

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
THOMAS MCGINNIS	:	DETERMINATION
	:	DTA NO. 818351
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 June 1, 1997 through August 31, 1997.	:	

Petitioner, Thomas McGinnis, 1811 Antigua Road, West Palm Beach, Florida 33406, 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 June 1, 1997 through August 31, 1997.

On November 7, 2001 and November 19, 2001, respectively, petitioner, appearing *pro se*, and the Division of Taxation, appearing by Barbara G. Billet, Esq. (Andrew S. Haber, Esq., of counsel), consented to have the controversy determined on submission without a hearing. All documentary evidence and briefs were due to be submitted by October 24, 2002, which date began the six-month period for issuance of this determination. After due consideration of the record, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner is liable for the sales and use taxes due on behalf of Lido West, Ltd. as a person responsible for the collection and payment of sales and use taxes pursuant to Tax Law §§ 1131 and 1133 for the quarter ended August 31, 1997.

FINDINGS OF FACT

1. During the sales tax quarter June 1, 1997 through August 31, 1997 (“period in issue”), petitioner was the vice-president and 50-percent owner of Lido West, Ltd. (“Lido”), a surf shop located in Lido Beach, New York.

2. Petitioner became a 50-percent owner of the business in December 1993. He was responsible for helping to build the business by using his notoriety as a professional surfer to attract customers. Petitioner also was responsible for marketing, promotions, vendor relations, purchasing and store merchandising. Petitioner was not involved in the maintenance of tax or payroll records but did sign tax returns and other tax documents. To create the time for petitioner’s duties, Lido delegated the day-to-day operations of the business to a store manager, David Juan.

3. Although the Division of Taxation (“Division”) issued two notices of determination to petitioner, only Notice No. L-016095253-6, concerning the sales tax quarter ended August 31, 1997, remains in issue. The Division conceded that Notice No. L-016095252-7, concerning the sales tax quarter ended February 28, 1998 has been fully paid. Therefore, despite the fact that petitioner challenged Notice No. L-016095252-7 in his petition, it is no longer in issue.

4. Lido had filed a quarterly sales tax return, dated September 19, 1997, for the quarter ended August 31, 1997 indicating sales tax due of \$18,309.00¹ but failed to remit any tax with the return. On March 1, 1999, the Division issued Notice of Determination No. L-016095253-6 to petitioner as a person responsible for the collection and payment of tax on behalf of Lido. The notice set forth additional tax due of \$18,409.00, penalty of \$4,952.44 and interest of \$3,464.24. After applying a credit of \$256.15, the total amount due was \$26,569.53.

¹Due to an error in preparing the return, this amount was incorrect and should have read \$18,409.00.

5. The sales tax return for the quarter ended August 31, 1997 was prepared and filed by petitioner, who signed the return and listed his position as vice-president of Lido.

6. Petitioner filed a joint New York resident income tax return with his spouse for the year 1997, which revealed that his only income for the year was derived from his employment with Lido. The Form W-2 from Lido, attached to the return, indicated wages paid to petitioner in the sum of \$19,375.00.

7. Since Lido's creation in December of 1993, petitioner has signed various official tax documents on its behalf, including the 1997 General Business Corporation Franchise Tax Return and the accompanying MTA Surcharge Return; the 1996 General Business Corporation Franchise Tax Return Short Form; the Election by a Federal S Corporation to be Treated as a New York S Corporation, dated February 7, 1994; and the 1995 New York S Corporation Franchise Tax Return.

8. In a letter to the Division of Taxation, dated October 20, 1998, petitioner acknowledged that he had participated in the operation of the business and that operations had terminated. Petitioner signed the letter as vice-president of Lido.

9. Petitioner also executed a deferred payment agreement, dated November 13, 1997, on behalf of the corporation, which covered two assessments and three periods against Lido: a withholding tax assessment for the period ended December 31, 1996; a sales tax assessment for the period ended May 31, 1996; and the sales tax set forth on the quarterly sales tax return filed by Lido for the period ended August 31, 1997.

SUMMARY OF THE PARTIES' POSITIONS

10. Petitioner does not believe that his role as vice-president of Lido, his execution of tax returns and other official documents, his job duties and 50-percent ownership of the corporation

make him responsible for the collection and payment of sales and use taxes on behalf of Lido. Further, petitioner believed that he would be shielded from responsibility for the tax by the corporate veil.

Petitioner also contends that the liability should be collected from his partner, John Zator, who, petitioner maintains, removed assets and inventory of Lido in his absence which should have been liquidated and used to pay the taxes due.

11. The Division of Taxation argues that petitioner is the model of a person responsible for taxes due from a corporation. It points out petitioner's 50-percent stake in the company, his office, his salary, his signing of tax returns and his actions in dealing in other tax matters on Lido's behalf. The Division contends that petitioner's knowledge of the business operations, his signing of tax returns and responsibility for purchasing all inventory are indicative of his authority and control over the corporation and, therefore, his responsibility for the sales tax due.

CONCLUSIONS OF LAW

A. 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 former § 1131(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]."

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; *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*)

C. The facts supporting a finding that petitioner is a person responsible for the collection and payment of sales and use taxes on behalf of Lido are overwhelming. Petitioner was a 50-percent owner of the business who derived all of his income from it during the year in issue. He

held the corporate office of vice-president since the company's inception and has signed in his official capacity many tax returns and tax-related documents, including a deferred payment agreement which encompassed the very tax in issue. He was heavily involved in the operations of the business, acting as principal buyer of merchandise, dealing with vendors and setting up their accounts. He traveled to several trade shows each year, where he was authorized to enter into deals with vendors on behalf of Lido. He also played a major role in marketing Lido's merchandise.

During the period 1994 to 1998, Lido assigned the day-to-day store operations to a store manager, David Juan, presumably to permit petitioner to pursue his marketing and buying activities. Given all of these indicia, it is concluded that petitioner was a person required to collect tax on behalf of Lido pursuant to Tax Law § 1131(1) and is personally liable for the tax imposed, collected or required to be collected pursuant to Tax Law § 1133(a). His significant authority and control over the business demand a finding that he is a person responsible for the collection and payment of sales and use taxes. (*See, Matter of Constantino, supra.*)

D. With regard to petitioner's argument that his partner, John Zator, should be liable for the tax, it is concluded that, while Mr. Zator may have betrayed petitioner's confidence, it does not vitiate petitioner's status as a person responsible for the tax in issue. (*See, Matter of D & W Auto Service Center, Inc.*, Tax Appeals Tribunal, April 20, 1989.)

E. Petitioner's contentions that he should not be held liable because he believed the corporate entity would shield him from liability and that the Division should have educated him on liability issues are completely unfounded, without merit and fly in the face of the pertinent statutes, regulations and case law.

F. The petition of Thomas McGinnis is granted to the extent indicated in Finding of Fact “3”, wherein it states that Notice No. L-016095252-7 has been canceled by the Division; in all other respects the petition is denied, and the Notice of Determination, Notice No. L-016095253-6, dated March 1, 1999, is sustained.

DATED: Troy, New York
April 3, 2003

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE