

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :

of :

RICHARD TOPOREK :

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 March 1, 1998 through August 31, 1999. :

DETERMINATION
DTA NOS. 818906
AND 818907

In the Matter of the Petition :

of :

RICHARD TOPOREK :

for Redetermination of a Deficiency or for Refund of New :
York State and New York City Personal Income Taxes :
under Article 22 of the Tax Law and the New York City :
Administrative Code for the Period March 1, 1999 :
through June 30, 1999. :

Petitioner, Richard Toporek, 2840 Lindenmere Drive, Merrick, New York 11566, filed petitions 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 March 1, 1998 through August 31, 1999, and for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the period March 1, 1999 through June 30, 1999.

A hearing was held before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on March 5, 2003 at 10:30

A.M., with all briefs to be submitted by August 22, 2003, which date began the six-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Mark F. Volk, Esq. (Justine Clarke Caplan, Esq., of counsel).

ISSUES

I. Whether petitioner was personally liable for sales tax due on behalf of Liberty Truck Sales and Leasing, Inc., as a person required to collect and pay tax under Tax Law §§ 1131 and 1133 .

II. Whether petitioner is liable for penalties under Tax Law § 685(g) for the unpaid withholding taxes of Liberty Truck Sales and Leasing, Inc.

III. Whether the Division of Taxation was improperly denied its right to impeach petitioner's credibility.

FINDINGS OF FACT

DTA # 818907

1. The Division of Taxation ("Division") issued the following notices of determination to petitioner, Richard Toporek, dated November 6, 2000, indicating he was being held responsible as an officer of Liberty Truck Sales & Leasing, Inc. ("Liberty") for sales and use taxes:

(a) For the period ended May 31, 1998, Assessment No. L-018695484-5 was issued asserting additional sales and use tax in the amount of \$23,712.57, plus interest and penalty of \$5,492.29 and \$5,983.33, respectively, less payments and credits of \$13,521.82, for a balance due of \$21,666.37. The tax assessed was derived from a sales tax return filed late by Liberty, where the taxes reported due in the amount of \$23,647.91 were increased by the Division's denial of a vendor credit of \$64.66 improperly taken by Liberty. The tax reported due was not

paid by the corporation, and was thereafter assessed against the corporate officer, Richard Toporek.

(b) For the period ended August 31, 1998, Assessment No. L-018695483-6 was issued asserting additional sales and use tax in the amount of \$17,405.93, plus interest and penalty of \$4,314.62 and \$4,729.41, respectively, less payments and credits of \$3,786.46, for a balance due of \$22,663.50. The tax assessed was derived from a sales tax return filed late by Liberty, where the taxes reported due in the amount of \$17,305.93 were increased by the Division's denial of a vendor credit of \$100.00 improperly taken by Liberty. The tax reported due was not paid by the corporation, and was thereafter assessed against the corporate officer, Richard Toporek.

(c) For the period ended February 28, 1999, Assessment No. L-018695482-7 was issued asserting additional sales and use tax in the amount of \$22,383.24, plus interest and penalty of \$4,844.20 and \$6,491.09, respectively, for a balance due of \$33,718.53. The tax assessed was derived from a sales tax return filed by Liberty, where taxes due in the amount of \$22,220.46 were increased by the Division's denial of a vendor credit of \$162.78 improperly taken by Liberty. The tax reported due was not paid by the corporation and was thereafter assessed against the corporate officer, Richard Toporek.

(d) For the period ended August 31, 1999, Assessment No. L-018695481-8 was issued asserting additional sales and use tax in the amount of \$20,392.25, plus interest and penalty of \$2,957.46 and \$4,690.18, respectively, for a balance due of \$28,039.89. The tax assessed was derived from a sales tax return timely filed by Liberty, where the taxes reported due of \$20,392.25 were not paid by the corporation, and were thereafter assessed against the corporate officer, Richard Toporek.

DTA # 818906

2. The Division issued the following two notices of deficiency to petitioner, dated December 7, 2000, indicating he was being held liable as an officer or responsible person of Liberty for a penalty in an amount equal to withholding taxes not paid by Liberty:

(a) For the period ended March 31, 1999, Assessment No. L-018902316-8 was issued asserting a penalty equal to unpaid withholding tax in the amount of \$3,852.32.

(b) For the period ended June 30, 1999, Assessment No. L-018902315-9 was issued asserting a penalty equal to unpaid withholding tax in the amount of \$2,711.84.

3. In mid-1997, Philip Capodiferro approached petitioner to become a partner in a new venture selling unified diesel trucks, a Nissan product. Philip Capodiferro had been involved in a prior dealership in the same location which had gone out of business. At the time he was approached by Philip Capodiferro in 1997, petitioner was already involved in the operations of two other businesses, one of which was RIT Auto Leasing. Philip Capodiferro requested the assistance of petitioner for Liberty in the following ways: the use of petitioner's credit to obtain financing for the business, petitioner's knowledge of the leasing industry and the contacts which resulted from petitioner's former and current business endeavors.

4. During the audit period Liberty operated a truck sales and leasing business and, in doing so, was engaged in the purchase and sale of tangible personal property in New York State.

5. Liberty's U.S. Corporation Income Tax Return, Form 1120, for the fiscal period ended June 30, 1998, listed the officers of Liberty as Philip Capodiferro, a 50% stockholder devoting full time to the business and earning compensation in the amount of \$36,000.00, and petitioner, a 50% stockholder devoting part time to the business and earning no compensation.

6. A document dated July 1, 1997 referenced as a “directors consent” form was signed by both petitioner and Philip Capodiferro, authorizing them as officers to execute all documents as necessary to carry on Liberty’s business.

7. A Chase Financing Application, where the lender was Associate [sic] Commercial Corporation (“Associates”), listed petitioner and Philip Capodiferro as president and vice president, respectively, and partners of an entity not named (though identified as Liberty through testimony), 50% of which was owned by each.

8. An affidavit in opposition in an action in the Supreme Court of the State of New York, by Associates against Liberty, Philip Capodiferro and petitioner indicates that petitioner was a 50-percent shareholder of the defendant corporation, Liberty, and alleges that Associates failed to account for collateral it repossessed and the sales proceeds therefrom, when it disposed of the collateral vehicles to satisfy a balance due on a security agreement. The affidavit was signed by petitioner, notarized and dated May 15, 2000.

9. Copies of the following checks drawn on Liberty’s accounts, signed by petitioner, were introduced into the record:

(a) A check payable to MCM Tax Service dated October 7, 1998, in the amount of \$1,100.00;

(b) A check payable to Spaton, Parsoff Siegal dated October 7, 1998, in the amount of \$1,000.00;

(c) A check payable to Discover, dated September 29, 1997, in the amount of \$1,000.00;

(d) A check payable to RIT Auto Leasing Group dated April 7, 1998, in the amount of \$1,500.00;

(e) A check payable to RIT Auto Leasing Group dated December 10, 1997, in the amount of \$23,000.00;

(f) A check payable to RIT Auto Leasing dated December 9, 1997, in the amount of \$2,337.00;

(g) A check payable to RIT Auto Leasing dated June 11, 1998, in the amount of \$1,500.00; and

(h) A check payable to RIT Auto Leasing dated June 11, 1998, in the amount of \$1,500.00.

10. A foreclosure sale report listing Liberty as the debtor and Philip Capodiferro and petitioner as guarantors, indicated that a public sale was to take place on December 17, 1999, and the property that was the subject of the foreclosure sale was sold to Associates.

11. A certified copy of Liberty's corporate resolutions dated August 12, 1997, signed by both petitioner and Philip Capodiferro, as president and vice president, respectively, set forth a wide array of powers bestowed upon them as officers of Liberty, including authorization to sell, assign, negotiate and grant a security interest to Associates for inventory, to borrow from Associates secured or unsecured funding that Liberty might require for its operations, to execute on behalf of Liberty any promissory notes, security agreements, mortgages and documents of any nature including without limitation master loan agreements providing for borrowing on a revolving basis, and to enter into any leasing agreements of equipment or vehicles with Associates.

12. A copy of a continuation of an examination before trial ("EBT") of Peter Hart, appearing on behalf of Associates, dated August 7, 2002, in an action by Associates against Liberty, Philip Capodiferro and petitioner was submitted as part of the record. In questions

posed to Mr. Hart during the EBT, he had no recollection of communicating with petitioner or seeing him on site at Liberty during Associate's collateral checks of vehicles, a procedure which matches physical vehicles with an inventory list of collateral for loaned money.

13. A copy of the "Minutes of the Special Meeting of Directors of Liberty Truck Sales & Leasing Inc.," dated July 10, 1998, tendered as proof of petitioner's resignation as an officer of Liberty at that time, states that notice of the meeting was waived, and those present included petitioner, Philip Capodiferro and Mark Caulo, Liberty's accountant. Petitioner expressed disappointment with the manner in which Liberty was being run by Philip Capodiferro as well as the financial status of the company. Pursuant to this document, petitioner resigned as officer of Liberty, and Philip Capodiferro was instructed to notify the New York State Department of Motor Vehicles, the New York State Department of Taxation and Finance, the Internal Revenue Service, Chase Manhattan Bank, EAB Bank and any and all other parties with whom the corporation was doing business of this resignation. Petitioner signed the bottom of the form as shareholder and a signature appears above the line designated for Philip Capodiferro's signature as president, chairman and secretary. The Division raised questions about the authenticity of Philip Capodiferro's signature and the validity of the document. Petitioner had full access to books and records as president of Liberty until his purported resignation on July 10, 1998.

14. Petitioner introduced into evidence copies of more than 25 checks payable to Associates, the Internal Revenue Service, Chase Manhattan Bank and New York State Income Tax, between August 13, 1997 and August 4, 1999, all of which were signed by Philip Capodiferro; a Power of Attorney executed by Philip Capodiferro on behalf of Liberty, granting Mark Caulo, CPA, the power to represent Liberty on a Federal employment tax matter during periods in 1998; a New York State Sales Tax Return for the period ended May 31, 1998;

extensions to file various tax forms; and correspondence between Liberty and New York State Department of Taxation and Finance, all of which were signed by or had checks attached thereto signed by Philip Capodiferro.

15. While an officer of Liberty, petitioner did not check to see if withholding tax returns were filed, and he relied upon the outside payroll company hired to properly withhold and file. As to sales tax returns, petitioner did not inquire of Philip Capodiferro if they were properly filed. Petitioner believed the responsibility for such filings was that of Philip Capodiferro who was operating Liberty on a daily basis and who hired a comptroller and accountant to assist him. The first time petitioner became aware of taxes due and owing to New York State was when he received a notice during 1999 or 2000.

16. The Division introduced as part of its field audit record two newspaper accounts containing a brief account of the circumstances of the arrest of petitioner for criminal activity involving the Internet solicitation of a minor child. When objected to by petitioner and after a failure by the Division to show relevance to the issue of petitioner's credibility, the administrative law judge denied their admission. Two similar articles dealing with the criminal charges were included in the record as part of a larger group of documents, not individually identified.

SUMMARY OF THE PARTIES' POSITIONS

17. Petitioner maintains that Philip Capodiferro should be held responsible for the taxes in issue since Mr. Capodiferro was the person running the day-to-day business operations, and petitioner's name and signature appear on far fewer documents than Mr. Capodiferro's. Petitioner asserts that his role in the business was to provide credit which Philip Capodiferro did not have and business networking opportunities in the trucking industry that would assist Mr.

Capodiferro in his business pursuit, and thus he should not be held liable as a responsible officer of Liberty.

18. The Division argues that petitioner is clearly a responsible officer for both the unpaid sales and withholding taxes. Secondly, the Division argues that it was improperly denied its right to impeach petitioner's credibility.

CONCLUSIONS OF LAW

A. Tax Law § 1133(a) imposes upon any person required to collect the tax imposed by Article 28 of the Tax Law personal liability for the tax imposed, collected or required to be collected. A person required to collect tax is defined to include, among others, corporate officers and employees who are under a duty to act for such corporation in complying with the requirements of Article 28 (Tax Law § 1131[1]).

B. The mere holding of corporate office does not, per se, impose tax liability upon an office holder (*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; *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 upon the particular facts of each case (*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 a person is authorized to sign the corporation's tax returns, 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 Barton*, [Tax Appeals Tribunal, July 20, 1989]; *Matter of William F. Martin, supra*; *Matter of Autex, supra*).

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).

C. Tax Law § 685(g) imposes liability on those persons responsible for the collection and remittance of withholding taxes who willfully fail to collect or remit such funds.

Tax Law § 685(n) defines the term "person" as it is used in section 685(g) as follows:

the term person includes an individual, corporation or partnership or an officer or employee of any 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.

The issue of whether a corporate officer is a person as defined by section 685(n) has been litigated many times (*e.g.*, *Matter of McHugh v. State Tax Commn.*, 70 AD2d 987, 417

NYS2d 799; *Matter of MacLean v. State Tax Commn.*, 69 AD2d 951, 415 NYS2d 492, *affd* 49 NY2d 920, 428 NYS2d 675). The relevant factors to be considered are well defined and similar to those considered in the context of sales tax liability. They include the following: whether the individual signed the company's tax returns, possessed the right to hire and fire employees, derived a substantial portion of income from the company's activities, possessed a financial interest in the company and had the authority to pay the company's obligations (*Matter of Amengual v. State Tax Commn.*, 95 AD2d 949, 464 NYS2d 272; *see also*, *Matter of McHugh v. State Tax Commn.*, *supra*; *Matter of MacLean v. State Tax Commn.*, *supra*). The person's official duties in relationship to the company are also a pertinent area of inquiry (*Matter of Amengual v. State Tax Commn.*, *supra*).

D. A conclusion that petitioner was under a duty to act for the corporation in collecting and paying over taxes, will not automatically lead to a determination that his failure to do so was willful within the meaning of Tax Law § 685(g). In *Matter of Levin v. Gallman* (42 NY2d 32, 34, 396 NYS2d 623, 624), the Court of Appeals held that the test of willfulness is:

whether 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.* at 34, 396 NYS2d at 624-625).

The Tax Appeals Tribunal has stated that “[t]he essence of the willfulness standard is that the person must voluntarily and consciously direct the trust fund monies from the State to someone else. . . . Mere negligence is not enough.” (*Matter of Gallo*, Tax Appeals Tribunal, September 9, 1988.) Lack of actual knowledge that withholding taxes have not been remitted to the State may, under certain circumstances, support a finding that a corporate officer did not act consciously and voluntarily (*id.*). However, the failure to collect and pay over taxes can be

willful, notwithstanding the lack of actual knowledge, if it is determined that one with a duty to act, recklessly disregarded that duty (*see, Matter of Capoccia v. State Tax Commn.*, 105 AD2d 528, 481 NYS2d 476; *Matter of Ragonesi v. State Tax Commn.*, 88 AD2d 707, 451 NYS2d 301).

E. Upon review of the entire record, it is clear that petitioner was properly held responsible for the sales and withholding tax obligations of the corporation. 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 was thwarted by others in carrying out his corporate duties through no fault of his own (*Matter of Goodfriend*, Tax Appeals Tribunal, January 15, 1998). Neither of these circumstances accurately describes the facts of this case.

F. The facts in this case indicate that petitioner was a responsible officer of Liberty. Petitioner was the president of Liberty and he and Philip Capodiferro each owned 50% of the stock of the company. Petitioner had authority to sign checks for Liberty and in fact did so, as indicated by copies of checks introduced into evidence. Liberty's corporate tax return for the fiscal period ended June 30, 1998 indicated petitioner was devoting part time to the business and was a 50% shareholder collecting no compensation for that period. He and Philip Capodiferro executed a director's consent authorizing them as officers to execute all documents necessary to carry on Liberty's business. In conjunction with such authorization, petitioner signed a financing application with Associates and became a guarantor for Liberty. The corporate resolutions extended petitioner's powers even further (*see*, Finding of Fact "11"). The day-to-day running of the business seems to have been in the hands of Philip Capodiferro. From the evidence submitted, it does not appear that petitioner signed tax returns or hired

employees. Petitioner believed that Mr. Capodiferro was responsible for the tax filings and payment of taxes, and was under the impression all financial matters were being properly handled. However, petitioner was not prevented from inquiring or verifying that all matters were being properly handled; he merely did not make such inquiry. Petitioner clearly possessed a financial interest in Liberty, and the evidence indicates that he had the authority and ability to pay the company's obligations. Furthermore, petitioner knew that Philip Capodiferro had been involved in a prior dealership in the same location which had gone out of business. Petitioner knew that Mr. Capodiferro's credit was poor. Yet petitioner blindly relied upon him to take care of these important matters without any inquiry. Petitioner's preoccupation with his other businesses is not a valid excuse for his failure to exercise his duties as officer of Liberty, no matter how much "in name only" he professes his position to have been. Although petitioner may not have been aware that the tax obligations were not being met, he recklessly disregarded any duty on his part to be sure they were paid. Corporate officials responsible as fiduciaries for tax revenues cannot absolve themselves merely by disregarding their duty and leaving it to someone else to discharge (*Matter of Risoli v. Commr. of Taxation & Finance*, 237 AD2d 675, 654 NYS2d 218; *Matter of Ragonesi, supra*). Accordingly, petitioner was properly held responsible for the corporation's sales and withholding tax obligations. The only question which remains is whether such liability is limited to the period before petitioner's purported resignation date of July 10, 1998.

G. Petitioner asserts that he tendered his resignation at a special meeting of the directors of Liberty on July 10, 1998, as evidenced by the minutes of that meeting (*see*, Finding of Fact "13"). The Division challenges the authenticity of Mr. Capodiferro's signature, and thus of the document, on the basis of an examination and comparison of other signatures by Philip

Capodiferro contained on documents in the record. Further, the Division notes that petitioner's signature appears on company checks after July 10, 1998.

A handwriting expert has not been called upon in this matter to verify the Division's claim concerning the authenticity of petitioner's resignation. However, after carefully studying Mr. Capodiferro's signature on the checks submitted into evidence by petitioner to show Mr. Capodiferro's involvement in Liberty, and viewing other documents submitted by the Division bearing his signature, there are sufficient key differences in the letter formation of the signature to question its authenticity, and thus the validity of the document. Although petitioner may very well have resigned from his position at some point in time, this document does not provide proof of the same.

As to copies of checks in evidence which are dated October 7, 1998, petitioner claims they were signed in advance as an accommodation to Philip Capodiferro. This testimony is deemed unreliable, as it is inconsistent with petitioner's insistence that Philip Capodiferro was running the day-to-day operations of Liberty. It is not credible that petitioner signed checks, leaving amounts and payees blank, allegedly months in advance of his purported resignation. Consistent with petitioner's unreliable testimony concerning the minutes, this explanation is rejected as unreliable.

Accordingly, petitioner was properly held responsible for the tax obligations of Liberty for the periods in issue.

H. The Division's claim that it was improperly denied its right to impeach petitioner's credibility is without merit. Based upon the testimony and documents provided by the Division in support of its case, the Division established petitioner's liability for the sales and withholding taxes in issue. Further, the Division proved that petitioner's credibility was to be questioned

with regard to several documents and explanations provided by petitioner, which were directly related to the issue of officer status and failure to properly pay taxes. The Division failed to establish that the criminal charges brought against petitioner (*see*, Finding of Fact “16”) speak to petitioner’s credibility, particularly with regard to his role as an officer of Liberty.

Accordingly, the Division’s argument that it was prevented from impeaching petitioner’s credibility is not only moot, but the criminal charges are determined to be irrelevant to the credibility issue.

I. The petition of Richard Toporek is denied and the notices of determination dated November 6, 2000 and the notices of deficiency dated December 7, 2000 are hereby sustained.

DATED: Troy, New York

February 19, 2004

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE