

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JOSEPH APPLE : DETERMINATION
for Revision of a Determination or for Refund of Sales : DTA NO. 820349
Use Taxes under Articles 28 and 29 of the Tax Law for :
the Period February 1, 2001 through May 31, 2003. :

Petitioner, Joseph Apple, 666 Fifth Avenue, Suite 228, New York, New York 10013, 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 February 1, 2001 through May 31, 2003.

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on November 7, 2005 at 10:30 A.M. with all briefs to be submitted by February 17, 2006 which date commenced the six-month period for issuance of this determination. Petitioner appeared by affidavit. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Jennifer A. Murphy, Esq., of counsel).

ISSUE

Whether petitioner was a person responsible for the collection and payment of sales and use taxes on behalf of Signature Parking Corp., NYC Medical Parking Corp. and 101 East 16th Street Garage Corp. 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 corporations.

FINDINGS OF FACT

1. Petitioner was assessed as a person responsible for the collection and payment of sales and use taxes on behalf of three different corporations which operated parking facilities in New York City - Signature Parking Corp. (“Signature”), NYC Medical Parking Corp. (“NYC Medical”) and 101 East 16th Street Garage Corp. (“101 East”).

Signature

2. On April 24, 2003, the Division of Taxation (“Division”) issued two notices of estimated determination to petitioner, Joseph Apple, as an officer or responsible person of Signature. The estimated assessments were issued because sales tax returns for the quarterly periods ended November 30, 2001 and May 31, 2002 were not filed by Signature. After the estimated assessments were issued, the Division received the required tax returns for the forgoing quarterly periods but without remittance of the tax reported due. On March 28, 2005, the Division issued the following notices and demands for payment of tax due to petitioner as a responsible officer of Signature. The amount of the assessments was adjusted to reflect the tax reported to be due but not remitted.

Notice Number	Period Ended	Tax	Interest	Penalty	Balance Due
L-022254812-2	05/31/02	\$1,666.17	\$751.20	\$499.81	\$2,917.18
L-022254814-9	11/30/01	48.36	26.13	50.00	124.49

3. The Division concluded that petitioner was a responsible officer of Signature because he was the only authorized signatory on Signature’s bank account as of June 27, 2000; petitioner signed Signature’s sales and use tax return for the period June 1, 2000 through August 31, 2000 and the check accompanying Signature’s sales and use tax return for the period June 1, 2002 through August 31, 2002; and petitioner signed Signature’s New York State corporation

franchise tax return for the period March 25, 2000 through February 28, 2001 and the corresponding Federal corporate income tax return for the same period. Petitioner's title was listed as secretary on each of the forgoing returns. Petitioner signed the check, drawn on the account of Signature, dated May 5, 2003, in payment of the New York State General Business Corporation MTA Surcharge Return for the period March 1, 2002 through February 28, 2003. Lastly, petitioner was listed as the corporate secretary on records maintained by the Secretary of State.

4. The address of Signature set forth on the bank signature card as well as the address of Signature on the corporate tax returns for the fiscal year ended February 28, 2001 is the same as the address listed for petitioner on his New York State resident income tax return dated March 12, 2002. Petitioner's signature on his personal income tax return for 1999 is similar to petitioner's signature on the corporate documents set forth above.

NYC Medical

5. On September 22, 2003, the Division issued a series of notices of estimated determination to petitioner as an officer or responsible person of NYC Medical Parking Corp. The estimated assessments were issued because quarterly sales tax returns were not filed by NYC Medical. After the estimated assessments were issued, the Division received the required tax returns but without remittance of the tax reported to be due. On the basis of NYC Medical's sales tax returns, the Division issued notices and demands for payment of tax due, dated March 28, 2005, which assessed the following amounts of unpaid tax, penalty and interest:

Notice Number	Period Ended	Tax	Interest	Penalty	Balance Due
L-023027554-9	02/28/03	\$2,789.70	\$910.35	\$836.77	\$4,536.82

Notice Number	Period Ended	Tax	Interest	Penalty	Balance Due
L-023027556-7	11/30/02	\$0.00 ¹		\$50.00 ²	\$50.00 ³
L-023027557-6	05/31/02	2,640.41	1,190.43	792.04	4,622.88
L-023027559-4	11/30/01	229.95	124.24	100.00	454.19

6. The following notices and demands were issued on March 28, 2005 because the checks accompanying the sales and use tax returns for NYC Medical were returned because of insufficient funds:⁴

Notice Number	Period Ended	Tax	Interest	Penalty	Balance Due
L-023027555-8	05/31/03	\$1,359.81	\$382.26	\$407.78	\$2,149.85
L-023027560-4	02/28/01	11,538.00	4,161.81	3,461.40	1,594.20 ⁵
L-023027561-3	05/31/01	16,399.26	7,742.54	4,919.72	19,061.52 ⁶

7. For the quarter ending February 28, 2002, NYC Medical filed a sales and use tax return without remitting tax. Consequently, the Division issued a Notice of Determination, assessment number L023027558, dated September 22, 2003, which assessed sales and use taxes in the amount of \$15,287.04 plus penalty and interest for a balance due of \$22,780.32. Thereafter, the

¹ There were no reported taxable sales or services.

² The penalty was assessed for the late filing of a fully paid return.

³ The assessment has been fully paid.

⁴ On September 22, 2003, notices of determination, bearing the same assessment numbers and assessing the same amount of tax, were issued to petitioner. The notices of determination were superseded by notices and demands set forth above.

⁵ The amount due reflects payments or credits in the amount of \$17,567.01.

⁶ The balance due reflects payments or credits in the amount of \$10,000.00.

Division issued a Notice and Demand for Payment of Tax Due, dated March 28, 2005, which assessed the same amount of tax, plus penalty and interest, for a balance due of \$27,447.57.

8. Petitioner was assessed as a responsible officer of NYC Medical because the documents acquired by the Division showed that petitioner was an officer who was engaged in the financial affairs of the corporation. For example, NYC Medical's Application for Registration as a Sales Tax Vendor lists petitioner as the president of the corporation. Petitioner endorsed a check drawn on the account of NYC Medical at HSBC, dated September 20, 2002, in payment of sales tax. Further, as secretary, petitioner signed the New York State General Business Corporation Franchise Tax Return Short Form and the General Business Corporation MTA Surcharge Return for the period March 25, 2000 through February 28, 2001. Petitioner's name was also listed on NYC Medical's U.S. Corporation Income Tax Return for the fiscal year ended February 28, 2003 on the schedule for compensation of officers. Petitioner's involvement with the corporation is evidenced by the fact that the address listed for NYC Medical on the New York State and Federal corporate income tax returns for the fiscal year ended February 28, 2001 is the same address used by petitioner on his New York State income tax return for the year 1999. Petitioner's signature on his personal income tax return for 1999 is similar to petitioner's signature on the corporate documents set forth above.

101 East

9. On October 27, 2003, the Division issued a series of notices of estimated determination to petitioner as an officer or responsible person of 101 East. The estimated assessments were issued because 101 East failed to file quarterly sales and use tax returns for the periods ended November 30, 2001 and November 30, 2002. On or about November 5, 2003, 101 East filed a New York State and Local Sales and Use Tax Return for the period September 1, 2001 through

November 30, 2001. The return reported that there were no sales or services and that no tax was due. The Division's assessment receivable database shows that a prior estimated notice (L023144896) was adjusted to reflect the filing of the return and that no tax was reportedly due. A Notice and Demand for Payment of Tax Due was issued, dated March 28, 2005, assessing a \$50.00 penalty for the late filing of a fully paid return.

10. 101 East filed a New York State and Local Sales and Use Tax Return late for the period September 1, 2002 through November 30, 2002. The return reported that there were no sales or services and that no tax was due. The Division's assessments receivable database shows that a previous estimated notice (L023144892) was adjusted to reflect the corporation's filing of the return for the period September 1, 2002 through November 30, 2002 resulting in an assessment of \$50.00 for the late filing of a fully paid return. This assessment has been paid.

11. Petitioner was listed as president on 101 East's Application for Registration as a Sales Tax Vendor and was named as a signatory on the corporation's checking account. The bank signature card lists petitioner's title as vice-president. As secretary, petitioner signed a New York State corporation franchise tax return for the period March 25, 2000 through February 28, 2001. He was also listed as an officer on the United States corporate income tax return of 101 East for the period March 1, 2002 through February 28, 2003 under the section asking for compensation of officers. Petitioner's involvement with the corporation is evidenced by the fact that the address listed for 101 East on the New York State and Federal corporate tax returns for the fiscal year ended February 28, 2001 is the same address used by petitioner on his New York State income tax return for the year 1999. Petitioner's signature on his personal income tax return for 1999 is similar to petitioner's signature on the corporate documents set forth above.

SUMMARY OF PETITIONER'S POSITION

12. In an affidavit, petitioner stated that purported signatures on certain tax returns and checks which were supplied by the Division were not his. Petitioner also stated that he was only a personal assistant who had no control over the checkbook, tax returns or information placed on the tax returns. According to petitioner, he was merely a nominee for other individuals who ran the corporations. It is petitioner's belief that after 2000, his name was not utilized in any capacity on any documents for the corporations in issue. Petitioner also stated that he was informed that a portion of the indebtedness has been paid and that many of the liabilities were estimated for periods in which the corporations were either not in business or actual returns were subsequently filed showing reduced liability. Lastly, petitioner maintained that he has never been notified of the issues presented here since the notices were mailed to an incorrect address.

CONCLUSIONS OF LAW

A. Tax Law § 1133(a) imposes personal liability for taxes required to be collected under Articles 28 and 29 of the Tax Law upon a person required to collect such tax. A person required to collect such tax is defined as “any officer, director or employee of a corporation . . . who as such officer, director or employee . . . is under a duty to act for such corporation . . . in complying with any requirement of [Article 28]” (Tax Law § 1131[1]).

B. In *Matter of Ebhojiaye* (Tax Appeals Tribunal, February 3, 2005), the Tribunal summarized the relevant factors in determining whether a person is required to collect tax under Articles 28 and 29 of the Tax Law as follows:

Whether an individual is under a duty to act for a corporation with regard to its tax collection responsibilities, such that the individual would have personal liability for the taxes not collected or paid, depends on the particular facts of the case (*see, Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022, 513 NYS2d 564).

The question to be resolved in a 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" (*Matter of Constantino*, Tax Appeals Tribunal, September 27, 1990).

Factors to consider when determining responsible officer status under Article 28 are the authorization to hire and fire employees (*see, Matter of Blodnick v. New York State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536); the individual's day-to-day responsibilities, involvement with, knowledge of and control over the financial affairs and management of the corporation (*see, Vogel v. New York State Dept. of Taxation & Fin.*, 98 Misc 2d 222, 413 NYS2d 862; *see also, Matter of Stern*, Tax Appeals Tribunal, September 1, 1988); the duties and functions of the officers and directors as outlined in the certificate of incorporation, corporate bylaws and minutes of corporate meetings, and the preparation and filing of sales tax forms and returns (*see, Vogel v. New York State Dept. of Taxation & Fin., supra*); the individual's economic interest in the corporation and whether he had authority to sign tax returns for the corporation (*see, Matter of Martin v. Commissioner of Taxation & Fin.*, 162 AD2d 890, 558 NYS2d 239); and the payment, including the authorization to write checks on behalf of the corporation, of creditors other than the State of New York and the United States (*see, Chevlowe v. Koerner*, 95 Misc 2d 388, 407 NYS2d 427). Another factor is the individual's simultaneous status as an officer, director and shareholder (*see, Matter of Cohen v. State Tax Commn., supra*); and in a closely-held corporation, as in the present matter, the individual's knowledge of the affairs of the firm and the firm's profits (*see, Vogel v. New York State Dept. of Taxation & Fin., supra; see also, Matter of Blodnick v. New York State Tax Commn., supra*).

C. The record supports the conclusion that petitioner was a responsible officer of Signature. As pointed out by the Division, petitioner was the firm's corporate secretary. The inferences to be drawn from the documents also support the conclusion that petitioner was directly involved in and had control over the financial affairs of the corporation. Petitioner was the only authorized signatory on Signature's bank account as of June 27, 2000. Petitioner signed a check in payment of a sales and use tax liability in 2002. Petitioner signed Signature's New York State corporate tax return for the period March 25, 2000 through February 28, 2001 and the corresponding Federal corporate income tax return for the same period. Petitioner signed the

check, drawn on the account of Signature, dated May 5, 2003, in payment of the New York State General Business Corporation MTA Surcharge Return for the period March 1, 2002 through February 28, 2003. Lastly, petitioner was listed as the corporate secretary on records maintained by the Secretary of State.

D. The record also supports the determination that petitioner was a responsible officer of NYC Medical. NYC Medical's Application for Registration as a Sales Tax Vendor lists him as the president of the corporation. Petitioner endorsed a check, dated September 20, 2002, drawn on the account of NYC Medical at HSBC in payment of sales tax. Further, as secretary, petitioner signed the New York State General Business Corporation Franchise Tax Return Short Form and the General Business Corporation MTA Surcharge Return for the period March 25, 2000 through February 28, 2001. Petitioner's name was also listed on NYC Medical's U.S. Corporation Income Tax Return for the fiscal year ended February 28, 2003 on the schedule for compensation of officers.

E. Lastly, the documents show that petitioner was an officer of 101 East who was similarly engaged in that company's financial affairs and responsible for the taxes due from said corporation. 101 East's Application for Registration as a Sales Tax Vendor lists petitioner as president. Petitioner was listed as a signatory on the corporation's checking account where his title was reported as vice-president. As secretary, petitioner signed a New York State corporation franchise tax return for the period March 25, 2000 through February 28, 2001. The record also shows that petitioner signed 101 East's sales and use tax return for the period September 1, 2002 through November 30, 2002.

F. In his affidavit, petitioner states that "[o]n certain of the tax returns and checks that I examined as supplied by the Respondent I hereby state that the signature was not mine." This

assertion cannot be given any weight. The signature on petitioner's personal income tax return is similar to the signature which appears on the corporate tax returns and business documents. Furthermore, petitioner does not deny signing any of the specific documents offered by the Division. Other than the bare assertion by petitioner in his November 4, 2005 affidavit that certain signatures were not his, there is no evidence to support the claim that the signatures on the documents presented by the Division were not petitioner's signatures. Therefore, this claim is rejected (*Matter of Ingolia*, Tax Appeals Tribunal, April 28, 1994).

G. Petitioner next asserts that he was nothing more than a personal assistant who had no control over the checkbook, tax returns or information placed on the tax returns. According to petitioner, he was merely a nominee for other individuals who ran the corporations. In view of the documentary evidence in the record, this assertion lacks credibility. To the contrary, the record supports the inference that petitioner held a position of responsibility for the financial affairs of each of the corporations (*see*, Conclusions of Law "C" through "E"). Petitioner's close affiliation with the operation of the corporations is also evidenced by the fact that his home address was used at certain times as the business address of each of the corporations. It is noteworthy that petitioner has neither argued nor presented evidence that he was precluded from participating in the business (*see, e.g., Matter of Taylor*, Tax Appeals Tribunal, October 24, 1991; *Matter of Constantino*, Tax Appeals Tribunal, September 27, 1990).

H. According to petitioner, after the year 2000 his name was not used in connection with any of the businesses. As pointed out by the Division, the documents in the record establish that this argument is erroneous. On November 21, 2001, petitioner signed a bank signature card for Signature. Petitioner signed a check, dated September 20, 2002, drawn on the account of NYC Medical. Lastly, on June 25, 2002, petitioner signed a bank signature card for 101 East.

I. Petitioner asserts that the liabilities were paid. The record shows that there was a payment of \$10,000.00 on the liability of NYC Medical for the quarter ending May 31, 2001. Further, there was no tax due for 101 East for the quarters ending November 30, 2001 and November 30, 2002. Petitioner's argument with respect to the remaining quarters is rejected since no evidence was presented to support the allegation that the liabilities were paid.

J. Petitioner next contends that the assessments were for quarters that the corporations were out of business. As pointed out by the Division, this argument is nonsensical since all of the assessments currently in issue were based on returns which were filed by the corporations. Each of the assessments which were based on an estimated liability were adjusted to one based on the actual filing of sales and use tax returns.

K. Lastly, petitioner contends that the notices were mailed to an incorrect address. In response, the Division objected to the raising of this issue since it was not raised in the petition. The Division also notes that even if the notices were mailed to an incorrect address, the error would be irrelevant since petitioner obviously received the notices in time to file for a conciliation conference for all of the assessments.

L. The Division's objections have merit. The issue raised by petitioner presents factual questions, such as if and when petitioner advised the Division of his purportedly correct address (*see*, Tax Law § 1138[a][1]). Since petitioner did not raise this issue until after the hearing was completed, the Division did not have an opportunity to present evidence on petitioner's last known address. Nevertheless, it is clear that since there is no issue with respect to the timeliness of the conciliation conference for each of the assessments in issue, any alleged error in the mailing address is moot (*see, Matter of OfficeMax, Inc.*, Tax Appeals Tribunal, March 24, 2005).

M. Although they were addressed by the Division in its brief, petitioner has not presented any evidence or offered any argument regarding the imposition of penalties and therefore this issue has been deemed waived.

N. The petition of Joseph Apple is denied and the notices and demands, dated March 28, 2005 (except for notices # L023144892 and #L023027556, which have been paid in full), are sustained together with such penalties and interest as are lawfully due.

DATED: Troy, New York
August 17, 2006

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE