, the Division's representative stated that "the Division of Taxation is not asserting its claim for the quarter ending February of 1987." Therefore, this notice is hereby canceled.

4. Di Franco's Certificate of Incorporation was filed with the State of New York Department of State on November 4, 1981. The incorporator was Ronald Webster.

5. In May 1982, petitioner and Ronald Webster entered into a written agreement ("the Agreement") which provided that Ronald Webster would be the recipient of 95 of the 100 shares of common stock of Di Franco; petitioner would own the remaining 5 shares (the Agreement provided petitioner with options to acquire up to 20 additional shares from Mr. Webster).

Pursuant to the Agreement, both Ronald Webster and petitioner were directors of Di Franco; Ronald Webster was Chairman of the Board and President while petitioner was Secretary/Treasurer. The name "Di Franco" was the maiden name of petitioner's mother.

6. Helen Sullivan, a manager whose duties included preparation of the payroll, worked for Di Franco from its inception. She considered both Ronald Webster and petitioner to be her bosses. Petitioner had the authority to hire and fire employees and also signed checks on behalf of Di Franco.

7. Thomas Rufino was a salesman for Di Franco during the years 1985 until 1987 when the store closed. He considered both Ronald Webster and petitioner to be his bosses.

8. Ronald Webster was an executive vice president of an import company and, therefore, worked at DiFranco at night and on weekends. Mr. Webster provided all of the money to start the business and petitioner was to devote his full-time attention to running the business.

SUMMARY OF PETITIONER'S POSITION

9. In a letter, submitted by petitioner on August 10, 2001, in lieu of a reply brief, petitioner admits that he was a shareholder of Di Franco, was involved in the day-to-day management of the business with the ability to hire and fire employees and to sign checks. He contends, however, that the signatures on the sales and use tax returns filed for the periods at issue were not his. He also maintains that the president of the corporation, Ronald Webster, is responsible for sales and use taxes owed.

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. . . ."

Tax Law former § 1131(1), in turn, defined "persons required to collect tax" and a "person required to collect any tax imposed by [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]."

B. 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; *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*).

C. Petitioner was a director, officer and shareholder of Di Franco. Admittedly, he was involved in the day-to-day management of the business and had the ability to hire and fire employees and to sign checks. Apparently, it is petitioner's position that Ronald Webster, as president and majority shareholder, was responsible for the sales and use tax liability of the business.

In *Matter of Hurley* (Tax Appeals Tribunal, July 16, 1998), the Tribunal noted that more than one person can be held as a responsible officer. The Tribunal stated that “merely pointing to others and alleging that such individuals are the true responsible officers does not necessarily establish that petitioner is not a responsible officer as well.”

In the present matter, while it is conceivable that Ronald Webster may also have been found to have been a responsible officer of Di Franco, that fact does not relieve petitioner of his status as well.

D. The petition of Philip J. Prianti is granted to the extent indicated in Finding of Fact “3”; the Division of Taxation is hereby directed to cancel the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 20, 1987; but except as so granted, the petition is in all other respects denied.

DATED: Troy, New York
January 3, 2002

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE