STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
WILLIAM C. BALBACH	:	DETERMINATION DTA NO. 818303
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, 1992 through November 30, 1995.	:	

Petitioner, William C. Balbach, 18 Rose Lane, North Merrick, New York 11566, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1992 through November 30, 1995.

A small claims hearing was held before Dennis M. Galliher, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on July 15, 2002 at 1:15 P.M., which date began the three-month period for the issuance of this determination. Petitioner appeared by S. Buxbaum and Company (Stewart Buxbaum, CPA, of counsel). The Division of Taxation appeared by Barbara G. Billet, Esq. (Dennis Simmons).

ISSUES

I. Whether the Division of Taxation properly and timely issued a notice of determination assessing additional sales and use tax due from petitioner with respect to his activities on behalf of an entity known as Hunter Real Estate Management Corporation.

II. Whether, if so, petitioner had sufficient involvement in and control over the activities of Hunter Real Estate Management Corporation to be considered a person responsible to collect

and remit sales and use taxes on behalf of such entity pursuant to Tax Law §§ 1131(1) and 1133(a).

FINDINGS OF FACT

1. On February 1, 1999, the Division of Tax Appeals received a petition from William C. Balbach ("petitioner"). This petition (the "original petition"), hand-dated January 27, 1999, challenged three separate assessments of sales and use taxes against petitioner as a person responsible for the sales and use tax obligations of three separate entities, to wit, Hunter Real Estate Construction Corp. ("Construction"), Hunter Real Estate Management Corp. ("Management"), and Tricom Management Corp. ("Tricom"). The petition alleged that petitioner was not a person responsible for the tax obligations of the named entities, and also alleged that he never received any notices of determination with respect to the assessments listed in the petition, but rather only became aware of the assessments as the result of collection proceedings undertaken by the Division of Taxation ("Division").

2. The above-described petition included three tax warrants against petitioner (one for each of the three entities named above). Each warrant, addressed to petitioner at 18 Rose Lane, Merrick, New York, 11566-1700, lists a "docketed date" of January 7, 1999. Petitioner noted that the warrants, rather than the notices of determination, were included with his petition since he never received the notices.

3. The Division filed an answer to this petition, dated April 8, 1999, alleging that the notices of determination had been issued to petitioner on March 17, 1998 (regarding Construction), April 24, 1998 (regarding Management), and May 26, 1998 (regarding Tricom). The Division further alleged that since the petition was not received (i.e., filed) until February 1, 1999, which is more than 90 days after the alleged issuance dates for the three notices, the

petition was untimely. Hence the Division requested that a hearing be held only on the issue of the timeliness of the petition, that the petition be denied, and the notices sustained. The record includes copies of the three notices of determination, apparently furnished to petitioner at the time the answer to his petition was filed (i.e., on or about April 8, 1999). The respective alleged issuance dates of the notices of determination, as specified above, appear on the upper right corner of each such notice. Each notice is addressed to petitioner at 1981 Marcus Ave., Lake Success, New York, 11042-1038. The assessments in question result from a Division audit of the three entities, and each notice asserts that petitioner was being assessed as an officer or person responsible for the taxes determined due from such entities, per Tax Law §§ 1138(a), 1131(1) and 1133.

4. On December 22, 1999, petitioner and the Division, by their respective representatives, executed a Stipulation for Discontinuance of Proceeding and Referral of Proceeding to Bureau of Conciliation and Mediation Services ("Stipulation"). By this Stipulation, the parties agreed that the petition would be deemed a Request for a Conference in the Division's Bureau of Conciliation and Mediation Services ("BCMS"), without prejudice to petitioner's right to file a petition with the Division of Tax Appeals in the event the matter was not finally resolved through the conciliation process.

5. On December 15, 2000, BCMS Conciliation Order No. 179841 was issued. This Order partially resolved the matter by canceling in full the assessments against petitioner pertaining to Construction and Tricom. However, the Order sustained the assessment against petitioner pertaining to Management. This Order, as well as the Notice of Determination pertaining to Management, lists the amount of tax assessed as $32,193.57 excluding interest thereon. The

period covered by this Notice involves the 12 sales tax quarterly periods spanning December 1, 1992 through November 30, 1995.

6. Petitioner continued his challenge against the only remaining assessment, that pertaining to Management, by filing a petition with the Division of Tax Appeals. This petition, hand-dated January 23, 2001 and received by the Division of Tax Appeals on January 26, 2001, again stated the allegation that petitioner was not a person responsible for the tax obligations of Management. Petitioner also continued to claim that the notice should be canceled since he never received a copy thereof (prior to receiving the Division's answer), but rather only became aware of the assessment as the result of collection proceedings (apparently the warrants) initiated against him. Petitioner's allegation centers on the claim that the notice was mailed to an incorrect address, to wit, to Management's business address where petitioner formerly worked (i.e., 1981 Marcus Ave., Lake Success, NY 11042-1038) rather than to petitioner's home address (i.e., 18 Rose Lane, Merrick, NY 11566-1700). Ultimately, petitioner maintains that the assessments were not properly issued to him or received by him within the requisite period of limitations on assessment.[1]

7. By a letter dated March 4, 2002, the Division advised petitioner that it would further reduce the assessment in question by eliminating six of the twelve quarterly periods covered thereunder. The six periods eliminated are those spanning June 1, 1993 through November 30, 1994. This reduction is based on the Division's admission that even if the Notice of Determination was issued on April 24, 1998 (as the Division asserts it was), the three-year

---

[1] On January 28, 1998, Ann Feldman, executed a consent by which Management agreed that the amount of tax at issue was in fact correct. Petitioner, for his part, does not challenge the audit basis upon which tax was found to be due from Management, or the computation or resulting dollar amount thereof. Rather, petitioner only challenges the assessment of such tax against him on the dual grounds that 1) he was never properly and timely notified of the liability as required under the Tax Law and 2) he was not a person responsible to collect and remit sales and use taxes on behalf of Management.

period of limitations on assessment for such six quarterly periods ended prior to such date. The Division, however, continues to assert that the balance of the Notice is valid. Specifically, the Division maintains that the earliest two quarterly periods, spanning December 1, 1992 through May 31, 1993, remain valid since no sales tax returns were filed for Management for such periods, and that the remaining four quarterly periods, spanning December 1, 1994 through November 30, 1995, remain valid since a notice issued on April 24, 1998 falls within the three-year period of limitations on assessment.

8. In connection with the audit of Management, a consent extending the period of limitations on assessment was executed, by Ann Feldman on behalf of Management, pursuant to which sales and use taxes could be assessed against the corporation for the period January 1, 1993 through November 30, 1995 at any time on or before June 20, 1998. The record contains no such consent extending the period of limitations on assessment with respect to petitioner.

9. One hundred percent of the stock of Management was owned by Ann Feldman. Mrs. Feldman's husband, Lewis Feldman, was not a shareholder of Management, allegedly due to creditor judgement issues against him arising from prior business activities. For the same reason, he was not a signatory on Management's bank accounts, However, Lewis Feldman was portrayed by petitioner as the person ultimately in charge of Management.[2]

10. Petitioner became employed by Management through his prior employment with Lewis Feldman's father, Irving Feldman. Petitioner held the title of Management's chief financial officer. His is also listed under the title of treasurer on other documents, including

[2] Each of the three entities originally assessed were owned by the same two principals, were engaged in the same general business of managing office buildings, and it appears that petitioner carried out the same activities with respect to each of such entities. To simplify reading, and since only the assessment against Management remains in issue, specific references to the other entities will not be made unless required for clarity.

powers of attorney he executed in connection with the subject audit. Petitioner explained that he became an officer of Management, to wit, its treasurer, when he was told that Lewis Feldman could not be an officer (ostensibly due to the judgement creditor issues as noted above), that two officers were needed, and that petitioner would be the other officer in addition to Ann Feldman. Petitioner owned no stock, or stock options with respect to Management, but rather was compensated by wages. Forms W-2 indicate petitioner's wage compensation from Management as $179,638.00 for 1996, and as $160,596.00 for 1997.

11. Petitioner's employment duties may best be described as overseeing all of the financial and operational aspects associated with the ownership of three large office buildings (each of the three buildings contained approximately 330,000 or more square feet of space). These duties included negotiating the refinancing or restructuring of the mortgages or other financing underlying the buildings, overseeing the fiscal operations of the buildings including the inflow and outflow of revenues, and the like. The actual physical aspects of operating the buildings, including construction of tenant improvements in connection with leasing the space, was apparently handled by crews of workers overseen by one or more foremen, who reported to petitioner. Petitioner, in turn, reported to Lewis Feldman. Petitioner was also involved on an ongoing basis with investigating new opportunities to purchase or develop additional real properties for the Feldmans (Irving and Lewis Feldman).

12. Petitioner was authorized to sign Management's checks and he did so, including payroll checks and other checks. He noted that many items, such as payroll, utilities, real estate taxes, and the like, were recurring in nature and amount, and that such items were handled as routine matters. He kept Lewis Feldman apprised of such payments on an ongoing basis, but noted that no specific steps authorizing such payments by Mr. Feldman were required unless

there was some aberration in amount or timing. Petitioner was in contact with Mr. Feldman regarding general business matters a few times a day, and also drafted periodic memos to Mr. Feldman regarding the ongoing status of business matters. One such memo, offered in evidence, conveys information concerning a number of ongoing business (cash and budget) matters, a review of steps previously taken by petitioner with respect thereto, advice on how to proceed with such matters, as well as requests for permission to carry out certain of the recommendations.

13. Petitioner would recommend staffing levels in the administration, accounting and secretarial areas, and would interview candidates for employment in these areas. He would then make his hiring recommendations to Lewis Feldman who would, it appears, typically approve of such recommendations. Employment staffing levels in other areas were recommended to petitioner by the foreman for that area (e.g., construction) as were the candidates for employment, and petitioner would in turn make such recommendations to Lewis Feldman. Again, the sense is that approval was typically given. Petitioner could not recall firing any employees, other than one instance in which Lewis Feldman wished to terminate his assistant, but assigned petitioner the task of carrying out the termination. Petitioner appears to have essentially run the ongoing aspects of the business, subject to an obligation to report to Mr. Feldman so as to keep him apprised of such ongoing business operations and to secure his approval on matters which were out of the ordinary.

14. In connection with the audits which resulted in the assessments against petitioner, including that pertaining to Management, petitioner signed an Officer Questionnaire. This document is designed to glean information about the role carried out by corporate officers within a corporation. In this case, the Officer Questionnaire indicates that petitioner was listed on

corporate resolutions filed with the corporation's bank, was listed on its bank cards, had check signing capabilities and signed checks, and had the ability to hire and fire employees. The form indicates that petitioner did not sign corporation tax returns or sales tax returns. The form states petitioner's responsibilities as "full involvement in all business operations," "full knowledge of all financial affairs," "[signed checks in the] ordinary course of business," and "[was a] salaried employee only."

15. In addition, and as particularly relevant to this proceeding, the Officer Questionnaire form carries a line for the officer to provide his "HOME ADDRESS." On the form signed by petitioner, the "home" address listed is "1981 Marcus Avenue, Lake Success, NY 11042." Petitioner's signature appears at the base of this form, together with the date May 18, 1995. The information on the form is typewritten, and according to petitioner, the form would have been completed by a secretary or by his assistant, and then given to him for his signature.

16. In contrast to the foregoing, it is undisputed that petitioner's home address before, during and after the periods in issue, as shown on his personal income tax returns and as appearing on page two of the March 13, 1998 audit report generated in this matter, is 18 Rose Lane, North Merrick, New York 11566.

17. A one-page computer printout, entitled "CARTS-Taxpayer and Employee Notification-Case Contact Inquiry," submitted by the Division, pertaining to the assessment at issue (L-014796494) and listing the taxpayer's name as "Balbach-William C," indicates the following:

CONTACT DESCRIPTION: NIXIE MAIL RETURNED

COMMENTS: 1981 MARCUS AV, LAKE SUCCESS, NY 11042. "ATTEMPTED NOT KNOWN"

CONCLUSIONS OF LAW

A. During the time periods at issue, Tax Law § 1138(a)(1) provided, in part, as follows:

> If a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the commissioner of taxation and finance from such information as may be available . . . Notice of such determination shall be given to the person liable for the collection or payment of the tax.[3]

Tax Law § 1147(a)(1) provides:

> Any notice authorized or required under the provisions of [Article 28] may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person *at the address given in the last return filed by him pursuant to the provisions of this article or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable*. A notice of determination shall be mailed promptly by registered or certified mail. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this article by the giving of notice shall commence to run from the date of mailing of such notice. (Emphasis added).

B. The foregoing provisions of the Tax Law were construed by the Appellate Division in ***Matter of Ruggerite, Inc. v. State Tax Commn***. (97 AD2d 634, 468 NYS2d 945, ***affd*** 64 NY2d 688, 485 NYS2d 517). The Court held that the proper mailing of a notice of determination to a taxpayer at his or her last known address creates a presumption of receipt which may be rebutted with proof that the notice was never received. Where the presumption of receipt is successfully rebutted, the 90-day time period for requesting a conference in the BCMS or a hearing under section 1138 of the Tax Law is not triggered, and a petitioner is entitled to a conference or a hearing (***Matter of Ruggerite, Inc. v. State Tax Commn, supra; Matter of Karolight, Ltd.***, Tax

---

[3] Tax Law § 1138(a)(1) has since been amended and now provides for the mailing, rather than the giving, of notice to persons liable for collection or payment of the tax at that person's last known address; in addition, such a notice becomes a fixed and final assessment unless a petition is filed within 90 days (L 1996, ch 267 §§ 1,3; applicable to tax years commencing on or after January 1, 1997). Thus, the presumption of receipt contained in Tax Law § 1147(a)(1) is now irrebuttable.

Appeals Tribunal, February 8, 1990). In addition, where it cannot be established that notice was given prior to expiration of the period of limitations on assessment, the assessment must be canceled as untimely. (***Id***.)

C. Petitioner has claimed that he did not receive the notice, at least not until the Division's answer was filed on April 8, 1999, with copies of the notices furnished to petitioner in connection therewith (***see*** Finding of Fact "3"). In this regard, petitioner has challenged the propriety of the address listed on the face of the notice (i.e., 1981 Marcus Ave., Lake Success, NY), claiming that the Division knew such address was not petitioner's home address (18 Rose Lane, North Merrick, NY), that the Division was required to mail the notice to his home address rather than to the address of the business for whose taxes petitioner was being held responsible, and that the notice was therefore improperly issued to an incorrect address and should be canceled.

D. The Division bears the burden of going forward to establish that it properly mailed the Notice to petitioner pursuant to Tax Law § 1147(a)(1) (***see Matter of Malpica***, Tax Appeals Tribunal, July 19, 1990). The evidence required of the Division consists of that which establishes (1) the standard procedure for the issuance of such notices by one with knowledge of such procedure, and (2) that such mailing procedure was followed in the particular case at hand (***see Matter of Katz***, Tax Appeals Tribunal, November 14, 1991; ***Matter of Novar TV & Air Conditioner Sales & Serv.***, Tax Appeals Tribunal, May 23, 1991).

E. First, petitioner's claim that the Division used an incorrect address on the notice is rejected. It is true that, as a general proposition, the Division is obligated to mail a notice assessing tax against a responsible person to that person's home address, as opposed to the address of the business for which the allegedly responsible person worked (***see, Matter of***

Nelloquet Restaurant, Inc., Tax Appeals Tribunal, March 14, 1996). However, this requirement must be modified where a taxpayer specifically advises the Division of a different address. In this case, and in connection with this audit, petitioner specified his home address as 1981 Marcus Ave., Lake Success, NY, the address of the business. This specific address was listed on the Officer Questionnaire, a document completed in connection with the audit and directly geared to obtaining information, including address information, about those who might be held responsible for the taxes of a given business. Petitioner provided this address, and cannot now complain or logically justify the position that his actual home address is a "better" address than that given in the Officer Questionnaire. While the Division admittedly had other information listing petitioner's home address as 18 Rose Lane, including income tax returns, petitioner nonetheless specified the 1981 Marcus Ave. address on the sales tax audit Officer Questionnaire, and this form and its address clearly must take precedence over such other information. The Division is entitled to reasonably rely, as it did here, on such a specific address as was given by a taxpayer for purposes of issuing officer liability notices, at least until such time as a taxpayer (such as petitioner) advises the Division that such address should be changed (***see Matter of Brager***, Tax Appeals Tribunal, May 23, 1996). Although the Officer Questionnaire form may have been physically completed (typed) by an assistant to petitioner, he nonetheless signed the form, must be held to its contents, and cannot reasonably disavow the same for lack of careful reading thereof. In fact, the Division's use of an address different from that specified by petitioner in the Officer Questionnaire, including the 18 Rose Lane address, would have provided strong grounds for an argument by petitioner that the notice was not properly addressed per Tax Law § 1147(a)(1) (***Matter of Service Merchandise Company***, Tax Appeals Tribunal, January 14, 1999). In sum, the use of Management's address on the Notice of Determination, as specified by

petitioner in the Officer Questionnaire, rather than the use of petitioner's home address was, under the circumstances of this case, proper.

F. Having concluded that the Notice was not flawed for lack of a proper address does not resolve the notice issue in this case, since petitioner has claimed that he never received the notice at any time prior to the filing of the Division's answer on April 8, 1999. It is well established that when proper mailing of a notice is established by the Division, it is presumed that the notice is received by the taxpayer, and mere denial of receipt is not sufficient to rebut the presumption of receipt. In this case, while the notice was properly addressed, as concluded above, the Division has submitted no evidence to establish that the notice was mailed on April 24, 1998 as claimed (***see*** Finding of Fact "3"). In fact, while petitioner specifically challenged the receipt of the notice, the record contains no evidence to establish when the notice was mailed. Moreover, the Division's own Exhibit "Q", pertaining to the assessment in question as identified thereon by the assessment ID number and by petitioner's name, reveals that the notice, addressed to petitioner at 1981 Marcus Ave, Lake Success, NY was not delivered but rather was returned (***see*** Finding of Fact "17"). While this evidence indicates that the notice was in fact mailed to petitioner, it not only contains no indication of the date of mailing but, more importantly, also serves to directly rebut the presumed delivery of the notice to petitioner. Ultimately, the record contains no evidence as to the date on which the notice was initially mailed. Further, although the evidence establishes that the notice was returned to the Division, thus rebutting the presumption of delivery to petitioner, there is no evidence nor any claim that any attempt to re-mail the notice was undertaken by the Division at any time, notwithstanding the Division's knowledge of petitioner's actual home address at 18 Rose Lane.

G. The evidence shows that the earliest point in time that petitioner admitted actually receiving the Notice of Determination was on April 8, 1999, with the filing of the Division's answer (***see*** Finding of Fact "3"). The earliest date by which petitioner admitted receiving notice of an assessment at all was upon the commencement of collection proceedings, in response to which the original petition in this matter was filed on February 1, 1999 (***see*** Finding of Fact "1"). Such collection proceedings would have commenced, at the earliest, some 90 days after the alleged April 28, 1998 issuance date of the Notice in issue, to wit, on July 27, 1998 when the Notice would have ripened into a fixed and final assessment pursuant to Tax Law former § 1138(a)(1) and Tax Law § 1141. In fact, the warrant docketed date of January 7, 1999 falls well beyond such July 27, 1998 date and much closer in time to the dates on which the original petition and answer thereto were filed (i.e., February 1, 1999 and April 8, 1999, respectively). None of the evidence in the record establishes that the Notice of Determination or any other notice of the assessment was actually given to or received by petitioner within the time period for which an assessment could have been timely made with respect to the four quarterly periods at issue spanning December 1, 1994 through November 30, 1995 (***see*** Tax Law § 1147[a][1]). Accordingly, the portion of the assessment against petitioner relating to such four quarterly periods must be canceled. Such cancellation, in turn, leaves only the two earliest quarterly periods, spanning December 1, 1992 through May 31, 1993 at issue on the merits of whether petitioner should be held responsible for the unpaid sales and use tax owed by Management.[4]

---

[4] While such earliest periods would likewise appear to be barred by the period of limitations on assessment in the same manner as the other four quarters, petitioner has not challenged the Division in its assertion that no returns were filed by Management for such two earliest quarterly periods. Further, it is clear that petitioner has received actual notice of the assessment for such two quarterly periods. With no returns filed for such periods, there is no limitations bar on issuing an assessment for such quarterly periods (***see*** Tax Law §1147[b]), nor any impediment to addressing petitioner's liability therefor in this forum. Significantly, with respect to the issue of the statute of limitations on assessment, the Division made no such assertion that returns were not filed for the other four quarterly periods covered under the Notice. It is also noteworthy that while a consent extending the period of

H. The remaining issue in this case thus concerns petitioners's liability for unpaid sales and use taxes owed by Management for the two earliest quarterly periods. Exposure to such liability arises under Tax Law § 1133(a), which states that:

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

Tax Law § 1131(1), in turn, defines "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]."

I. 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

---

limitations on assessment was executed on behalf of the corporation Management, allowing assessment on or before June 20, 1998 (***see*** Finding of Fact "8"), such a consent would have no impact in extending the period of limitations as to an individual officer such as petitioner (***Matter of Bleistein***, Tax Appeals Tribunal, July 27, 1995).

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***).

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 order to prevail, "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).

K. Review of the evidence in this case reveals that petitioner was properly held to be a person who was an officer of Management responsible to assure that sales and use taxes were collected and remitted on its behalf. Although petitioner points to Lewis Feldman as the person

who was ultimately in control of the activities of Management, it remains that petitioner was fully involved in the ongoing operations of Management's business including, significantly, all of the financial aspects of such business. Petitioner was also aware of the fact that Lewis Feldman was presented as someone who could not own stock in or be an officer of Management, or be a signatory on its bank accounts, allegedly because of judgement creditor issues. Petitioner, who voluntarily accepted employment with Management and held an officer title in such entity, kept Lewis Feldman apprised of the ongoing business activities in person and via memos, consulted with him on such matters, and presumably secured Mr. Feldman's consent in instances where such matters were other than routine or ongoing. At the same time, however, there is no evidence that the Feldmans ever affirmatively stopped petitioner from doing any given act or function, or rejected any proposal by petitioner or his advice on any matter. The tenor of petitioner's memo to Mr. Feldman reflects both providing information and offering advice on the management of the properties. In sum, petitioner was fully involved in operating Management and there is no sense that petitioner lacked authority to act or was thwarted in his attempts to act in such capacity. Accordingly, petitioner was properly held to be a person responsible to collect and remit taxes on behalf of Management.

L. The petition of William C. Balbach is hereby granted to the extent of the reductions agreed to by the Division in its March 4, 2002 letter which eliminated six of the twelve quarterly periods in issue, as set forth in Finding of Fact "7", and further to the extent indicated in Conclusion of Law "G", which eliminates four of the remaining six quarterly periods in issue,

and except as so granted, the petition is hereby denied and the Notice of Determination dated April 28, 1998, as recomputed and reduced in accordance herewith, is sustained.

DATED: Troy, New York
October 3, 2002

/s/ Dennis M. Galliher
PRESIDING OFFICER